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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 Lampe,
Judge Presiding, Dept. 11

From the Published Opinion of the Court of Appeal, Fifth Appellate District,
5th Civ. No. F069370

PETITION FOR REVIEW

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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 Lampe, Judge Presiding, Dept. 11

From the Published Opinion of the Court of Appeal, Fifth Appellate District,
5th Civ. No. F069370

PETITION FOR REVIEW

ISSUES PRESENTED FOR REVIEW

1. 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?

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?

INTRODUCTION

Enacted in 2002, SB800 applies to all original construction sold as individual dwelling units or on or after January 1, 2003 (except for condominium conversions). (Cal. Civ. Code, sections 896 and 938.) The Legislature sought by enacting SB800 to streamline construction defect claims by adopting a uniform set of building standards and permitting homeowners to recover for violations of the standards, regardless of whether any physical damage had resulted to their home. SB800 also set up a prelitigation procedure, the purpose of which is to provide the builder with the opportunity to address claims brought under SB800 prior to the commencement of litigation by the homeowner. No one disputes the vast applicability of SB800 to essentially all California residences sold within the last 13 years, nor, consequentially, does anyone dispute its huge importance to Californians who seek to recover for defective conditions in their homes.

However, as a result of the decision of the Fifth District, there now exists a significant dispute between California Courts of Appeal in regards to two issues: first, to what extent homeowners are prohibited from stating *non-*SB800 causes of action when seeking to recover for defects that have already

resulted in damage to their homes, and second, whether a homeowner who brings an action in which he or she states no claim under SB800 is nevertheless required to comply with the SB800 prelitigation procedure at Civil Code section 910, et seq.

In *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC* (2013) 219 Cal.App.4th 98, the Fourth District Court of Appeal held that SB800 does not prevent homeowners from stating common law causes of action such as negligence and strict liability, provided that the homeowner bases his or her claim upon defects that have resulted in physical damage to the home. (*Id.* at pp, 104, 107, and 108-109.) The court also observed that in bringing such a claim, a homeowner is not required to comply with the SB800 prelitigation procedure. (*Id.* at p. 106.)

In *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, the Second District Court of Appeal discussed *Liberty Mutual* at length, adopting its reasoning, and applying its holding to reverse the trial court's grant of summary judgment as to the common law causes of action which had been brought therein by the plaintiff homeowner against the defendant builder. (*Id.* at pp. 1417-1418.)

In the present case, the Fifth District reached a result contrary to the holding in *Liberty Mutual* and *Burch* as to both the question of whether SB800 is the exclusive remedy for homeowners, and the question of whether the

SB800 prelitigation procedure applies in cases where the homeowner has not stated any cause of action under SB800. (Opinion, pp. 10 and 15.) The Fifth District stated that, "We ultimately reject [*Liberty Mutual*'s] reasoning and outcome . . . which we conclude are not consistent with the express language of the Act." (Opinion, pp. 8-9.)

This disagreement will inevitably spawn countless disputes between builders and homeowners as to these two fundamental issues concerning SB800. Unless this Court resolves the dispute between the Fifth District's opinion and *Liberty Mutual* and *Burch*, trial courts will not know which rule to follow, and builders and homeowners alike will have no way of knowing what law governs them in construction defect actions. Review is therefore warranted in order to bring much-needed clarity to an area of the law that affects many thousands of litigants and potential litigants statewide.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are the owners of 37 homes constructed by defendants McMillin Albany LLC, et al. (herein McMillin). (Opinion, p. 2.) Plaintiffs brought an action against McMillin to recover for defective conditions in their homes, and damage resulting therefrom. (Opinion, p. 2.) Plaintiffs stated eight causes of action, including strict liability, negligence, and breach of express and implied warranty. (Opinion, p. 2.) Plaintiffs initially stated a cause of

action for violation of the SB800 building standards (i.e., those set forth in Civil Code section 896), but later dismissed it. (Opinion, pp. 2-3.)

Plaintiffs did not provide notice to McMillin as specified under the SB800 prelitigation procedure at Civil Code section 910. (Opinion, p. 3.) McMillin moved to stay the action under Civil Code section 930(b), based upon the plaintiffs' failure to comply with the SB800 prelitigation procedure. (Opinion, p. 3.) The trial court denied McMillin's motion, finding that in the absence of any cause of action under SB800, the plaintiffs were not required to complete the SB800 prelitigation procedure, and McMillin therefore was not entitled to a stay. (Opinion, p. 3.)

McMillin sought writ relief. (Opinion, p. 3.) The Fifth District Court of Appeal granted McMillin's Petition for Writ of Mandate, directing the trial court to vacate and reverse its ruling. (Opinion, p. 20.) The plaintiffs did not file a petition for rehearing.

WHY THIS COURT SHOULD GRANT REVIEW

The conflict between the Fifth District's opinion and the appellate authorities that preceded it is manifest and undeniable. This conflict is the primary reason why, if this Court does not grant plaintiffs' concurrent request to depublish the Court of Appeal's opinion, then it should grant review, in order so that homeowners, builders, and trial courts statewide will know what rules govern construction defect actions.

Additionally, the Fifth District's opinion is incoherent in myriad different respects, and thus gives rise to needless uncertainties, as further explained below. For this reason as well, review should be granted, in order so that trial courts and litigants are not saddled with the task of trying to resolve the many questions that are needlessly created by the Fifth District's opinion.

A. This Court Should Grant Review in Order to Resolve the Conflict Between the Fifth District's Opinion and the Opinions of Other Courts of Appeal in *Liberty Mutual* and *Burch*

Primarily, this Court grants review "[w]hen necessary to secure uniformity of decision or to settle an important issue of law." (Cal. Rules of Ct., Rule 8.500(b)(1).) The need to secure uniformity can never be so clear as in a case like this one, where there are three published appellate opinions, and one of the three Courts of Appeal disagrees sharply with the other two on two fundamental and very significant points of law. These points of law must be settled--through a grant of review (if this Court denies plaintiffs' concurrent request for depublication)--in order to prevent widespread uncertainty as to the law in California governing residential construction defect actions.

1. The SB800 Building Standards and Prelitigation Procedure

As noted above, SB800 applies to most all residential real estate sold as individual dwelling units since 2003. (Cal. Civ. Code sections 896, 938.) Prior to the enactment of SB800, construction defect actions had been

governed by the economic loss rule which, as set forth in *Aas v. Superior Court* (2000) 24 Cal.4th 627, states that a plaintiff may not sue the builder of his or her home in tort for a defective condition unless the condition has caused physical damage to the home. (*Id.* at pp. 632, 636, 643, 647.)

SB800 sets forth a list of building standards in Civil Code section 896 which are "intended to address every component or function of a structure." (Cal. Civ. Code sec. 897.) A homeowner may recover for violation of any of the standards set forth in section 896, whether or not the violation has resulted in physical damage. (Cal. Civ. Code sections 896, 942.) The homeowner also need not demonstrate that the violation was caused by the builder, "provided that the violation arises out of, pertains to, or is related to, the original construction." (Cal. Civ. Code sec. 942.)

A homeowner may also pursue an action against a general contractor, subcontractor, or materials supplier for violation of the standards, but as to such person or entity SB800 does not eliminate any requirement for the homeowner to prove negligence or causation that would otherwise exist under the common law. (Cal. Civ. Code sec. 936.)

The amount of recovery that a homeowner may obtain is set forth in Civil Code sections 943 and 944. Section 944 entitles the homeowner, among other things, to the cost to repair any violations of the SB800 building standards, the cost to repair any damage resulting from violations of the SB800

building standards, and reasonable investigative costs for each established violation of the SB800 building standards. Section 943(b) defines the cost of repair for "nonconformities" occurring in a single family home as "the repair costs, or the diminution in value of the home caused by the nonconformity, whichever is less, subject to the personal use exception as developed under common law."

Before commencing an action for violation of the SB800 building standards, the homeowner is required to complete the prelitigation procedure set forth in Chapter 4 of SB800, at Civil Code section 910 through 938. The mandate to complete the procedure is found in section 910, which states in pertinent part 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 procedures."

The procedure is intended as a precursor to an action specifically to enforce the SB800 building standards at Civil Code section 896. This is clear from the fact that section 910 and various other provisions in the prelitigation procedure (see, sections 916(a), 916(e), and 924) are all based upon claims of "violations of the standards" or of "unmet standards." Additionally, SB800 states at section 914(a) that, "This chapter establishes a nonadversarial procedure, including the remedies available under this chapter which, if the

procedure does not resolve the dispute between the parties, may result in a subsequent action *to enforce the other chapters of this title*." (Emph. added.)

Finally, if a homeowner is required to complete the prelitigation procedure under section 910, but commences a legal action without having first complied with the procedure, then section 930(b) entitles the builder to move for a stay of the action until the procedure has been completed.

2. *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC*

In *Liberty Mutual*, *supra*, 219 Cal.App.4th 98, the plaintiff insurer, Liberty Mutual, sought to recover from the defendant builder, Brookfield, in a subrogation action after the insurer paid the homeowner pursuant to the terms of a homeowner's policy. (*Id.* at p. 100.) Significant damage had been caused to the home by a plumbing defect that was covered by the building standards set forth in SB800. (*Id.* at p. 102.)

However, Liberty Mutual did not file its subrogation action until approximately seven years after the insured homeowner purchased had the home. (*Liberty Mutual* at p. 101.) This meant that any claim Liberty Mutual had under SB800 was time-barred by Civil Code section 896(e)'s four-year statute of limitations for plumbing defects. (*Id.* at p. 103.) Accordingly, the issue before the court was "whether Liberty Mutual's complaint in subrogation falls exclusively within the Right to Repair Act, and is therefore time-barred." (*Id.* at p. 102.)

The court found that even though the insurer's claim rested exclusively upon a defect that was covered by the SB800 building standards, the insurer was not limited to an action under SB800. After reviewing the legislative history of SB800, and the court stated:

> Nowhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage. Instead, the legislative history shows that the legislation was intended to grant statutory rights in cases where construction defects caused economic damage; the Act did nothing to limit claims for actual property damage. Simply put, a homeowner who suffers actual damages as a result of a construction defect in his or her house has a choice of remedies; nothing in the Act takes away those rights.
>
> (*Liberty Mutual, supra*, at p. 104.)

The court reached this conclusion in part based upon the rule that a common law right cannot be legislated out of existence "'[u]nless expressly provided,'" and for this reason statutes "'should be construed to avoid conflict with common law rules.'" (*Liberty Mutual* at p. 105, quoting *California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297; see also *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 669 [for statute to be construed to abrogate the common law, "a legislative purpose to do so must clearly and unequivocally appear"].) Indeed, there must be "'no rational basis'" on which to harmonize the statute with the

common law rule that it purports to abrogate. (*Liberty Mutual* at p. 105, quoting *California Association of Health Facilities* at p. 297.)

Interpreting SB800 in such a way as to nullify the common-law right of homeowners to recover in tort for resulting damage would, as the *Liberty Mutual* court observed, be highly incompatible with the rigid time structure that is set up in SB800's prelitigation process. The *Liberty Mutual* court observed that the timelines relating to inspection and testing set forth in Civil Code section 917 "dramatically illustrate[] that the legislative intent in enacting the Act was to provide for identification and repair of construction defects before they cause actual damage to the structure or its components, not to provide the sole remedy to recover actual damages that have occurred as a result of construction defects." (*Liberty Mutual* at pp. 105-106.)

The *Liberty Mutual* court recognized that the SB800 timelines are incompatible with a sudden or developing loss that must be handled by the homeowner's insurer. It stated:

> In the case of an actual catastrophic loss, the detailed timeframes would be unnecessary and nonsensical. If, as Brookfield argues, the Right to Repair Act applies to all claims involving construction defects regardless of actual damage, a homeowner whose property was severely damaged or destroyed would be required to await a solution during a lengthy process. As noted by the amicus curiae on behalf of Liberty Mutual, enforcement of a requirement of exclusive compliance with the notice provisions of the Act under those circumstances would effectively extinguish the subrogation rights of all homeowners' insurers who promptly cover their insureds'

> catastrophic losses. There is nothing in the Act or in its legislative history that shows the Legislature intended to eliminate those subrogation rights.
>
> (*Liberty Mutual* at p. 106.)

The court found that Civil Code sections 931 and 943 "disprove [the]contention that the Right to Repair Act was intended to provide the sole means for seeking redress for damages incurred due to any and all construction defects identified in the Act." (*Liberty Mutual* at p. 107.) The Court quoted section 943(a) in full, and then stated that it and section 931 "establish the Act itself acknowledges that other laws may apply to, and other remedies may be available for, construction defect claims, and therefore, that the Act is not the exclusive means for seeking redress when construction defects cause actual property damage." (*Id.* at p. 107.)

The court acknowledged that under Civil Code section 944, a homeowner can recover for actual damage caused by a violation of the building standards set forth in section 896. (*Liberty Mutual* at p. 107.) However, the court found that section 944's "inclusion of 'the reasonable cost of repairing and rectifying any damage resulting from the failure of the home to meet the standards' as part of the damages available for a violation of the Right to Repair Act does not mean that such actual damages may only be recovered by a claim under the Act." (*Id.* at p. 107.)

Finally, the *Liberty Mutual* court stated its holding:

> For all these reasons, Civil Code section 896 does not provide an exclusive remedy, as Brookfield argues. By creating a remedy for a particular cause of action, the Right to Repair Act does not expressly or impliedly support an argument that it mandates an exclusive remedy, and certainly does not derogate common law claims otherwise recognized by law. [Citation.] ¶ Based on the foregoing analysis of the language of the Right to Repair Act and its legislative history, we hold the Act does not provide the exclusive remedy in cases where actual damage has occurred because of construction defects.
>
> (*Liberty Mutual* at pp. 108-109.)

3. ***Burch v. Superior Court***

In *Burch v. Superior Court*, *supra*, 223 Cal.App.4th 1411, the court applied the rule in *Liberty Mutual* to a construction defect claim that did not involve a catastrophic loss or a subrogation claim by an insurer. (*Id.* at p. 1414.) *Burch* involved a homeowner like the plaintiffs herein, who sued the builder of her home, claiming that the home "suffered from numerous construction defects." (*Id.* at pp. 1414.)

The court in *Burch* stated, "*Liberty Mutual* examined the act and its legislative history and concluded that the act does not provide an exclusive remedy and does not limit or preclude common law damages claims for damages for construction defects that have caused property damage. . . . We agree." (*Burch* at p. 1418.)

On this basis, the court reversed the trial court's order granting summary adjudication of the plaintiff's claims for negligence and breach of implied warranty. (*Id.* at p. 1418.) The court concluded:

> Burch alleged in her second count for negligence in her third amended complaint that the defendants breached their duty of care resulting in deficient construction, including but not limited to specified defects that caused property damage. She alleged in her third count for breach of implied warranty that the defendants breached an implied warranty with respect to the construction. Both counts allege common law claims for damages for construction defects, including defects allegedly resulting in property damage. We conclude that the Right to Repair Act does not preclude such common law claims and that the summary adjudication of the second and third counts on this basis was error.
>
> (*Burch* at p. 1418.)

4. The Opinion of the Fifth District

The Fifth District's opinion sharply disagrees with the two authorities discussed above in regards to the permissibility of non-SB800 causes of action, and the applicability of the prelitigation procedure in instances where the homeowner has stated only non-SB800 causes of action.

Whether SB800 Is an Exclusive Remedy for Homeowners

The present matter is not unlike *Burch*, in that it arose in the context of a law and motion matter in an action involving numerous defect allegations by the plaintiffs. However, unlike *Burch*, the proceeding in the present case was not a dispositive motion concerning the validity of plaintiffs' common law

causes of action. Instead it was a motion to stay, brought under Civil Code section 930(b). (Opinion, p. 3.) Indeed, in its opinion, the Fifth District states, "We agree with real parties that the only issue before the court is whether McMillin's motion for a stay pending completion of the prelitigation procedures of Chapter 4 was properly denied." (Opinion, p. 8.)

However, the Fifth District finds that in order to answer this question, it must "consider the scope of the Act and to what claims the requirements of the Act, in particular the prelitigation procedures of Chapter 4, apply." (Opinion, p. 8.) The Fifth District then makes the following general statement expressing its disagreement with *Liberty Mutual*:

> *Liberty Mutual* held the requirements of the Act apply only when a plaintiff expressly alleges a cause of action for violation of the Act; it held that, if the plaintiff alleges a common law cause of action to recover for damages caused by a construction defect in residential housing, the Act does not apply and the builder is not entitled to the benefits of the Act. Because it is relevant to the issue before us, we have considered the *Liberty Mutual* decision. We ultimately reject its reasoning and outcome, however, which we conclude are not consistent with the express language of the Act.
>
> (Opinion, pp. 8-9.)

The Fifth District concludes, based on the language of section 896 and 943, that "the Act applies to *any* action for damages related to construction deficiencies, and limits a claimant's claims or causes of action to claims of violation of the statutory standards." (Opinion, p. 9, orig. emph.)

Then, paradoxically, it finds that a claim which, by definition, is *not* based on the SB800 building standards, is still, nevertheless, a claim brought "under the Act." (Opinion, pp. 9-10.) The Fifth District refers to Civil Code section 897, which states that the SB800 standards are "intended to address every component or function of a structure," however, "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." (Opinion, p. 9.)

The Fifth District states the following:

> 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 section 896 and 897, for "damages recoverable under section 944."
>
> . . . .
>
> Accordingly, the second portion of section 943 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.
>
> (Opinion, pp. 9-10.)

Two things are apparent from this portion of the Fifth District's opinion. First, the Fifth District clearly finds, contrary to the holdings in *Liberty Mutual* and *Burch*, that an action based upon defects that violate the SB800 building standards may only be brought under SB800, and cannot be brought as a separate common law cause of action for negligence or strict liability. The Fifth District finds that *Liberty Mutual* and *Burch* were wrongly decided on this point.

Second, the Fifth District's reasoning is undecipherable. If a claim "under section 897" is by definition one which is *not* based upon the SB800 building standards, then how could a homeowner possibly bring a claim "under section 897" to recover damages under section 944, when any such recovery--again, by definition--can consist only of the cost to repair a "violation *of the standards*" or the cost to repair "damage resulting from the failure of the home *to meet the standards*"? (Emphasis added.)

And given this limitation, how does it make sense for there even to be such a thing as a cause of action "under section 897"? And, finally, what is the basis for the Fifth District's assumption that the Legislature intended to create such a cause of action, 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? The Fifth District does not say.

Whether a Homeowner Who States No Cause of Action Under SB800 Must Comply with the SB800 Prelitigation Procedure

The Fifth District then arrives at the question of whether a homeowner who states no cause of action under SB800 must nevertheless comply with the SB800 prelitigation procedure. It states its holding concerning this issue as follows:

> The language of the Act is . . . clear in barring any cause of action for damages related to residential construction defects other than a cause of action brought in compliance with the Act:
>
> > "In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential 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." (§ 896.)
> >
> > "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(a), subd. (a).)
>
> Consequently, we conclude the 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.
>
> (Opinion, p. 15.)

The Fifth District goes on to find that in the present case, the plaintiffs have "alleged residential defects in components or functions for which standards have been established in section 896 of the Act," and "[t]hus, their claims fall within the scope of the Act." (Opinion, p. 19.) The Fifth District therefore finds that, within the meaning of section 910, the plaintiffs have filed "an action against [a] party alleged to have contributed to a violation of the standards set forth in Chapter 2." The plaintiffs are thus required to comply with the SB800 prelitigation procedure, and McMillin is entitled to an order staying the action under section 930(b). (Opinion, pp. 19-20.)

Again, at a minimum, it is clear that the Fifth District disagrees with the finding in *Liberty Mutual* that a homeowner who states no cause of action under SB800 need not comply with the SB800 prelitigation procedure. This is, indeed, the heart of the matter. This is the *only* finding that the Fifth District needed to make in order to rule upon McMillin's request for writ relief.

But, here again, the Fifth District creates confusion where there need not be any. As noted above, the Fifth District stated previously in its opinion that "the Act applies to *any* action for damages related to construction

deficiencies," and that, "[a] claim covered by the Act is a claim as defined in sections 896 and 897," the latter being defined as one which is based upon defects that do *not* constitute violations of the section 896 building standards. (Opinion, pp. 9, 10, orig emph.) But here, the court states that a claim is "within the scope" of SB800 only if defects are alleged which constitute violations of building standards under section 896. Is there a difference between claims that SB800 "applies to," as opposed to ones that are "covered by" SB800, as opposed to ones that are "within the scope of" SB800? Does the Fifth District mean something different in its use of these various terms?

And, going back to the Fifth District's supposition that there exists such a thing as a "cause of action under section 897," would a homeowner who brings such a cause of action, standing alone, be required to complete the prelitigation procedure? It is really not possible to say one way or the other on the basis of the Fifth District's opinion. It would make no sense for the answer to be yes, given that (as noted above) section 910 and various other provisions in the prelitigation procedure (see, sections 916(a), 916(e), and 924) are all based upon claims of "violations of the standards" or of "unmet standards." However, the Fifth District repeatedly insists that claims under section 897 *are* claims under SB800, and it "conclude[s] the Legislature intended that all claims arising out of defects in residential construction . . . 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." (Opinion, p. 15.)

Furthermore, what about claims for breach of contract and breach of warranty? As the Fifth District noted, such claims are at issue in this very action. (Opinion, p. 2.) And, indisputably, such claims are frequently based upon defects which *do* also constitute violations of the section 896 building standards. So, if a homeowner were to bring only a claim for breach of contract and breach of warranty based upon such defects, then would he or she be required under the Fifth District's opinion to complete the prelitigation procedure? Again, there is simply no clear answer. On the one hand, the Fifth District acknowledges periodically in its opinion that Civil Code section 943(a) contains language stating that, "In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision." (Opinion, pp. 11 and 12.) But, on the other hand, the Fifth District holds, unequivocally, that, "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." (Opinion, p. 15.)

5. Review by this Court Is Warranted by the Conflict Between the Various Courts of Appeal

Plaintiffs do not expect that McMillin will disagree that the Fifth District's opinion is simply irreconcilable with *Liberty Mutual* and *Burch* as to the two disputed issues identified in this Petition. It is likewise manifest that such disagreement on these points will cause confusion in trial courts every time a homeowner attempts under *Liberty Mutual* to bring a common law cause of action based upon building defects that also violate SB800, or every time a builder moves for a stay of such an action under SB800.

This conflict in the law presents a dire need for intervention by this Court. If the Court does not grant plaintiffs' concurrent request for depublication, then it should grant review to resolve the conflict.

B. This Court Should Grant Review Because of the Needless Uncertainty Created by the Fifth District's Opinion

Even though the Fifth District was faced with a discrete question of law that appears on its face to call for nothing more than an interpretation Civil Code section 910 according to its plain terms, it decided that it needed to embark on a wide-ranging discussion of the law of SB800.

In doing so, it created internal inconsistencies, it spoke in terms that seem to have no finite meaning, and it raised a raft of questions--far more than it could possibly be said to have answered. The Fifth District's opinion does

the opposite of what it should. It fails to resolve questions in a manner that is useful to litigants and courts. This Court should grant review simply to ward off the confusion that will otherwise result from this opinion.

CONCLUSION

Based on the foregoing, plaintiffs respectfully ask that this Court grant review of the Fifth District's Opinion in this matter, in order to resolve for the benefit of homeowners statewide the two questions discussed above. These are, first, whether SB800 precludes a homeowner from bringing common law causes of action for defective conditions which have resulted in physical damage to his or her home, and second, whether SB800 requires 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.

Dated: October 5, 2015

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CERTIFICATE OF WORD COUNT

I certify that, under California Rules of Court, rule 8.504(d)(1), the preceding Petition for Review contains 5,374 words.

Respectfully submitted,

Dated: October 5, 2015

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MCMILLIN ALBANY LLC et al., Petitioners, v. THE SUPERIOR COURT OF KERN COUNTY, Respondent; CARL VAN TASSELL et al., Real Parties in Interest.	F069370 (Super. Ct. No. S-1500-CV-279141) **OPINION**

ORIGINAL PROCEEDING; petition for writ of mandate. David R. Lampe, Judge.

Borton Petrini, Calvin R. Stead and Andrew M. Morgan for Petitioners.

Donahue Fitzgerald, Kathleen F. Carpenter; Ware Law, Amy R. Gowan and Dee A. Ware for California Building Industry Association as Amicus Curiae on behalf of Petitioners.

Newmeyer & Dillon, Alan H. Packer, J. Nathan Owens, Paul L. Tetzloff and Jeffrey R. Brower for Leading Builders of America as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Milstein Adelman, Fred M. Adelman and Mayo L. Makarcyzk for Real Parties in Interest.

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Real Parties in Interest, Carl Van Tassell et al. (real parties), filed an action against the builders of their homes for recovery of damages allegedly resulting from defects in the construction of the homes. Petitioners, McMillin Albany LLC et al. (McMillin), moved to stay the litigation until real parties complied with the statutory nonadversarial prelitigation procedures of the "Right to Repair Act", which applies to construction defect litigation involving certain residential construction. Real parties opposed the motion, contending the statutory prelitigation procedures did not apply because they had dismissed the only cause of action in their complaint that alleged a violation of the Right to Repair Act. The trial court denied the stay, and McMillin petitioned this court for a writ of mandate compelling the trial court to vacate its order denying the motion and enter a new order granting the stay as requested. We grant the writ.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Real parties, the owners of 37 homes constructed by McMillin, filed a first amended complaint alleging eight causes of action, including strict products liability, negligence, and breach of express and implied warranty. They alleged the homes were in a defective condition at the time they purchased them, and the defects had resulted in damage to their homes and their component parts. The third cause of action of the first amended complaint alleged violation of the building standards set forth in Civil Code section 896.[2] Section 896 is part of a statutory scheme commonly referred to as the Right

1 We grant real parties' unopposed requests for judicial notice, filed November 10 and 12, 2014.

2 All further statutory references are to the Civil Code unless otherwise indicated.

to Repair Act (§§ 895 et seq.; the Act).[3] Under the Act, before a homeowner who claims defective residential construction can file an action against the builder in court, the homeowner must give notice of the claimed defects to the builder and engage in a nonadversarial prelitigation procedure, which affords the builder an opportunity to attempt to repair the defects. (§ 910.) If the homeowner files suit without giving the required notice, the builder may obtain a stay of the litigation, pending completion of the prelitigation process. (§ 930, subd. (b).)

Real parties did not give McMillin notice of the alleged defects before filing suit. The parties attempted to negotiate a stay of the judicial proceedings to complete the prelitigation process, but real parties' attorney withdrew from the negotiations, dismissed the third cause of action of the first amended complaint, and contended real parties were no longer required to comply with the statutory prelitigation process because they had dismissed the cause of action alleging violation of the Act. McMillin filed a motion for a stay, which real parties opposed. The trial court denied the motion, concluding real parties were entitled to plead common law causes of action in lieu of a cause of action for violation of the building standards set out in section 896, and they were not required to submit to the prelitigation process of the Act when their complaint did not allege any cause of action for violation of the Act. McMillin filed this petition for a writ of mandate, seeking a writ directing the trial court to vacate its order denying McMillin's motion for a stay and to enter a new order granting a stay pending completion of the prelitigation process.

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3 See, e.g., *Belasco v. Wells* (2015) 234 Cal.App.4th 409, 413; *The McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1334; *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1222, fn. 5. The Act is also referred to as SB 800 (Sen. Bill No. 800 (2001–2002 Reg. Sess.)).

DISCUSSION

I. Writ Relief

A writ of mandate "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) Writ review is deemed extraordinary and appellate courts are normally reluctant to grant it. (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100; *City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803.) Where an order is not appealable, but is reviewable only upon appeal from a later judgment, writ relief may be appropriate if appeal after judgment would be an ineffective remedy. (*Baeza v. Superior Court, supra,* 201 Cal.App.4th at p. 1221.) McMillin claims they are entitled to the benefits of the nonadversarial prelitigation procedure that permits them to attempt to repair the claimed defects in the homes before real parties may bring an action against them in court, but the trial court's order denies them that opportunity. If they may not appeal that ruling until after judgment, the benefits of the statutory prelitigation procedure will be lost, even if they prevail on appeal. We conclude McMillin does not have "a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.)

Additionally, a writ may be granted when the petition presents an issue of first impression that is of general interest to the bench and bar. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 655.) McMillin's writ petition presents an issue of first impression, which is of interest to builders, home buyers, their attorneys, and others. The issue may escape review unless it is addressed in a writ proceeding. Accordingly, we conclude review by extraordinary writ is appropriate in this case.

II. Mootness

Real parties assert the issue presented by the writ petition is moot because they have offered to stipulate to a stay of the action pending completion of the statutory prelitigation procedure, if McMillin will dismiss its petition. They contend that, in light

of this offer, there is no actual controversy for this court to adjudicate and McMillin will not be subject to irreparable injury. "However, when a pending case involves a question of public interest that is likely to recur between the parties or others, 'the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot.'" (*Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1106–1107, fn. 4.) In light of McMillin's showing that at least one court in this district reached the opposite result in a situation similar to that before the trial court here, and the presentations of amici curiae[4] indicating the issues are of widespread interest in the building industry, we conclude this is an appropriate case in which to consider the issues presented despite real parties' assertion that they are moot.

III. The Act

In 2002, the Legislature enacted the Act "to 'specify the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed prelitigation procedure, and the obligations of the homeowner.'" (*Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 585.) Chapter 2 of the Act (Chapter 2) sets out building standards, a violation of which constitutes a deficiency in construction for which the builder may be held liable to the homeowner. (§§ 896, 897.) Chapter 3 imposes obligations on the builder. (§§ 900–907.) Chapter 5 sets out the applicable statute of limitations, the burden of proof, the damages that may be recovered, and the affirmative defenses that may be asserted; it also makes the Act binding on successors-in-interest of the original home purchaser. (§§ 941–945.5.)

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4 On June 11, 2015, we granted the applications of Leading Builders of America and California Building Industry Association to appear as amici curiae.

Chapter 4 of the Act (Chapter 4) prescribes nonadversarial prelitigation procedures a homeowner must initiate prior to bringing a civil action against the builder seeking recovery for alleged construction deficiencies. (§§ 910–938.) These are the procedures McMillin contends real parties were required to follow prior to filing suit against them. The procedures require the homeowner to give the builder written notice of the claim that the builder violated any of the standards of Chapter 2; they set time limits for the builder to inspect the alleged defects and make an offer to repair them or compensate the homeowner in lieu of repair. (§§ 910, 916, 917, 929.) If the builder declines to attempt repairs or fails to meet any of the deadlines, the homeowner is released from the requirements of Chapter 4 and may file an action against the builder in court. (§§ 915, 916, subd. (d), 920, 925, 930, subd. (a).) The homeowner may also file an action against the builder if he is dissatisfied with the repairs. (§ 926.)

IV. *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC*

In *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98 (*Liberty Mutual*), Hart purchased a new home built by Brookfield. (*Id.* at p. 101.) A few years later, a pipe in the sprinkler system burst, flooding the home and causing damage. Brookfield acknowledged its liability and repaired the damage. (*Ibid.*) Hart lived in a hotel during the repairs; his homeowner's insurer, Liberty Mutual, paid for Hart's hotel and relocation expenses. Liberty Mutual then filed a subrogation action against Brookfield to recover the expenses it paid; the first amended complaint alleged causes of action for strict liability, negligence, breach of contract, breach of warranty, equitable estoppel, and declaratory relief. (*Id.* at pp. 101, 102.) Brookfield's demurrer to the first amended complaint was sustained on the ground Liberty Mutual's complaint was time-barred under the Act. The appellate court reversed.

The court defined the issue before it as: "whether Liberty Mutual's complaint in subrogation falls exclusively within the Right to Repair Act, and therefore is time-barred." (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 102, fn. omitted.) The court

stated a key goal of the Act was to abrogate the holding in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 632 (*Aas*). In *Aas*, "the California Supreme Court held that construction defects in residential properties, in the absence of actual property damage, were not actionable in tort." (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 103.) Thus, homeowners could not recover in tort for costs of repair or the diminution in value of the homes arising from construction defects that had not caused property damage. (*Ibid.*) The *Liberty Mutual* court cited the legislative history of the Act, which stated: "'[E]xcept where explicitly specified otherwise, liability would accrue under the standards regardless of whether the violation of the standard had resulted in actual damage or injury. As a result, the standards would essentially overrule the *Aas* decision and, for most defects, eliminate that decision's holding that construction defects must cause actual damage or injury prior to being actionable.'" (*Liberty Mutual,* at pp. 103–104.)

After considering a number of the provisions of the Act, the *Liberty Mutual* court concluded "the Act covers instances where construction defects were discovered before any actual damage had occurred," but does not provide the exclusive remedy when the defects have caused damage. (*Liberty Mutual, supra*, 219 Cal.App.4th at pp. 105, 108–109.) Therefore, the time limitations of the Act did not bar Liberty Mutual's subrogation claims. (*Id.* at p. 109.)[5]

V. Scope of the Act

In the trial court, real parties' opposition to the motion for a stay relied on *Liberty Mutual*. Real parties asserted: "This is a matter of law, cemented in the recent decision of *Liberty Mutual* ..., which McMillin incorrectly claims is inapplicable to this case....

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5 Real parties relied on both *Liberty Mutual* and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, as establishing that the Act does not provide the exclusive remedy for damages for construction defects that have resulted in property damage. Because the *Burch* court based its decision on that issue on the holding in *Liberty Mutual* and a cursory description of some of the provisions of the Act, without detailed analysis, we do not separately address the *Burch* decision.

In fact, *Liberty Mutual* applies squarely and inescapably to the dispute before this Court.... It holds unequivocally that a plaintiff can bring non-SB800 causes of action for damages that result from violation of the SB800 building standards." Real parties argued that they were permitted to pursue common law causes of action for construction deficiencies that caused damage, and, once they dismissed their third cause of action for violation of the Act, they were pursuing only common law causes of action and were therefore not required to comply with the requirements of the Act, including the prelitigation procedure.

The trial court denied McMillin's motion for a stay, stating: "Pursuant to *Liberty Mutual* ..., 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.)"

We agree with real parties that the only issue before this court is whether McMillin's motion for a stay pending completion of the prelitigation procedures of Chapter 4 of the Act was properly denied. In order to make that determination, however, we must consider the scope of the Act and to what claims the requirements of the Act, in particular the prelitigation procedures of Chapter 4, apply. *Liberty Mutual* held the requirements of the Act apply only when a plaintiff expressly alleges a cause of action for violation of the Act; it held that, if the plaintiff alleges a common law cause of action to recover for damages caused by a construction defect in residential housing, the Act does not apply and the builder is not entitled to the benefits of the Act. Because it is relevant to the issue before us, we have considered the *Liberty Mutual* decision. We ultimately

reject its reasoning and outcome, however, which we conclude are not consistent with the express language of the Act.

The basic scope of the claims to which the Act applies is set out in section 896. It provides:

> "In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential 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."

Section 896 then goes on to set out various construction standards. Thus, the Act applies broadly to "*any* action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction." (§ 896, italics added.) In such an action, "the claimant's claims or causes of action shall be limited to violation of" the standards set out in section 896. (§ 896.) Section 896 does not limit application of the Act to actions seeking recovery for deficiencies that have not yet caused property damage. The language limiting a claimant's claims or causes of action does not make an exception for common law tort causes of action where the defect has caused property damage. By its plain language, the Act applies to *any* action for damages related to construction deficiencies, and limits a claimant's claims or causes of action to claims of violation of the statutory standards.

Section 897 provides: "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." 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." Section 944 authorizes recovery of:

> "... damages for the reasonable value of repairing any violation of the standards set forth in this title, the reasonable cost of repairing any damages caused by the repair efforts, the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards, the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of a business licensed to be operated from the home, reasonable investigative costs for each established violation, and all other costs or fees recoverable by contract or statute."

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.

Section 896 makes an exception for condominium conversions: "As to condominium conversions, this title does not apply to or does not supersede any other

statutory or common law." Section 943 also contains an exception: "In addition to the rights under this title, this title does not apply to 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, subd. (a).) Section 931 clarifies: "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."

Liberty Mutual interpreted the scope of the Act much differently, by focusing on other provisions and not fully analyzing the language of sections 896, 897, and 943. It invoked the general principle that statutes should not be construed to alter or abrogate the common law, unless a legislative purpose to do so clearly and unequivocally appears from the language or evident purpose of the statute. (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 105; *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 669; *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) It discussed various sections of the Act and concluded the Act did not establish an exclusive remedy for claims of residential construction defects where the defect allegedly resulted in actual property damage. (*Liberty Mutual*, *supra*, 219 Cal.App.4th at pp. 105, 108–109.)

The court in *Liberty Mutual* first considered sections within Chapter 4. These sections, however, set out the prelitigation procedures for inspection and attempted repair of construction defects; they do not define the scope of the Act. (*Liberty Mutual*, *supra*, 219 Cal.App.4th at pp. 105–106, discussing §§ 910, 913, 916, 917 & 921.) The court then discussed section 942, which provides:

> "In order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5. No further showing of causation or

damages is required to meet the burden of proof regarding a violation of a standard set forth in Chapter 2 (commencing with Section 896), provided that the violation arises out of, pertains to, or is related to, the original construction." (§ 942.)

The 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." (*Liberty Mutual, supra*, 219 Cal.App.4th at pp. 106–107.)

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, other damage or costs allegedly caused by the violation of the standard.

Liberty Mutual addressed sections 943, subdivision (a), and 931, which provide:

"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. In addition to the rights under this title, this title does not apply to 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. Damages awarded for the items set forth in Section 944 in such other cause of action shall be reduced by the amounts recovered pursuant to Section 944 for violation of the standards set forth in this title." (§ 943, subd. (a).)

"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 ...." (§ 931.)[6]

The court's entire analysis of these provisions consisted of one sentence: "These code sections establish the Act itself acknowledges that other laws may apply to, and other remedies may be available for, construction defect claims, and, therefore, that the Act is not the exclusive means for seeking redress when construction defects cause actual property damage." (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 107.) The court did not discuss the effect of the first sentence of section 943, that "no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed." (§ 943, subd. (a).) It also did not discuss the specific list of exceptions set out immediately following that provision. Neither list of exceptions, in section 943 or in section 931, includes common law causes of action, such as negligence or strict liability. If the Legislature had intended to make such a wide-ranging exception to the restrictive language of the first sentence of section 943, we would have expected it to do so expressly. It did so in the exception of condominium conversions from the scope of the Act: "As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law." (§ 896.)

The court noted that the Act contains its own statute of limitations, but the Legislature did not repeal the preexisting statutes of limitations, Code of Civil Procedure sections 337.1 and 337.15. (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 108.) It concluded: "Those statutes remain and evidence a legislative intent and understanding that the limitations periods they contain could and would be used in litigation other than cases under the Act." (*Ibid.*) We do not interpret the failure to repeal Code of Civil Procedure sections 337.1 and 337.15 as evidence the Legislature retained them because it intended residential construction defect actions where the defects resulted in actual

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6 The quotation of section 931 in *Liberty Mutual, supra*, 219 Cal.App.4th at page 107, omitted the language "including, without limitation, personal injuries, class actions, other statutory remedies, or fraud-based claims." (§ 931.)

property damage to be actionable outside the Act. Those statutes of limitation continue to govern actions expressly excluded from the Act, such as actions for personal injuries arising out of construction defects and actions involving nonresidential construction.

Finally, the court discussed section 896. (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 108.) Instead of analyzing the language of the section itself, however, the court analyzed the builder's argument, which it dubbed "circular." (*Ibid.*) "Brookfield argues the language 'any action' means that the present case must fall within the Right to Repair Act. Brookfield's argument, however, is circular; Brookfield's argument is essentially that any action arising out of the Act is an action under the Act. Section 896 refers to any action that is covered by the Right to Repair Act; as explained *ante*, we conclude the Act was never intended to, and does not, establish exclusive remedies for claims for actual damages for construction defects such as those suffered by Hart." (*Ibid.*)

Section 896 does not provide that "any action arising out of the Act is an action under the Act." (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 108.) As previously discussed, it provides that "[i]n any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction ... , the claimant's claims or causes of action shall be limited to violation of" the standards set out in Chapter 2. (§ 896.) The language of the statute clearly and unequivocally expresses the legislative intent to limit the causes of action available to a homeowner claiming damages arising out of, or related to deficiencies in, the construction of the homeowner's residence.

In *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 326–327, the California Supreme 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, subd. (c).)

> "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 & Saf. Code, § 1799.102, subd. (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.)

The language of the Act 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 the Act:

> "In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential 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." (§ 896.)
>
> "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).)

Consequently, we conclude the 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.

The legislative history of the Act supports our interpretation of the scope of the Act.[7] The analysis by the Senate Judiciary Committee states:

> "*This bill would make major changes to the substance and process of the law governing construction defects.* It is the product of extended negotiations between various interested parties. Among other things, the bill seeks to respond to concerns expressed by builders and insurers over the costs associated with construction defect litigation, as well as concerns expressed by homeowners and their advocates over the effects of a recent Supreme Court decision that held that defects must cause actual damage prior to being actionable in tort [*Aas, supra,* 24 Cal.4th 627]." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 1, italics added.)

Additionally,

> "This bill would provide that *any action* against a builder ... seeking recovery of damages arising out of, or related to deficiencies in, residential construction ... shall be governed by detailed standards set forth in the bill relating to the various functions and components of the building." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 2, italics added.)

The Assembly Committee on Judiciary described the bill as follows:

> "This bill, the consensus product resulting from nearly a year of intense negotiations among the interested parties, proposes two significant reforms in the area of construction defect litigation. First, the bill would establish definitions of construction defects for the first time, in order to provide a measure of certainty and protection for homeowners, builders, subcontractors, design professionals and insurers. Secondly, the bill requires that claimants alleging a defect give builders notice of the claim, following which the builder would have an absolute right to repair before the homeowner could sue for violation of these standards." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 1.)

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[7] On September 9, 2014, we granted McMillin's motion for judicial notice of the legislative history of the Act.

Additionally,

> "According to the author, this bill represents *groundbreaking reform* for construction defect litigation. As many prior bill analyses on this subject have noted, the problem[s] of construction defects and associated litigation have vexed the Legislature for a number of years, with substantial consequences for the development of safe and affordable housing. This bill reflects extensive and serious negotiations between builder groups, insurers and the Consumer Attorneys of California, with the substantial assistance of key legislative leaders over the past year, leading to consensus on ways to resolve these issues.
>
> "... A principal feature of the bill is the codification of construction defects. For the first time, California law would provide a uniform set of standards for the performance of residential building components and systems. Rather than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet. Significantly, these standards effectively end the debate over the controversial decision in the *Aas* case to the effect that homeowners may not recover for construction defects unless and until those defects have caused death, bodily injury, or property damage, no matter how imminent those threats may be." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 2, italics added.)

Describing the prelitigation procedure and the builder's right to repair, the Senate Judiciary Committee stated:

> "The bill establishes a mandatory process prior to filing of a construction defect action. The major component of this process is the builder's absolute right to attempt a repair prior to a homeowner filing an action in court. Builders, insurers, and other business groups are hopeful that this right to repair will reduce litigation." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 4.)

The Act is referred to as "groundbreaking reform for construction defect litigation" (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 2) that "would make major changes to the substance and process of the law governing construction defects." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 1.)

One of the primary purposes of its enactment was to codify a uniform set of construction standards by which to determine whether actionable construction defects exist in a particular residence. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 2.) Another purpose was the imposition of 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. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 4; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 1.) A recurring theme throughout the legislative history is the hope and expectation that the Act would reduce 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. (See, e.g., Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 2; Enrolled Bill Memo. on Sen. Bill No. 800 (2001–2002 Reg. Sess.) prepared for Gov. Gray Davis (Sept. 19, 2002); Cal. Housing Finance Agency, Enrolled Bill Rep. on Sen. Bill No. 800 (2001–2002 Reg. Sess.) Sept. 7, 2002; Cal. Dept. of Housing and Community Development, Enrolled Bill Rep. on Sen. Bill No. 800 (2001–2002 Reg. Sess.) Aug. 28, 2002; Home Ownership Advancement Foundation, Sen. Floor Alert on Sen. Bill No. 800 (2001–2002 Reg. Sess.) Aug. 30, 2002; Cal. Building Industry Assn., Sen. Floor Alert on Sen. Bill No. 800 (2001–2002 Reg. Sess.); Cal. Chamber of Commerce, Letter to Governor Davis. Sen. Bill No. 800 (2001–2002 Reg. Sess.) Sept. 10, 2002.)

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.

VI. Application to This Case

Real parties' complaint alleged residential construction defects in components or functions for which standards have been established in section 896 of the Act. Thus, their claims fall within the scope of the Act. Section 910 provides that, before a homeowner files "an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2," the homeowner must give written notice to the builder of the claim that the construction of the residence violates any of the standards in that chapter. (§ 910, subd. (a).) That notice sets in motion the nonadversarial prelitigation procedure of Chapter 4, which affords the builder an opportunity to attempt to repair the claimed deficiencies before the homeowner initiates expensive and time-consuming litigation. If the homeowner does not comply with the Chapter 4 procedure,

"the builder may bring a motion to stay any subsequent court action ... until the requirements of this chapter have been satisfied." (§ 930, subd. (b).)

Because real parties did not comply with the requirements of Chapter 4 and accommodate McMillin's absolute right to attempt repairs, McMillin is entitled to a stay of the action until the statutory prelitigation process has been completed. Accordingly, we will grant McMillin the relief sought in the writ petition.

DISPOSITION

Let a peremptory writ of mandate issue directing the respondent court to vacate its order of February 27, 2014, denying McMillin's motion to stay the litigation, and enter a new order granting the motion and staying the litigation until the parties have satisfied the requirements of the statutory prelitigation procedures found in Civil Code sections 910 through 938. The parties are to bear their own costs on appeal.

HILL, P.J.

WE CONCUR:

GOMES, J.

KANE, J.

AUG 28 2015

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2800 Donald Douglas Loop, Santa Monica, California 90405.

On October 5, 2015, I served the foregoing document(s) described as:

PETITION FOR REVIEW

on all interested parties in this action by placing a true copy of the document(s), enclosed in a sealed envelope, addressed as follows:

See Attached Service List

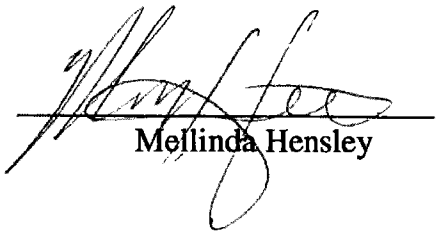
( ) **BY MAIL** as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Santa Monica, California.

( ) **BY PERSONAL SERVICE:** I caused to be delivered such envelope by hand to the above addressee(s).

(X) **BY OVERNIGHT COURIER:** I am "readily familiar" with the firm's practice of collecting and processing overnight deliveries, which includes depositing such packages in a receptacle used exclusively for overnight deliveries. The packages were deposited before the regular pickup time and marked accordingly for delivery the next business day.

( ) **BY FACSIMILE TRANSMISSION:** I caused the above-referenced document(s) to be transmitted to the above-named person(s) at the telecopy number(s) listed.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 5, 2015 at Santa Monica, California.



Mellinda Hensley

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