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 Lampe,
Judge Presiding, Dept. 11

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs' Petition for Review is based upon the fact that the Fifth District's opinion plainly conflicts with existing authority concerning two issues. These are the exclusivity of SB800 (i.e., Title 7 of the Civil Code at section 895, et seq.) for homeowners who bring defect claims, and whether a

homeowner who brings only non-SB800 causes of action and seeks no relief under SB800 is nonetheless required to comply with the SB800 prelitigation procedure before bringing his or her action ion court. Plaintiffs also base their Petition on the fact that the Fifth District's opinion is fraught with internal inconsistencies and lapses in reasoning, and thus will only cause confusion among trial courts.

In its Answer, McMillin has done little to dispute these basic contentions. Importantly, it agrees that the conflict exists, and that it must be resolved by this Court.

Plaintiffs believe this Court should simply depublish the Fifth District's opinion, but if it does not do so, then review should be granted to avoid confusion among trial courts, and to resolve the conflict in the law applicable to California homeowners who wish to bring defect claims.

1. McMillin Does Not Deny the Existence of a Conflict as to Either of the Two Issues Stated in Plaintiffs' Petition for Review

In their Petition, the plaintiffs presented two issues for review by this Court. These are: (1) whether SB800 (i.e., Title 7 of the Civil Code at section 895, et seq.) precludes a homeowner from bringing common law causes of action for defective conditions in his or her home when such conditions have resulted in physical damage to the home; and (2) whether a homeowner who states no cause of action under SB800 and seeks no relief under SB800 must

nevertheless comply with the statutory prelitigation procedure set forth at Civil Code section 910 et seq.

As to the first question, McMillin concedes the existence of a conflict. It states that it "does not deny that as a result of the Fifth District's . . . opinion . . . there exists a conflict of case law with . . . *Liberty Mutual Insurance Company v. Brookfield Crystal Cove* (2013) 219 Cal.App.4th 98 . . . and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411," because the latter two cases both hold that "SB800 does not provide the exclusive remedy for residential construction defects, i.e., that common law caused of action are permitted." (Answer at pp. 3-4.)

However, as to the second question, McMillin claims that, "ostensibly," *Liberty Mutual* does not hold that the SB800 prelitigation procedure is inapplicable to a homeowner who seeks no relief under SB800, because no party in that case sought to enforce the procedure. (Answer at p. 5.) This logic is backward. In *Liberty Mutual*, the court found that when a home is physically damaged because of a defect that violates one of the SB800 building standards, then the homeowner's insurer--who steps into the homeowner's shoes in a subrogation action--may state causes of action for negligence and strict liability against the builder of the home. (*Liberty Mutual*, *supra*, 219 Cal.App.4th at pp. 102, 109.) In so holding, the *Liberty Mutual* court stated:

> Many code sections in the Act provide timeframes for the homeowner to notify the builder (Civ.Code, § 910, subd.

> (a)) and the builder to acknowledge receipt of the notice of the claim (*id.*, § 913), as well as inspection of the property by the builder (*id.*, § 916), the builder's offer to repair (*id.*, § 917), the homeowner's response to the offer to repair (*id.*, § 918), and the completion of the repairs of the construction defects by the builder (*id.*, § 921). 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.
>
> (*Id.* at p. 106.)

The *Liberty Mutual* court thus decided that SB800 is not the exclusive remedy for homeowners in part because if it *were*, then homeowners would have to comply with the SB800 prelitigation procedure even in instances where it makes no sense for them to do so. This holding cannot possibly be reconciled with the idea that a homeowner who seeks no relief under SB800 is nevertheless required to comply with the SB800 prelitigation procedure. This issue *was* decided in *Liberty Mutual*, and the Fifth District reached precisely the opposite conclusion in the matter before this Court.

Finally, McMillin does not deny the importance of either of these two issues. Indeed, it spends the next several pages if its Answer brief decrying the fact that, because of *Liberty Mutual* and *Burch*, courts statewide have denied builders' attempts to enforce the SB800 prelitigation procedure against homeowners who state no cause of action under SB800. (Answer at pp. 5-9.)

This is simply another way of expressing the same basis for granting review that the plaintiffs stated in their Petition--that disagreement on the two points set forth above will lead to confusion every time a builder demurs to a complaint in which a homeowner states non-SB800 causes of action, or moves to enforce the SB800 prelitigation procedure against a homeowner who seeks no relief under SB800. (See Petition, pp. 21-22.)

For this reason, there is no meaningful dispute between the parties that a grant of review by this Court is warranted.

2. McMillin's Suggested Revisions to the Issues Presented for Review Are Only Partially Correct

In its Answer, McMillin states that if review is granted, then the first issue, concerning whether SB800 excludes common law causes of action, should be worded more broadly to state, "What is the scope of causes of action that are precluded by [SB800] for residential construction defects in non-condominium conversion homes, where the alleged defects have resulted in physical damage to the home?" (Answer, p. 35.) Plaintiffs concede that a more broadly-stated question is better to definitively resolve the conflict between the competing authorities. Accordingly, plaintiffs would suggest that the final clause in McMillin's proposed formulation of the first question is superfluous. The question should simply read, "What is the scope of causes of

action that are precluded by SB800 for residential construction defects in non-condominium conversion homes?"

McMillin then claims that the first issue subsumes the question of "whether the exclusivity issue was properly before the Fifth District independent of any analysis regarding McMillin's right to a stay under Civil Code section 930(b), and in spite of there having been no dispositive motion at the trial court." (Answer, p. 36.) Plaintiffs concur entirely with McMillin that this question should be taken up by this Court. However, this question is not "subsumed" by the first issue. It is a *precondition* for the first issue.

Plaintiffs contended before the Fifth District (just as they do in their pending Request for Depublication -- see pages 3-6) that the Fifth District should never have reached the question of whether SB800 is the exclusive remedy for California homeowners, precisely because there had been no dispositive motion by McMillin. That is, McMillin sought only a stay under Civil Code section 930(b). It did not demur or move to dismiss any of the causes of action stated by the plaintiffs. Accordingly, the only question before the court was whether or not the plaintiffs--who sought no relief under SB800--were required under Civil Code section 910 to comply with the SB800 prelitigation procedure. The Fifth District should simply have answered this question by applying the plain language of section 910. There was no need for it ever to *reach* the issue of whether SB800 is or is not the exclusive remedy

for California homeowners. If this Court concurs in this analysis, then the proper remedy is to *depublish* the Fifth Districts opinion, on the ground that it never should have reached the issues that it decided (and that it did so in a way that is incoherent, wrong, and certain to create confusion among trial courts). This is why plaintiffs have taken the position in their Petition for Review that the Petition should be granted only if the Court determines *not* to depublish *McMillin*. (See Petition, pp. 5, 6, and 22.)

Finally, McMillin takes issue with the second question proposed by the plaintiffs. It claims that the first question is simply a "sub-issue" of the second. (Answer, pp. 36-37.) It states:

> [I]f SB800 *is* the exclusive remedy, then Real Parties *cannot* control whether McMillin can enforce its "absolute right" to the prelitigation procedures. If it is *not* the exclusive remedy, then Real Parties can simply plead common law causes of action and avoid altogether McMillin's (suddenly ironically described) "absolute right to the prelitigation procedures.
>
> (Answer, p. 37. Emphasis in orig.)

This is an oversimplification. As discussed below, plaintiffs maintain that the Fifth District's invention of a "cause of action under section 897" makes no sense, and that even if SB800 is the "exclusive" remedy for homeowners, this exclusion certainly does not reach common law causes of action for defects that are not covered by the SB800 building standards and have resulted in damage to the home. It also certainly does not extend to

causes of action for breach of contract and breach of warranty (which McMillin has curiously failed to discuss in its lengthy Answer brief), regardless of whether the defects there at issue have resulted in any physical damage to the home.

If some non-SB800 causes of action are excluded but others are not, then, of course, the question becomes whether a homeowner who brings only non-SB800 causes of action is nonetheless required to comply with the SB800 prelitigation procedure. As explained in plaintiffs' Petition (see pp. 19-21), the Fifth District has not only failed to answer this question, but it has done so in a way that is certain to cause confusion among trial courts. It is entirely separate from the first question, and should be addressed as such by this Court.

3. This Court Should Ignore McMillin's Request to Depublish *Liberty Mutual* and *Burch*

California Rules of Court, rule 8.1125 states that a request to depublish an opinion of the court of appeal must be made within 30 days after the opinion is final. The rule also states that such a request may not be made as part of a petition for review.

McMillin willfully violates these rules by asking this Court in its Answer to Plaintiffs' Petition for Review to depublish *Liberty Mutual* and *Burch*, which were decided in 2013 and 2014, respectively. Plaintiffs do not deny that this Court has the power to do what it wishes on its *own* motion, but

it is improper and contrary to rule 8.1125 for a party to make such a request years after the fact.

As it happens, this Court not only denied review in *Liberty Mutual*, but it also denied multiple requests for depublication on December 11, 2013. (See docket, Case No. S213718.) This Court likewise denied review and multiple requests for depublication in *Burch*, on June 11, 2014. (See docket, Case No. S217503.) McMillin's current request that these opinions be depublished is nothing more than an improper request for reconsideration of these years-old determinations.

This Court should also ignore McMillin's request that the Fifth District's opinion remain published following the Court's order granting review. It articulates to special need for such an order, other than that it believes the Fifth District's opinion to be correct. Of course it does--all litigants believe that opinions favorable to them were decided correctly. But this does nothing to distinguish McMillin from any other litigant before this Court. The entire purpose of granting review is to resolve a conflict. This purpose is not furthered by *perpetuating* the conflict for as long as it takes this Court to issue its opinion from the time when review is granted. This is particularly true in the present case, where (as discussed below) the opinion of the Court of Appeal not only conflicts with multiple existing authorities, but it

is internally inconsistent, incoherent, and certain to cause confusion among trial courts, all on its own.

4. The Fifth District's Opinion Is Incoherent, Raises More Questions than It Answers, and Will Cause Confusion Among Trial Courts

In their Petition for Review (see pp. 17-21), the plaintiffs explain that in determining that it could not resolve the matter before it without "consider[ing] 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 commenced a highly unnecessary analysis of SB800 that is fraught with internal inconsistencies that are certain to confuse trial courts. McMillin's brief, while lengthy, does little to address this contention.

a. The Fifth District's Invention of a Cause of Action Under Civil Code Section 897 Is Baseless and Confusing

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

In their Petition for Review, plaintiffs explained that the Fifth District had no basis for assuming that, in stating such defects "shall be actionable," the Legislature intended to create a cause of action "under section 897," as

opposed to simply permitting homeowners to bring common law causes of action for such defects, as they would have done prior to the enactment of SB800. (See Petition, p. 17.)

McMillin spends literally 13 full pages of its Answer claiming that, in fact, section 897 *is* a building standard under SB800. (See Answer, pp. 15-28.) This may come as something of a surprise to the Fifth District, which says no such thing anywhere in its opinion. Indeed, the Fifth District's commentary on the subject would suggest otherwise. At page 9 of its opinion, it states:

> [T]he 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.

This is a far cry from McMillin's determination that section 897 *is itself* a building standard under SB800. Indeed, the Fifth District seems to be saying that section 897 is *not* itself a standard, but just a provision that makes conditions that are omitted by the standards actionable. McMillin itself is forced to admit that, even though the Fifth District's opinion is the first appellate authority ever to recognize a cause of action under section 897, the court "does not go to the trouble of explicitly stating . . . in its own words" that the cause of action it has invented is based upon the very counterintuitive notion that section 897 is *itself* a building standard. (Answer, p. 17.)

The fact that McMillin is forced to spend 13 pages of its Answer brief in a misbegotten attempt to make sense of the Fifth District's opinion merely proves the plaintiffs' point--that the opinion is bound to cause confusion among trial courts.

And furthermore, while plaintiffs do not seek to argue the merits of the matter at this time, the contention that section 897 is itself a building standard is plainly wrong. It is not only contrary to the plain meaning of the term "building standard," but it is unsupported by the text of SB800. The mere fact that some of the statutes in SB800 state that the building standards "commence with section 896" does not convert section 897 into something that it clearly is not. If the Legislature had wanted trial courts to understand section 897 to be *itself* a building standard--when no rational court would naturally do so--then it would have said so, and it did not.

b. The Fifth District's Opinion Is Already Causing Confusion Regarding Warranty and Contract Causes of Action

Notably, while McMillin spends a third of its Answer defending the Fifth District's creation of a cause of action under section 897, it says nothing about the other inconsistencies noted by the plaintiffs.

For example, the plaintiffs note on page 21 of their Petition that it is not clear whether, under the Fifth District's opinion, an action which consists only of claims for breach of contract and warranty that are based upon building

defects that *do* constitute violations of the SB800 building standards is subject to the SB800 prelitigation procedure.

Plaintiffs point out that, 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." (Petition, p. 21, citing to 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." (Petition, p. 21, citing to Opinion, p. 15.) McMillin does not address this question in its Answer--probably because it cannot guess how to resolve it based upon the Fifth District's opinion.

And, even more troubling, as plaintiffs pointed out in their pending Request for Depublication (see pp. 7-8), at least one trial court has already read the Fifth District's opinion to mean that actions for breach of contract and breach of warranty are *barred altogether* by SB800, notwithstanding the language of section 943(a). This matter is presently the subject of a Petition for Review before this Court. (See *Moose v. Superior Court*, Case No.

S230342.) This trial court ruling was the direct result of confusion over how to interpret the Fifth District's opinion, and there is no question that such confusion will continue for as long as the opinion remains a reported authority.

CONCLUSION

Based on the foregoing, plaintiffs respectfully ask that in the event this Court does not grant plaintiffs' pending Request for Depublication, that it 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.

Dated: November 19, 2015

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CERTIFICATE OF WORD COUNT

I certify that, under California Rules of Court, rule 8.504(d)(1), the preceding Reply to Answer to Petition for Review contains 3,103 words.

Respectfully submitted,

Dated: November 19, 2015

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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 November 19, 2015, I served the foregoing document(s) described as:

REPLY TO ANSWER TO 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:

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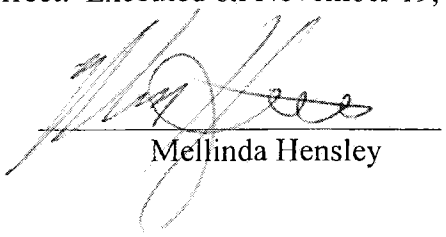

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