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 BRIEF ON THE MERITS

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I. INTRODUCTION

In this case Real Parties in Interest ("Real Parties") claim they can circumvent the builders' "absolute right" to the "mandatory" SB800 prelitigation inspection and repair process simply by the way they choose to draft their complaint. They assert that if only tort common law causes of action and/or breach of contract causes of action are alleged, then SB800's prelitigation procedures do not apply.

The builders' prelitigation "right" cannot be "absolute" or "mandatory" if it is only made available to builders at the election of homeowners. The plain language of the SB800 statutory scheme abrogates tort common law causes of action. It also provides that any action to enforce a contract is subject to its prelitigation process if the builder has elected to use that process. The fundamental error in Real Parties' statutory construction analysis is that they presuppose that the *only* purpose for SB800's enactment was to abrogate the "economic loss rule," which prevented plaintiffs from recovering for residential construction defects that did not cause resulting physical damage to the home. This premise is demonstrably false by reference to both the plain language of the statutory scheme as a whole and to SB800's Legislative history. When all of SB800's purposes and provisions are given effect, it abrogates tort common law causes of action and requires all residential construction defect actions to proceed through the prelitigation process.

II. FACTUAL AND PROCEDURAL SUMMARY

A. Real Parties' Petition for Review and Issues under Review by this Court

Real Parties filed a Petition for Review with this Court on October 6, 2015, which was granted on November 24, 2015. While the Court's order granting review did not define the issues for review, it appears from the parties' briefing that they are as follows:

1. "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?"

2. "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?"

B. Summary of *Liberty Mutual* and *Burch* and Their Effect on Builders' "Absolute Right" to Enforce SB800's Prelitigation Inspection and Repair Process

In *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC* (2013) 219 Cal.App.4th 98, a pipe suddenly burst and flooded the home of Liberty Mutual's insured homeowner; it was an actual catastrophic loss. (*Id.* at 100, 106.) The builder, Brookfield, "acknowledged its liability for,

and repaired, the damage to [the homeowner's] home,"[1] while Liberty Mutual paid the homeowner's relocation expenses. (*Id.* at 100-101.) Liberty Mutual then sued Brookfield under a subrogation theory to recover for the amounts it paid to relocate its insured. (*Id.* at 101.) Based on Brookfield's argument that SB800 was the exclusive remedy for a plaintiff to pursue construction defects, the trial court found Liberty Mutual's complaint was time-barred by a statute of limitation for plumbing defects contained in section 896(e). (*Id.* at 100-103, FN1.)

The Fourth District Court of Appeal framed the issue before it as "whether Liberty Mutuals [*sic*] complaint in subrogation falls exclusively within the Right to Repair Act, and therefore is time-barred." (*Id.* at 102.) It ultimately held that "the Act does not provide the exclusive remedy in cases where actual damage has occurred because of construction defects" (*id.* at 109) and "the Act does not eliminate a property owner's common law rights and remedies, otherwise recognized by law, where, as here, actual damage has occurred." (*Id.* at 101.)

Following the *Liberty Mutual* decision, in *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, the Second District Court of Appeal adopted the *Liberty Mutual* court's holding with no meaningful or detailed analysis

[1] This direct quote from the *Liberty Mutual* opinion plainly refutes Real Parties' statement in their Opening Brief on the Merits, at pg. 22, that Liberty Mutual "paid to repair the home."

other than a cursory review of what was already stated in *Liberty Mutual.* (*Id.* at 1417-1418.)

C. Summary of Real Parties' Procedural Efforts to Avoid SB800's Prelitigation Inspection and Repair Process in this Case

On or around April 16, 2013 Real Parties filed their complaint, and on or around July 2, 2013 they filed their First Amended Complaint ("FAC") (Writ Exhibit, Vol. 1, Exhibit 2[2]). Both complaints were filed without first serving McMillin with a Notice of Claim pursuant to Civil Code section 910. The FAC alleged a cause of action for "Violations of Building Standards as Set Forth in California Civil Code § 896," along with causes of action for "Strict Products Liability," "Strict Products Liability (Component Products)," "Breach of Implied Warranty (Merchantability)," "Breach of Contract," "Negligence," "Breach of Express Warranty," and "Violation of Statute." (Vol. 1, Exhibit 2, Bates No. 000552.)

After McMillin was served with the FAC, counsel for McMillin and Real Parties engaged in negotiations to stay the underlying action for purposes of completing the SB800 prelitigation procedures. (Vol. 1, Exhibit 4, Bates Nos. 000033-000034, 000037-000049). Counsel for Real Parties eventually withdrew from those negotiations, stating that they

[2] All references to Volume and Exhibit numbers hereinafter are pertaining to the Writ Exhibits filed with the Fifth District Court of Appeal, unless otherwise indicated. For the Court's convenience, Bates Numbers have been applied to each Exhibit; they are consecutive within each Exhibit, but not consecutive across/between Exhibits.

intended to dismiss "the SB800 Cause of Action altogether," not engage in SB800's prelitigation procedure, and "instead only pursue the other common law causes of action as [they were] entitled to do under the recent *Liberty Mutual* decision." (Vol. 1, Exhibit 4, Bates Nos. 000034, 000048.) A request for dismissal of Real Parties' cause of action for "Violations of Building Standards as Set Forth in California Civil Code §896" was filed with Respondent Court. (Vol. 1, Exhibits 3 and 1, Bates Nos. 000595-000596.)

D. McMillin's Motion to Stay, the Hearing on the Motion to Stay, and Real Parties' Drafting of Respondent Court's Order Denying the Motion to Stay

As the result of Real Parties' refusal to stipulate to stay the action, McMillin was forced to bring a Motion to Stay Pursuant to Civil Code § 930 ("Motion to Stay"). (Vols. 1 and 2, Exhibits 4, 5 and 5 (cont.).) An Opposition and Reply were also filed. (Vol. 2, Exhibits 7 and 8.)

The Motion was heard by Respondent Court on January 29, 2014. Respondent Court concluded the hearing with the following statement:

> I'm satisfied in the sense that I think I'm correctly applying the rule of law that is dictated to this court by Liberty Mutual. And so I deny the motion for a stay.
>
> The plaintiff's counsel shall prepare an order pursuant to California Rule of Court, Rule 3.1312.
>
> I will state that – although there is no written request I'll state on the exercise of my discretion that there is a controlling question of law here as to which there are substantial grounds for a difference of opinion, appellate resolution of which may materially advance the conclusion of this litigation.

(Vol. 3, Exhibit 13 (cont.), Bates Nos. 000587 [line 19]-000588 [line 2].)

Real Parties' counsel drafted Respondent Court's order 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.) (Vol. 3, Exhibit 16, Bates No. 000005.)

Real Parties' counsel submitted to McMillin's counsel only one draft of this order; it was unaltered by McMillin's counsel and was adopted and executed by Respondent Court without change. (Declaration of Michael D. Worthing in McMillin's Reply to Return, ¶ 5, Exhibit 2.)

E. The Fifth District Grants McMillin's Petition for Writ of Mandate, Motions for Judicial Notice and Issues its *McMillin Albany* Opinion

On May 16, 2014 McMillin filed with the Fifth District Court of Appeal a Petition for Writ of Mandate ("Writ Petition"). On September 12, 2014, the Fifth District (1) issued an Order to Show Cause why the relief sought in McMillin's Writ Petition should not be granted, (2) granted

McMillin's concurrently filed Motion for Judicial Notice of SB800's legislative history, and (3) granted McMillin's concurrently filed Motion for Judicial Notice of a Kings County Superior Court ruling and related papers to show inconsistent application of *Liberty Mutual* among the Superior Courts of the Fifth District. Real Parties then filed a Return by Answer ("Return"), to which McMillin filed a Reply ("Reply to Return").

In its opinion issued on August 26, 2015, after an exhaustive and detailed analysis of SB800's various code sections and its legislative history, the Fifth District "reject[ed] [Liberty Mutual's] reasoning and outcome," as being "not consistent with the express language of the [SB800] Act." (*McMillin Albany, LLC et al. v. Superior Court* (2015) 239 Cal.App.4th 1132, 1141.) The Fifth District ultimately held the following:

> [T[he Legislature intended that all claims arising out of defects in residential construction, involving new residences sold on or after January 1, 2003 (§ 938), be subject to the standards and the requirements of the Act; the homeowner bringing such a claim must give notice to the builder and engage in the prelitigation procedures in accordance with the Provisions of Chapter 4 of the Act prior to filing suit in court. Where the complaint alleges deficiencies in construction that constitute violations of the standards set out in Chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with the prelitigation procedures, regardless of whether the complaint expressly alleges a cause of action under the Act. (*Id.* at 1146.)

III. DISCUSSION OF ISSUES BEFORE THE COURT

A. Standard of Review, California's Rules for Statutory Construction and Nullification of Common Law Rights by Statute

This Court reviews de novo questions of statutory construction. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.) In doing so, the Court's "fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Id.*; California Code of Civil Procedure ("C.C.P.") § 1859, "In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible.")

The Court begins "by examining the statutory language because it generally is the most reliable indicator of legislative intent." (*Id.*) The Court "give[s] the language its usual and ordinary meaning, and if there is no ambiguity, then [the Court] presume[s] the lawmakers meant what they said, and the plain meaning of the language governs." (*Id.* at 1232-1233 (internal quotes omitted).)

However, "[t]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with the other provisions of the statute." (*People v. Elmore* (2014) 59 Cal.4th 121, 139-140 (internal quotes omitted).) "The language is construed in the context of the statute as a whole and the overall statutory scheme, and [the Court] give[s] significance to every word, phrase, sentence, and part of an

act in pursuance of the legislative purpose." (*Id.* at 140 (internal quotes omitted); *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611 "[C]ourts may not excise words from statutes. [Citation.] We assume each term has meaning and appears for a reason. [Citation.]"; C.C.P. § 1858 "In the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.") Where "a specific provision [is] construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized . . . [t]he policy sought to be implemented should be respected . . . and to this end, titles of acts, headnotes, and chapter and section headings may properly be considered in determining legislative intent." (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489 (citations omitted).)

Consequently, "[t]he intent of the law prevails over the letter of the law, and the letter will, if possible, be so read as to conform to the spirit of the act." (*People v. Elmore* (2014) 59 Cal.4th 121, 140 (citations and internal quotes omitted); *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630, "[The Court] may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to

absurd results" (citation and internal quotes omitted).) Similarly, where a statute is to be construed 'strictly,' "strict construction must still be a reasonable construction." (*Cedars of Lebanon Hospital v. Los Angeles County* (1950) 35 Cal.2d 729, 735.)

"Under governing principles of statutory construction, 'the expression of one thing in a statute ordinarily implies the exclusion of other things. [Citation.]' [Citation.]" (*People v. Guzman* (2005) 35 Cal.4th 577, 588.) "If exemptions are specified in a statute, [the Court] may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 (citations, internal quotes and brackets omitted); *Quarry v. Doe I* (2012) 53 Cal.4th 945, 970, "It is a settled rule of statutory construction that 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.' [Citation.]".)

"The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]" (*People v. Yartz* (2005) 37 Cal.4th 529, 538 (citation and internal quotes omitted).)

"[I]f the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*People*

v. Yartz (2005) 37 Cal.4th 529, 538 (citations and internal quotes omitted); see also *In re Reeves* (2005) 35 Cal.4th 765, 771 FN9, citing *Renee J. v. Superior Court* (2001) 26 Cal4th 735, 744, "When a statute is capable of more than one construction, we must give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity" (internal quotes and brackets omitted).)

"In [the Court's] effort to divine what the Legislature intended, [it] may consider not only [the Legislature's] internal written expression of the bill's meaning and purpose, but also the wider historical circumstances of the bill's enactment." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1082 (citations, internal quotes and brackets omitted).) Further, "where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Id.* (citations, internal quotes and brackets omitted).) "Ultimately [the Court] choose[s] the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233 (citations and internal quotes omitted).)

"[A]s a general rule, unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid

conflict with common law rules." (*Verdugo v. Target Corporation* (2015) 59 Cal.4th 312, 326 (citation, internal quotes and brackets omitted) ("*Verdugo*").) "Accordingly, [t]here is a presumption that a statute does not, by implication, repeal the common law. [Citation.] Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws." (*Id.* (citation and internal quotes omitted).)

B. The Legislature's Intent in Enacting SB800

One of the purposes of SB800's enactment was to make actionable violations of specified construction standards whether or not those violations resulted in actual property damage, effectively abrogating the decision in *Aas v. Superior Court* (2000) 24 Cal.4th 627 ("*Aas*"). However, addressing the effects of the *Aas* decision was not SB800's <u>only</u> intended purpose. As articulated by the Fifth District, 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.)

C. The Plain and Express Language of Sections 896, 897 and 943 Abrogate Residential Construction Defect Common Law Actions, Except as Specifically Set Forth in Title 7, and there Is no Rational Basis for Harmonizing those Common Law Actions with SB800, Resulting in an Abrogation of the Common Law by Implication

1. Summary of Real Parties' Primary Argument

Real Parties' primary argument in their Opening Brief on the Merits ("Opening Brief") is that "none of California homeowners' common law rights have been supplanted by SB800" because "SB800 contains no express provision stating that its purpose is to nullify the common law rights of California homeowners." (Opening Brief, pgs. 10 and 27.) To support this position Real Parties rely upon the general rule that the Legislature's repeal of the common law must be express or by implication only where there is no rational basis for harmonizing the common law and the potentially conflicting statute.

In an attempt to conjure the requisite harmony, Real Parties nonsensically assert that the Legislature enacted SB800 in order to "streamline and reduce construction defect litigation" by "provid[ing] a means for homeowners to recover for defects that have not caused physical damage" that now "exist[s] side by side with the common law rights." (Opening Brief, pg. 21.) In other words, the Legislature attempted to "reduce construction defect litigation" by increasing the ways in which a builder can be liable to a homeowner and "streamline" it by adding yet another cause of action to the numerous already available to plaintiffs under

the common law. Presumably tongue-in-cheek, Real Parties also mention as a purpose of SB800 the builders' "right to inspect and cure any such defects" (Opening Brief, pg. 21), which through this appeal they are desperately trying to transform from an actual right to a privilege afforded builders only at the whim of plaintiffs' pleading preference.

Real Parties attempt to substantiate this not-so-carefully crafted summary of the Legislature's intent as follows: If (1) it is presumed, contrary to the actual words used by the Legislature, that section 896 only addresses defects that do not cause damage, (2) it is presumed, contrary to the actual words used by the Legislature, that section 897 "states that, to the extent that a homeowner seeks to recover for a defect that is *not* covered by the SB800 building standards, then he or she must do so in the manner prescribed by the common law," and (3) it is presumed that section 943's phrase "covered by this title" "simply means 'any action based upon a defect which has not resulted in physical damage and which violates the building standards in section 896'," then "there is no express intention to nullify the common law right of California homeowners to bring a tort action for defects that have resulted in physical damage to real property." (Opening Brief, pgs. 21-22.)

Real Parties also cite several cases in which this Court addressed whether the Legislature had sufficiently expressed its intent via statute to abrogate the common law. (Opening Brief, pgs. 13-15.) In *Verdugo v.*

Target Corporation (2015) 59 Cal.4th 312, this Court listed the following as examples of statutes in which the Legislature clearly expressed its intent to abrogate liability under common law principles for acting or failing to act in a particular manner:

> [N]o social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages. [§ 1714.]
>
> No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. [Health & Safety Code § 1799.102(a).]
>
> An owner of any estate or other interest in real property . . . owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section. [§ 846.]

In sum, Real Parties' statutory interpretation is wrong because the actual words used by the Legislature in sections 896, 897 and 943(a) expressly abrogate the common law, except as specifically set forth in Title 7, and because Real Parties' presumptive interpretation ignores completely, and consequently reads out of existence and renders superfluous and absurd, entire provisions of the SB800 statutory scheme.

2. The Actual Words Used by the Legislature in Sections 896, 897 and 943 Plainly Express an Intention to Abrogate Residential Construction Defect Common Law Claims

The opening paragraph of section 896, entitled "Building standards for original construction intended to be sold as an individual dwelling unit," articulates the scope of "actions" that fall within the SB800 statutory scheme and also "limits" those actions to "claims or causes of action" for violations of "the following standards" contained in Chapter 2:

> 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, a builder . . . shall, except as specifically set forth in this title, be liable for, and 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. This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law. (Emphasis added.)

Little, if any, explanation is needed to supplement this plain expression of the Legislature's intent. Except where Title 7 "specifically sets forth" exceptions, "any action" brought by a homeowner for residential construction defect "claims or causes of action shall be limited to violation of" SB800's construction standards found in Chapter 2 – "Actionable Defects." "Any action" expressly and necessarily includes common law actions that seek damages resulting from construction defects.

The Legislature clearly intended SB800 to 'occupy the field' of residential construction defect claims, "except as specifically set forth" in Title 7, as that intent was literally codified in section 897: "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." (Emphasis added.) By inclusion of section 897 in Chapter 2, any residential construction defect that is not already covered by the construction standards found in 896(a) through (g), is covered by section 897, making the scope of residential construction defect claims covered by SB800 completely comprehensive, "except as specifically set forth" in Title 7.

The Legislature reiterates this intent in section 943, entitled "Exclusiveness of title; exceptions": "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."

The plain language of sections 896, 897 and 943 is alone sufficient to establish that SB800 provides the exclusive remedy for "any action" seeking damages for residential construction defects, "except as specifically set forth" in Title 7. Again, "any action" expressly and necessarily includes common law actions that seek damages resulting from construction defects.

None of the statutes listed in *Verdugo* that this Court found to abrogate the common law explicitly contain the words "common law." None of them contain language that is more expansive in scope or more deliberate as to its intended effect on the common law than what is included

in sections 896 and 943. Of the *Verdugo* examples, Real Parties state, "This Court found that each of these statutes expressly conflicted with and altered the applicable common law tort duty." (Opening Brief, pg. 15.) That is a very good description of SB800 too. In comparing sections 896 and 943 to the *Verdugo* examples the Fifth District stated that "[t]he language of [SB800] is equally clear in barring any cause of action for damages related to residential construction defects other than a cause of action brought in compliance with [SB800]." (*McMillin Albany v. Superior Court* (2015) 239 Cal.App.4th 1132, 1146.) The Fifth District is correct.

Any presumption against abrogation of common law by statute is overcome by the plain and express language of sections 896 and 943.

Also supporting the conclusion that common law claims are within the scope of actions limited by SB800 is the fact that section 896's descriptive phrase "design, specifications, surveying, planning, supervision, testing, or observation of construction" is a verbatim recitation of the descriptive phrases used in C.C.P. sections 337.1 and 337.15. Prior to SB800, and even after SB800 in a non-residential commercial or condominium conversion context, those sections employed that verbatim language to describe common law construction defect claims and establish the limitations periods for patent and latent defects.

The Legislature is deemed to have knowledge that the scope defining language it was enacting in SB800 was verbatim to the already

existing scope defining language in C.C.P. sections 337.1 and 337.15 applicable to common law construction defect claims. (*People v. Yartz* (2005) 37 Cal.4th 529, 538). The Legislature is also deemed to know that existing case law interpreting those sections placed common law claims within their scope. (*Id.*)

Consequently, by enacting SB800 the Legislature carved out residential construction defect claims, including common law claims, from the scope of C.C.P. sections 337.1 and 337.15. Further evidence of this "carve-out" is that SB800 provides its own statutes of limitation/repose and "[s]ections 337.15 and 337.1 of the Code of Civil Procedure do not apply to actions under [Title 7]." (§ 941.)

3. There Is no Rational Basis for Harmonizing Residential Construction Defect Common Law Actions with SB800, Resulting in an Abrogation of the Common Law by Implication

Even if one assumes the language of sections 896, 897 and 943(a) is not considered "express" for purposes of overcoming the presumption against abrogation of the common law, if SB800's language is construed in the context of the statute as a whole and the overall statutory scheme, and the Court gives significance to every word, phrase, sentence, and part of it in pursuance of its legislative purpose, then repeal of the common law is warranted because there is no rational basis for harmonizing the common law with SB800. This is because many of SB800's provisions would be

rendered meaningless and absurd if common law claims for residential construction defects categorically survived the enactment of SB800.

a. If Residential Construction Defect Common Law Claims Categorically Survived Sb800's Enactment, Much of SB800's Language regarding Damages would Be Superfluous and Absurd

The scope and type of damages allowed to be recovered under the SB800 statutory scheme directly supports a statutory construction that SB800 provides the exclusive remedy for residential construction defects and also negates Real Parties' false premise that the only purpose for SB800's enactment was to abrogate the economic loss rule this Court articulated in the *Aas* case.

The introductory paragraph of section 896 makes reference to ". . . 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 scope of "damages" sought by "any action" is expansive in that it includes damages "arising out of, or related to deficiencies in . . . [specified construction-related conduct]," which necessarily include damages *resulting from* (i.e. "arising out of") any defects/violations claimed, not just damages for the defect/violation itself.

Commensurately, section 944 provides an exclusive list of the damages that are "allowed" "for a claim covered by" Title 7. (§ 943(a).)

That list includes "damages for the reasonable value of repairing any violation of the standards" *and* "the reasonable cost of repairing and rectifying any damages *resulting from* the failure of the home to meet the standards." (Emphasis added.)

There would be no reason for the Legislature to include the expansive language regarding damages in section 896 or to allow recovery of damages resulting from a violation of the SB800 building standards under section 944, if, as Real Parties assert, common law claims were not abrogated by SB00's enactment. If common law claims were still available to plaintiffs and SB800 was only intended to allow recovery for defects that do not cause property damage, then damages "resulting from the failure of the home to meet the [SB800 construction] standards" would be recoverable under a common law tort theory. This would render superfluous, meaningless and absurd section 896's expansive damages language and section 944's provision allowing recovery for damage resulting from an SB800 violation. However, the existence of those damages provisions make perfect sense when the statutory scheme is properly interpreted to be the exclusive remedy for residential construction defects and abrogate tort common law causes of action, including, but not limited to, negligence and strict products liability.

Real Parties' statutory construction argument does not even attempt to address this glaring inconsistency.

b. If Residential Construction Defect Common Law Claims Categorically Survived SB800's Enactment, Essentially every Exception "Specifically Set Forth" in Title 7 would Be Superfluous and Absurd

The exceptions to SB800's exclusivity found in Title 7 provide further meaningful insight to the scope of that exclusivity. It is a settled rule of statutory construction that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 970; *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239, "If exemptions are specified in a statute, [the Court] may not imply additional exemptions unless there is a clear legislative intent to the contrary" (citations, internal quotes and brackets omitted).)

The very first exception to Title 7's exclusivity is also the most relevant of all the exceptions in terms of revealing the intended scope of SB800's exclusivity. Immediately following SB800's limiting language in section 896, the last sentence of the introductory paragraph states, "As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law."

There is no reason why the Legislature could not have specifically set forth an exception for common law claims as to all residential construction, like it did for condominium conversions. It would have

simply stated, "This title does not apply to or does not supersede any other statutory or common law." It did not do so.

From SB800's inception the Legislature intended the limiting language of section 896 to apply to common law claims. This is substantiated by the fact that the condominium conversion provision was not included at all in the original version of the bill (see Legislative Counsel Digest, Amended August 25, 2002, pg. 4, Bates No. 000035[3]), but was only added in its final form, referencing "common law," in the Final Legislative Counsel's Digest containing the version of the bill approved by the Governor (Bates No. 000121).

Real Parties mention the condominium conversion common law exception zero times in their Opening Brief because its existence is totally inconsistent with their argument that common law claims were not abrogated by SB800. If, as Real Parties argue, the *only* purpose of the SB800 construction standards was to allow homeowners to recover for defects that did not cause damage (the abrogation of *Aas*), and common law claims were to remain available to plaintiffs after SB800 was enacted, then the condominium conversion common law exception in section 896 would be a completely superfluous and absurd provision. Such an interpretation

[3] This bates number is in reference to the complete copy of SB800's Legislative history of which the Fifth District took judicial notice in the underlying appeal. McMillin will shortly file a similar request with this Court, which will be bates numbered identically.

contradicts this Court's and the Legislature's own rules for statutory construction. (*People v. Elmore* (2014) 59 Cal.4th 121, 140, "The language is construed in the context of the statute as a whole and the overall statutory scheme, and [the Court] give[s] significance to every word, phrase sentence, and part of an act in pursuance of the legislative purpose"; *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611, "[C]ourts may not excise words from statutes. [Citation.] We assume each term has meaning and appears for a reason. [Citation.]"; C.C.P. § 1858 "In the construction of a statute . . . where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.")

Besides the exception for condominium conversion common law claims, the only other exceptions to SB800's exclusiveness "specifically set forth" in Title 7 are "any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure" (§ 869(g)(3)(E)), and "any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute." (§ 943(a).)

Real Parties correctly point out that actions to enforce a contract or express contractual provision and actions for fraud and personal injury are common law claims. (Opening Brief, pg. 33.) However, just like with the condominium conversion common law exception, if all common law claims

remained available to plaintiffs after SB800's enactment, the Legislature's specific listing of those actions as exceptions to SB800's exclusivity would have been pointless because they all would be available to plaintiffs regardless of section 943(a)'s language. Just like for section 896's exception for condominium conversion common law claims, the existence of section 943(a)'s exceptions directly supports the proper statutory construction that prohibits any cause of action for residential construction defects other than one specifically set forth by the code itself. There is no exception "specifically set forth" in Title 7 for any common law claim or action other than for condominium conversions, actions to enforce a contract or express contractual provision, or for any action for fraud, personal injury. Any other "non-SB800" action, including, but not limited to, any other type of common law action, is abrogated by the plain language of sections 896, 897 and 943(a). SB800 "specifically sets forth" exceptions to its "general rule" of exclusivity," consequently, "other exceptions are not to be implied or presumed." (see *Quarry v. Doe I* (2012) 53 Cal.4th 945, 970.)

Abrogation of the common law by implication is warranted because there is no rational basis for harmonizing the common law with SB800's damages provisions and exceptions, as they would be rendered meaningless and absurd if common law claims for residential construction defects categorically survived the enactment of SB800. This is true regardless of

whether the Court considers the language of sections 896, 897 and 943 to expressly abrogate the common law.

4. Real Parties' Policy Arguments Regarding SB800's Statutes of Limitation and Sudden Catastrophic Losses Are not a Legitimate Basis for Adopting Real Parties' Proposed Statutory Construction that would Allow Common Law Claims in Order to Avoid the Prelitigation Procedure

In support of their argument that SB800's only effect is to provide additional liability to builders by allowing plaintiffs to recover for residential construction defects that do not cause actual property damage, and to provide builders a prelitigation inspection and repair procedure that is optional at the plaintiffs' pleading discretion, Real Parties also make a few policy arguments.

a. Real Parties' Argument Regarding SB800's Statutes of Limitation Is not a Legitimate Basis for Adopting Their Proposed Statutory Construction of SB800

First, Real Parties point out that "[i]f SB800 were the exclusive remedy for homeowners, then recovery would oftentimes be precluded altogether by" statutes of limitation that are shorter than "the ten-year statute of limitations for latent defects under Code of Civil Procedure section 337.15, coupled with the three-year statute of limitations for patent defects. [Citation.]" (Opening Brief, pgs. 23-24.)

Real Parties' contention in this regard is nothing more than a disgruntled complaint that they do not like what the Legislature decided to do – that if their statutory construction is wrong then there are legal

consequences potentially adverse to them. At the time of SB800's enactment the Legislature was aware of the existing statutes of limitation on patent and latent defects and, in the midst of that awareness, proceeded to enacted SB800 as it exists today. Even if this Court, like Real Parties, were to take a negative view of the effects SB800's statute of limitations may have on potential future claims of homeowner plaintiffs, the Legislature has spoken. There is no legal authority cited to support Real Parties' implied position that this Court can or should disregard the Legislature's expressed intent simply because the legal effect may be adverse to a certain category of plaintiffs.

b. Real Parties' Argument Regarding Catastrophic Losses Is not a Legitimate Basis for Adopting their Proposed Statutory Construction of SB800

Second, Real Parties assert that "[i]f SB800 is the exclusive remedy, then [in a catastrophic loss context] the mandatory prelitigation procedure will frequently have the effect of extinguishing any right of recovery that the homeowner or his or her [subrogated] insurer have against the builder" because "[a] homeowner[/insurer] who performs emergency repairs without complying with [SB800's prelitigation] procedure is disqualified from bringing a cause of action under SB800." (Opening Brief, pgs. 24-27.)

Real Parties' argument amounts to the counterintuitive conclusion that the best and fastest fix for sudden catastrophic damage in a home is to file a common law action in Superior Court, instead of engaging in a

prelitigation inspection and repair process that (1) the builder has already agreed to provide (§§ 912(e)-(h) and 914), (2) only requires the homeowner to send a simple letter (§ 910(a)), (3) also allows the homeowner to make a customer service request (see § 910(b)), and (4) the builder has strong incentives to perform quickly and successfully (§§ 934 and 944). The absurd results that stem from Real Parties' argument are self-evident and alone justify rejecting the argument in its entirety.

Also, while it may be relevant for understanding whether SB800 was intended to abrogate common law causes of action, the topic of SB800's application to catastrophic loss situations is completely outside the factual context of *this* case. Plaintiffs have never claimed in this matter any type of catastrophic loss, so any narrow, pretend exception to SB800's exclusivity for catastrophic loss situations would be inapplicable here.

Finally, the false conundrum Plaintiffs' argument attempts to create is easily alleviated by the SB800 code itself. Imposed upon the homeowner by section 945.5(b), via an affirmative defense available to the builder, is the duty to take reasonable efforts to "minimize in a timely manner" any "obligation, damage, loss, or liability" of the builder.

In section 944, the "damages" referenced in section 945.5(b) explicitly include ". . . the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards. . . ," and ". . . reasonable relocation and storage expenses, lost business income

if the home was used as a principal place of business licensed to be operated from the home. . . ."

Where a catastrophic loss occurs, such as the one described in *Liberty Mutual*, "strict construal" Chapter 4 (see section 930(a)) requires that the homeowner serve the builder a section 910 notice of claim. (See *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1478.) However the code explicitly does "not preclude a homeowner from seeking redress through any applicable normal customer service procedure." (§ 910(b) (emphasis added).)

If water is pouring out of the cupboards and walls of the home because a pipe burst, it is not unreasonable to expect, indeed it is required by section 945.5(b), that the homeowner take reasonable action "to minimize or prevent those damages in a timely manner." These efforts would likely include, but certainly would not be limited to, immediately sending a notice of claim in accordance with section 910 and contacting the builder through any applicable customer service program to find out if and when the builder will do something about the defect and resulting damage.

Other than making the home available to the builder for inspection and repair, the *only* thing plaintiffs have to affirmatively do to comply with SB800's prelitigation procedure in order to avoid having their "right of recovery" extinguished, is to send the builder a notice of claim in

accordance with section 910. Essentially every other event that is part of the prelitigation process is the builder's responsibility to perform.

The requirement of delivery by the homeowner of a section 910 notice of claim to the builder is not close to burdensome or unreasonable, even in a catastrophic loss situation. The letter does not even have to be "served" in the legal sense. It just has to be delivered "via certified mail, overnight mail, or personal delivery." (§ 910(a).) All the letter has to contain is "the claimant's name, address, and preferred method of contact," and a statement "that the claimant alleges a violation pursuant to [SB800] against the builder, [describing] the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation." (*Id.*) Once the notice of claim is delivered in accordance with section 910, the homeowner's right to recover is preserved. (See *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1475-1476, concluding in subrogation action that "failure to give timely [section 910] notice to [builder] is fatal to [insurer's SB800] cause of action [], and summary judgment for [builder] is proper under the circumstances".)

Within 14 days of receiving the notice of claim a builder is required to "acknowledge, in writing," its receipt. (§ 913.) However, when a catastrophic event occurs, if the builder has not already begun making the repairs in response to a section 910(a) notice of claim, or a section 910(b)

customer service request, there is nothing in the SB800 statutory scheme or any published case that prevents homeowners (or their insurers) to wait 14 days before beginning reasonable mitigation efforts in connection with a catastrophic loss. Indeed, taking that reasonable mitigation action is the homeowner's/insurer's duty under section 945.5(b).

Also, built into the SB800 statutory scheme are strong incentives for builders to respond quickly to catastrophic events. "Since the builder is required to compensate the homeowner for consequential damages, including the cost of repair of actual property damage caused by a construction defect, any delay up to the statutory maximum risks increasing the builder's liability. Thus, the builder has an incentive to act quickly in such cases." (*KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1478.) Also, evidence of the builder's conduct during the prelitigation process "may be introduced during a subsequent enforcement action." (§ 934.) It is very unlikely a builder would want to risk a jury receiving evidence that, for example, it was informed via notice of claim regarding a sudden, unexpected flood and waited until the last minute it could to do anything about it.

That these incentives are real and have a practical effect on builders' responses to catastrophic loss situations is ironically and directly supported by the facts of the *Liberty Mutual* case, where the builder must necessarily have been informed of the homeowner's flood via a customer service

request or notice of claim, because it "acknowledged its liability for, and repaired, the damage to [the plaintiff's] home."[4] (*Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, 101.) However, those incentives are effectively nonexistent where the builder is never made aware of the catastrophic loss or where its first knowledge of the catastrophic loss comes via service of a complaint.

All of these reasons are what lead the Second District Court of Appeal to hold that "catastrophic damage cannot be an excuse to deprive a builder of its statutory right to have timely notice of a defect, to inspect the property, to offer to repair the defect and compensate the homeowner, and thus to resolve the matter in an expeditious, nonadversarial manner." (*KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1478.)

Real Parties' catastrophic loss argument is also inconsistent with the many statutory interpretation and legislative history arguments contained in this brief that SB800 is and was intended to be the exclusive remedy for residential construction defects. If significance is given to each of SB800's words, phrases, sentences, and parts in pursuance of the legislative purpose, as is required under the rules of statutory construction, then Real Parties' catastrophic loss argument must be rejected.

[4] Liberty Mutual was only seeking in subrogation the amounts it paid for the homeowner's relocation expenses.

In sum, Real Parties' (and *Liberty Mutual's*) argument that SB800's prelitigation procedures are incapable of adequately addressing catastrophic loss situations is false. Consequently, Real Parties' conclusion that stumbles from that argument – that common law causes of action were not intended to be abrogated by SB800 in catastrophic loss situations – is also false.

D. Section 897 does not Provide an Exception from SB800's Exclusivity for Residential Construction Defect Tort Common Law Claims that Are not Addressed by Section 896's Building Standards

1. Summary of Real Parties' Secondary Argument

In the event that this Court concludes, as it should, that SB800 abrogates tort common law actions, Real Parties assert that the abrogation should only extend to tort common law actions that seek recovery for defects that are addressed by the building standards in section 896. (Opening Brief, pgs. 27-32.) This argument is based on section 897's language stating that, "To the extent that a function or component is not addressed by these standards, it shall be actionable if it causes damage." Real Parties reason that since this language is "consistent on its face with the common law, which holds that a defect is actionable in tort if it causes damage," the Legislature did not intend to "set up a cause of action under SB800 for defects that do not violate the building standards in section 896," but *must* have intended to preserve tort common law actions where section 896's building standards do not address the defect that causes damage

because "there is no express intention to depart from the common law rule." (Opening Brief, pgs. 28-30.)

Real Parties also argue that the Legislature could not have intended section 897 to provide a cause of action under SB800 because "defects which fall under section 897 are by definition ones which '[are] not addressed by [section 896's] standards'," and "section 944 permits recovery only for 'the reasonable value of repairing any violation of the standards set forth in this title,' 'the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards,' and so forth. (Civ. Code sec. 944.)" (Opening Brief, pg. 30 (emphasis added).) They make a similar argument that the word 'standards' in sections 910, 916, 917 and 924 does not include a claim that is "actionable" under section 897. (*Id.* at 31.)

2. The Legislature Intended Section 897 to Provide the Exclusive Remedy for Residential Construction Defects that Are Unintentionally not Addressed by Section 896's Building Standards through a Statutory Cause of Action

True to form, Real Parties' argument ignores the most salient statutory language necessary for a proper understanding of the Legislature's intent. The first sentence of section 897 states: "The standards set forth in this chapter are *intended* to address *every* function or component of a structure." And *then*: "To the extent that a function or component is not

addressed by these standards, it shall be actionable if it causes damage." (Emphasis added.)

Since in section 896 the Legislature "intended to address *every* function or component of a structure," then it necessarily must have "*intended*" to address even the functions or components of that structure containing defects that the Legislature *unintentionally* did *not* address in section 896.

Accordingly, if section 896 abrogated tort common law actions encompassed by its building standards, and the Legislature "intended to address" in that section "*every* function or component of a structure," then it is an unassailable, codified fact that Legislature "*intended*" to abrogate *all* tort common law causes of action, even if the particular function or component of the structure containing the defect was unintentionally not addressed by section 896. There is no reason the Legislature would "intend" to abrogate tort common law actions for residential construction defects in "every function or component of a [residential] structure," but, as Real Parties argue, *also* intend to preserve tort common law actions arising from those same functions or components of a residential structure just because it *unintentionally* missed a potential defect in section 896's building standards.

If through section 897 the Legislature truly intended to exempt tort common law causes of action from SB800's exclusivity for defects that

were not addressed by section 896's building standards, it would have completely omitted the first sentence of section 897 because the only rational purpose for that statement is to communicate that the Legislature intended to 'occupy the field' of residential construction defect claims in its entirety. In their Opening Brief, Real Parties make no attempt to harmonize the first sentence with any other statutory language.

Commensurately, if Real Parties are correct, the Legislature would have used different language than what appears in section 897's second sentence. In the one place the Legislature actually *did* categorically exempt all common law causes of action from SB800's exclusivity, it used this language: "As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law." (§ 896.) "When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful." (*In re Ethan C.* (2012) 54 Cal.4th 610, 638 (citations omitted).) If Real Parties' construction of section 897 was correct the *entire section* would read as follows: "As to functions or components of a structure that are not addressed in this chapter, this title does not apply to or does not supersede any common law." There is no rational reason the Legislature would use a concise, unambiguous statement to exempt common law actions related to condominium conversions in section 896

and then, in the very next section, arbitrarily use totally different language to achieve the same affect for a different category of common law claims.

The true purposes of section 897's second sentence are to make "actionable" under SB800 defects inadvertently not addressed by section 896's building standards (i.e. to ensure SB800 actually achieved its purpose of 'occupying the field') and to simultaneously make clear the scope of the Legislature's abrogation of the economic loss rule articulated in the *Aas* case. When the abrogation of *Aas* is juxtaposed to section 897's second sentence, both of its intended effects are revealed: It is a clarification that if the Legislature inadvertently missed some defect in section 896's building standards, which it did not intend to do, then that defect would be "actionable" under SB800, *but only if it "caused damage,"* i.e. not like the rest of Chapter 2's standards.

By stating that section 896's standards were "intended to address every function or component of a structure," the Legislature, in section 897 itself, expressly provided that the common law should be abrogated for any defects that it inadvertently missed in section 896. If section 897's second sentence is construed in isolation the way Real Parties suggest, then section 897's first sentence is rendered superfluous and absurd. In other words, there is no rational basis to harmonize the continued existence of common law actions for defects not addressed by section 896 with section 897's first sentence. Consequently, common law actions for defects not addressed by

section 896's building standards were abrogated by section 896 and 897, both expressly and by implication.

Real Parties' argument that section 897 was not intended to provide a cause of action under SB800 because there are no recoverable damages for such a cause of action is also unavailing. There is no reason the words 'the standards' in SB800's damages section (§ 944) cannot be interpreted to include a defect not covered by section 896, but which is "actionable" under section 897 because it "causes damage." McMillin's proposed statutory construction of section 944's damages provisions that make reference to 'the standards' allows those words to not only have meaning for purposes of the section 896 "standards," but also for the "function[s] or component[s] of a structure" that are "actionable" under section 897, if they "cause damage."

There is ample supporting statutory evidence in SB800 that the words 'the standards' in section 944 should be construed as McMillin here suggests. 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 phrase "commencing with" 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).

In short, the statutory construction here proposed by McMillin "give[s] significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose" (see *People v. Elmore* (2014) 59 Cal.4th 121, 140 (internal quotes omitted)), whereas Real Parties' proposed

construction in appropriately "excise[s] words" from the statute (see *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611).

E. When the SB800 Statutory Scheme is Properly Construed as a Whole, Any Claimant Seeking Damages Covered by SB800 Must Initiate SB800's Prelitigation Process, Regardless of What Cause of Action Is Used to Seek those Damages, Assuming the Builder has Complied with the Notice, Recording and Contractual Requirements

Real Parties' position in this appeal amounts to an argument that it is their right to dictate through their pleading whims when a builder can enforce what was referred to by the Legislature as an "absolute right" to a "mandatory" prelitigation inspection and repair process. Real Parties here are attempting to transform that "absolute right" into a privilege only afforded to builders at homeowners' discretion, obliterating the prelitigation procedure's "mandatory" nature.

Real Parties appear to agree that for whatever claims SB800 provides the exclusive remedy, the prelitigation procedure applies. This definitely includes claims for defects that have not caused damage, and depending on the Court's decision in this case, may also include the first or both of the following, (1) any tort common law cause of action where the defect arises out of a function or component of a structure addressed by section 896's building standards, and (2) any tort common law cause of action where the defect arises out of a function or component of a structure that was unintentionally not addressed by section 896, but is addressed by section 897. If SB800 provides the exclusive remedy for these two

categories of tort common law claims, then homeowners are limited to recovering for residential construction defect claims in litigation only by asserting causes of action for violations of SB800's building standards in Chapter 2 (commencing with section 896). Again, there does not appear to be any dispute that, under section 910, the filing of a complaint containing a cause of action for violations of those building standards must be preceded by SB800's prelitigation procedure. Consequently, for all the same reasons that tort common law causes of action are abrogated by SB800, those causes of action also must submit to SB800's prelitigation procedure.

However, the following questions remain:

(1) Assuming this Court holds that such causes of action still exist, is the prelitigation procedure required where a plaintiff has brought only tort common law causes of action for residential construction defects?

(2) Is the prelitigation procedure required where a plaintiff has brought only an "action to enforce a contract or express contractual provision" for residential construction defects?

Real Parties take the position that if a plaintiff only pleads in her complaint a contract/warranty or tort common law cause of action for residential construction defects (again, assuming the latter still exists), then that plaintiff is under no obligation to engage in SB800's prelitigation process as the result of said cause of action. In support of this position,

Real Parties rely heavily on the language of section 910, and also sections 914, 942, and 931. (Opening Brief, pgs. 38-43.) Each of Real Parties' arguments is addressed below.

3. The Plain Language of Section 910 Requires a Homeowner to Exhaust His or Her Prelitigation Remedy (SB800's Inspection and Repair Process) before Initiating Litigation

Real Parties determine whether a claim alleging residential construction defects triggers SB800's prelitigation process as follows: They begin by identifying what cause of action the claimant would bring in a complaint to initiate litigation and *afterward* determine whether that cause of action triggers the *pre*litigation process under section 910. However, at the point in time the prelitigation process is supposed to be initiated, i.e. *before* litigation, there should not even exist a complaint containing *any* cause of action.

Even if Real Parties are correct (which they are not) that they can sue for residential construction defects under whatever legal theory/cause of action they want, their method of determining application of SB800's prelitigation process is fundamentally backward – the Legislature did not intend to require a complaint to be filed first so that afterward a determination whether the prelitigation process is triggered could be made. To the contrary, the claimant is supposed to first initiate the prelitigation process by delivery of a notice of claim and, when the process is completed (or ends before it is completed because the builder, for example, fails to

meet a deadline), *then* the claimant decides if she or he still wants to proceed with litigation, and if so, under what theory. (See §§ 910, 912(i), 930(b).)

Section 910 states in pertinent part:

> 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 procedures:
>
> (a) The claimant . . . shall provide written notice . . . to the builder, in the manner prescribed in this section, 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). That notice . . . shall state that the claimant alleges a violation pursuant to this part against the builder . . . ." (Emphasis added.)

If Real Parties construction of section 910 were correct, its first sentence would read, "Prior to filing an action ~~against any~~ [in which a] party [is] 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 procedures: . . . ." The important difference is that section 910's *actual* language does not specify any requirement for what the "action" must allege; it only specifies "against" who it must be alleged, i.e. a "party." It is true that the party the action would be "against" must be a party that is "alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896)," but that does not mean the allegation of violations must occur *in* the "action." Again, given that the prelitigation procedure is supposed to happen "[p]rior to filing" the

"action," there would not yet exist an "action"/complaint in which the violations could be "alleged." A more reasonable reading is that the violations "alleged" are those that will necessarily be found in the claimant's notice of claim, which *is* and *should be* in existence ["p]rior to filing [the] action against [the] party . . . ."

Indeed, regardless of what theory of recovery/cause of action a claimant ultimately chooses to use for initiating litigation later,[5] section 910 requires as a prerequisite to initiating litigation that the claimant "allege[]" via a notice of claim "a violation pursuant to [SB800] against the builder." (§ 910(a).) This is made possible, regardless of the cause of action the claimant would plead in future litigation, by sections 896 and 897 since the building standards in those sections collectively address "every function or component of a [residential] structure." In other words, section 910 requires homeowners to exhaust their prelitigation remedies, i.e. "pursue" SB800 claims via a notice of claim, before they are permitted to file an action against any party alleged to have contributed to a violation of the standards set out in Chapter 2 (commencing with Section 896).

Consequently, when an action/complaint for residential construction defects is filed before the plaintiff has complied with SB800's prelitigation procedures, a plain reading of section 910, when its syntax, context and purpose are properly analyzed, reveals that the prelitigation procedures are triggered regardless of what

[5] Assuming the prelitigation process does not resolve the matter.

"label" / theory of law / cause of action a plaintiff chooses to use, as long as the facts pleaded that underlay that legal label would, if true, constitute a violation of the SB800 standards set forth in sections 896 and/or 897.

If this were not the case then the Legislature could not have achieved its purpose of reducing litigation as the result of the prelitigation process. This "mandatory" procedural mechanism provided to reduce litigation is neither mandatory nor reduces litigation if there is simultaneously provided a procedural escape-hatch available to homeowners whenever they decide to open it through artful pleading.

To look past a complaint's legal theories/causes of action to the underlying facts pleaded for the purpose of determining the applicability of a specific code section or the availability of certain types of relief is a common and completely appropriate form of legal analysis in California. Some examples include:

- Code of Civil Procedure section 425.16 – "In determining whether the anti-SLAPP statute applies in a given situation, we analyze whether the defendant's act underlying the plaintiff's cause of action *itself* was an act in furtherance of the right of petition or free speech. [Citations.]" (*Castillo v. Pacheco* (2007) 150 Cal.App.4th 242, 249 (emphasis in original).)
- Demurrers – "It has long been established that in ruling on a demurrer, the trial court is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to

relief [Citation.] 'It is not what a paper is named, but what it is that fixes its character.' [Citation.]" (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908; see also *Najera v. Southern Pac. Co.* (1961) 191 Cal.App.2d 634, 635-636, regarding motions for judgment on the pleadings.)

Section 914(a) states that "if the procedure does not resolve the dispute between the parties," then there "may result [] a subsequent action to enforce the other chapters of this title." Real Parties argue this means the prelitigation procedures cannot apply to a tort common law or contractual cause of action because those causes of action are not brought to "enforce the other chapters of" SB800. In reality, this section is simply additional evidence that common law tort causes of action were intended to be abrogated by SB800. The Legislature enacted this section with the intent that no other cause of action other than one to enforce SB800's Chapter 2 would be allowed, except as specifically set forth elsewhere in Title 7. Also, just because an action to enforce the other chapters of SB800 "may result" when the prelitigation procedure fails does not mean that the prelitigation procedure does not apply to residential construction defect claims that will ultimately be framed as contract claims in some future complaint. Real Parties again "put the cart before the horse" in these respects.

Section 942 states that "a homeowner only need demonstrate . . . that the home does not meet the applicable standard" with "[n]o further showing

of causation or damages" in order to "make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896)." In other words, under SB800 a homeowner can recover for defects that do not cause damage, abrogating *Aas*.

Real Parties assert that "[s]ection 942 proves that the language in section 910" cannot include a tort common law action, which requires proof of damages as an element, because under section 942 "the plaintiff would not need to prove . . . causation or resulting damage" for such a claim.

There is no reason why section 942 should not be construed to apply only to claims of defects that have not caused resulting damage, and at the same time require a showing of causation and damages where claims where resulting damages are sought. That this is the proper construction of section 942 is supported by the very existence of section 897, which explicitly contemplates claims under SB800 that result in actual property damages, and also the provision of section 944 that allows a plaintiff to recover for "the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards" under section 896. If *all* SB800 codes sections and provisions are to be given effect, as is required under the rules for statutory construction, then this is the construction that must be adopted.

Real Parties also assert section 931 "supports the inference that[] if the homeowner states no claim under SB800, then he or she is not required to comply with the SB800 prelitigation procedure." (Opening Brief, pgs. 42-43.) Section 931, when read in context, actually supports the exact opposite inference than what Real Parties assert. Section 931 is located in Chapter 4 and is entitled "Causes of action or damages exceeding scope of actionable defects; applicability of standards." It states in pertinent part:

> If a claim combines causes of action ***or*** damages not covered by this part, including, without limitation, personal injuries, class actions, other statutory remedies, or fraud-based claims, the claimed unmet standards shall be administered according to this part . . . . As to any fraud-based claim, if the fact that the property has been repaired under this chapter is deemed admissible, the trier of fact shall be informed that the repair was not voluntarily accepted by the homeowner. As to any class action claims that address solely the incorporation of a defective component into a residence, the named and unnamed class members need not comply with this chapter. (Emphasis added.)

Real Parties' reading of this statute is that "[i]f a claim combines causes of action . . . not covered by this part" with causes of action that are covered by SB800, then the "unmet standards" giving rise to the causes of action that are covered "shall be administered according to this part," i.e. trigger the prelitigation process. This reading results in Real Parties' conclusion that "if the homeowner states no cause of action under SB800, then he or she is not required to comply with the SB800 prelitigation procedure."

The problem with Real Parties' interpretation is that section 931's first sentence also specifies "damages," not just "causes of action." As to damages the section reads, "[i]f a claim combines . . . damages not covered by this part" with damages that are covered by SB800, then the "unmet standards" giving rise to the damages that are covered "shall be administered according to this part," i.e. go through the prelitigation process.

Example: A single cause of action for fraud is brought against a builder in which it is alleged that the builder intentionally misrepresented both (1) the dollar amount of costs the builder incurred in constructing the home, which were then passed on to the homeowner, and (2) the quality of construction of the home, because of leaks in the roof. Under such a circumstance, the single cause of action for fraud "combines . . . damages not covered by" SB800 with damages that are covered by SB800. Leaks in the roof are covered by Chapter 2's building standards, and damages for that "unmet standard" are "covered" under section 944. But SB800 does not even attempt to cover damages arising from improper costs a builder knowingly passed on to a homeowner. Even though there is just a single action for fraud, to which Title 7 "does not apply" (section 943(a)), section 931 explicitly clarifies that the "claimed unmet standards" of leaks in the roof should "be administered according to" SB800's prelitigation procedure.

A similar analysis applies for any cause of action to which Title 7's exclusivity does not apply but that combines damages that are covered by SB800 with damages that are not covered by SB800, "including, ***without limitation***, personal injuries, class actions, other statutory remedies, or fraud-based claims." (§ 931.) Reinforcing this construction of section 931, and McMillin's general contention that the prelitigation process is mandatory, is section 931's second sentence: "As to any fraud-based claim, if the fact that the property has been repaired under this chapter is deemed admissible, the trier of fact shall be informed that the repair was not voluntarily accepted by the homeowner." If, as Real Parties argue, the prelitigation process is inapplicable to any cause of action to which Title 7 does not apply, then this sentence would be absurd and superfluous, as Title 7 "does not apply . . . to any action for fraud" (§ 943(a)).

As section 931 articulates, the prelitigation procedures apply to any cause of action, "without limitation," in which damages covered by SB800 are sought. This necessarily includes a tort common law cause of action for residential construction defects that seek recovery for damages resulting from the defect, since those damages are covered by section 944.

4. If Residential Construction Defects Are to Be Asserted via an Action to Enforce a Contract or Express Contractual Provision, then the Claimant Planning to Assert that Cause of Action Must Initiate SB800's Prelitigation Process before Filing His or Her Complaint, Assuming the Builder has Complied with SB800's Notice, Recording and Contractual Requirements

As the Court knows, Real Parties' have pending before this Court another case that is stayed pending the outcome of this matter. (*Moose v. Superior Court*, Case No. S230342.) At issue in that case is whether a plaintiffs' right to seek recovery for residential construction defects under a breach of contract theory was abrogated by SB800. Understandably, Real Parties devote much space in their Opening Brief to convince this Court that "actions by a claimant to enforce a contract or express contractual provision" are not abrogated by SB800 because they are specifically excepted from SB800's exclusivity at section 943(a). McMillin does not contend that "actions by a claimant to enforce a contract or express contractual provision" are abrogated by SB800's exclusivity.

However, even though section 943(a) allows a claimant to ultimately bring an "action to enforce a contract or express contractual provision" for residential construction defects, the provisions of the SB800 code itself have the effect of requiring the claimant to initiate the prelitigation process before the action to enforce the contract is brought.

The SB800 statutory scheme generally governs contracts between the builder and the homeowner in very significant ways, especially if the builder elects to use SB800's prelitigation process.

It is clear that the Legislature intended to make the building standards of Chapter 2 apply as a set of minimum standards to every legal situation in which residential construction defects could be alleged, as "[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." (§ 901.) Further, SB800 allows a builder to offer what is called an "enhanced protection agreement," which is simply "an express contract with the homeowner" that "offer[s] greater protection or protection for longer time periods . . . than that set forth in Chapter 2 (commencing with Section 896.)" (*Id.* (emphasis added); 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).)

"A builder's election to use an enhanced protection agreement addresses only the issues set forth in Chapter 2 (commencing with Section 896) and does not constitute an election to use or not use the provisions of Chapter 4 (commencing with Section 910). The decision to use or not use Chapter 4 (commencing with Section 910) is governed by the provisions of that chapter." (§ 906 (emphasis added).)

The way a builder "elect[s] to use or not use the provisions of Chapter 4" is by:

(1) Notifying the homeowner "[a]t the time the sales agreement is executed" that it "intends to engage in" SB800's prelitigation procedures instead of "attempting to enforce alternative nonadversarial contractual provisions" (§ 914(a)), and then;

(2) Complying with section 912's notice, recording and contractual requirements. These obligations include providing to the homeowner as part of the original sales documentation:

- The name and address of the agent for notice or third party to whom claims and requests for information may be mailed (§ 912(e));
- A notice of the existence of the prelitigation procedures, which also must be recorded (§ 912(f));
- A notice that the prelitigation procedures impact the legal rights of the homeowner, which also must be recorded (§ 912(f));
- A written copy of Title 7 (§ 912(g), and;
- An instruction to the original purchaser to provide these documents to any subsequent purchaser (§ 912(h)).

All but the last of these documents must be "initialed and acknowledged by the purchaser and the builder's sales representative." (§ 912(e)-(g).)

There is no rational way to harmonize (1) Real Parties' position that an "action to enforce a contract or express contractual provision" is not subject to SB800's prelitigation procedures with (2) the fact that section 906 says the prelitigation procedure applies to actions to enforce "an express contract with the homeowner" where the builder's "decision to use or not use Chapter 4 (commencing with Section 910) is governed by the provisions of that chapter." There is simply no reason section 906 would exist if the Legislature did not intended the prelitigation procedures to apply to an action to enforce a contract, as an enhanced protection agreement is a contract.

Perhaps Real Parties may argue that section 906 deals only with enhanced protection agreements, and not the enforcement of other contracts, but this argument is also untenable. No contract, enhanced protection agreement or otherwise, may "limit the application of Chapter 2 (commencing with Section 896) or lower its protection." (§ 901.) "If 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 [Chapter 2] in lieu of those provisions found to be unenforceable." (§ 903.) Where "a homeowner disputes that the particular provision or time periods of the enhanced protection agreement are not greater than, or equal to, the provisions of Chapter 2 (commencing with Section 896)" and "seeks to

enforce a particular standard in lieu of a provision of the enhanced protection agreement," then "the homeowner shall give the builder written notice of that intent **at the time the homeowner files a notice of claim pursuant to Chapter 4 (commencing with Section 910)**." (§ 904 (emphasis added).)

There is no rational reason the Legislature would require the prelitigation procedures (1) where the homeowner seeks to enforce a contract in which the builder agreed to adhere to building standards that exceed the building standards of Chapter 2 (§ 906), and (2) where the homeowner disputes that those contractual building standards are at least as high as those in Chapter 2 (§ 904), if the Legislature did not also intend for the prelitigation procedure to apply where a homeowner seeks to enforce contractual building standards that are not higher or allegedly lower than those in Chapter 2.

In sum, if a contract between a homeowner and a builder contains building standards at all, they must be at least as high as those found in SB800's Chapter 2. (§ 901.) If a contract's building standards are higher than those found in Chapter 2 (enhanced protection agreement), then the prelitigation procedures apply if the builder has elected to use them. (§ 906.) If a contract attempts to provide building standards that are higher that those found in Chapter 2 (enhanced protection agreement), and the homeowner disputes that the contract's building standards are equal to or

greater than those in Chapter 2, then the prelitigation procedures apply if the builder has elected to use them. (§ 904.) The only other possible scenario is if a contract's building standards are not higher or lower than those in Chapter 2, but are the same as those in Chapter 2. It would be absurd to conclude that the prelitigation procedures do not apply where a contract's building standards are the same as those in Chapter 2, but that they do apply where a contract's building standards either exceed those in Chapter 2 or are lower than those in Chapter 2. There is no rational reason the Legislature would have intended such an absurd application of the prelitigation procedures.

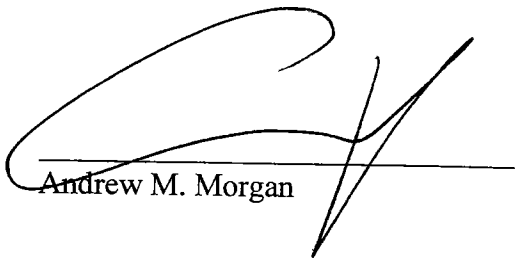
The prelitigation procedures were intended to, and do, apply in any action alleging residential construction defects, even if it is an action to enforce a contract or express contractual provision," as long as the builder has elected to use the prelitigation procedure in the manner required under Chapter 4.[6]

[6] Real Parties assert in their Opening Brief several times that implied warranty claims are contractual in nature and are therefore exempt from the prelitigation process for the same reasons express contractual claims are exempt. If implied warranty claims are contractual in nature as Real Parties assert, then they are subject to the prelitigation procedures for all the same reasons as express contract claims. If, however, they are not contractual in nature and are part of the common law, then they are abrogated and cannot be brought for the purpose of circumventing chapter 4's requirements.

IV. CONCLUSION

For all of the reasons set forth herein, McMillin respectfully requests that the Court hold that SB800 provides the exclusive remedy for residential construction defects, except as specifically set forth therein, abrogating tort common law causes of action, and that Real Parties may not avoid SB800's prelitigation procedures simply by the way they plead their complaint.

DATED: April 25, 2016

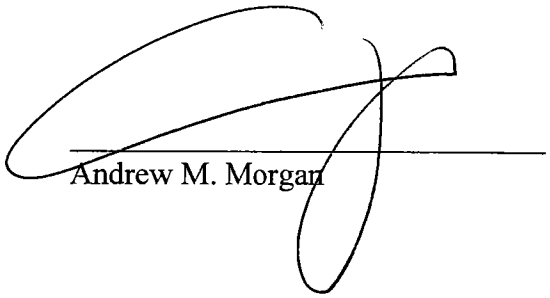


Andrew M. Morgan

CERTIFICATE OF WORD COUNT

On behalf of McMillin, I, Andrew M. Morgan, certify that in compliance with California Rules of Court 8.520(c)(1) the above Answer Brief on the Merits is comprised of no more than 13,893 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: April 25, 2016



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 **April 25, 2016,** I served the foregoing document described as **McMILLIN'S ANSWER BRIEF ON THE MERITS**, 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 **April 25, 2016**, at Bakersfield, California.

Rozemma (Sissy) Rucker
Type or Print Name

Rozemma Rucker
Signature

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