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

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

1. In their Petition for Review, Real Parties in Interest Carl & Sandra Van Tassel, et al. (herein Plaintiffs) framed the first issue as follows: "Does Title Seven of the Civil Code, at section 895, et seq., commonly referred to as 'SB800', preclude a homeowner from bringing common law causes of

action for defective conditions in his or her home which have resulted in physical damage to the home?" (Petition for Review, page 1.) In their Answer, Petitioners McMillin Albany, LLC and McMillin Park Avenue, LLC (herein collectively McMillin) contended the issue should be formulated more broadly. They proposed that the issue be stated as, "What is the scope of causes of action that are precluded by Title Seven of the Civil Code, at section 895, et seq., commonly referred to as 'SB800', for residential construction defects in non-condominium conversion homes, where the alleged defects have resulted in physical damage to the home?" (Answer, page 35.) Plaintiffs concurred that the issue should be framed more broadly, and proposed in their Reply that the issue be framed as, "What is the scope of causes of action that are precluded by SB800 for residential construction defects in non-condominium conversion homes?" (Reply, pages 5-6.) Put another way: What, if any, common law rights of California homeowners are nullified by SB800?[1]

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?

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[1] As shown below, this broader formulation of the first issue is necessary in order to adequately address the second of the two issues under review by this Court. (Cal. Rules of Court, rule 8.516(a)(1) [parties may brief issues that are "fairly included" within the specified issues].)

INTRODUCTION

Prior to the enactment of SB800, a homeowner who discovered a damage-causing defect in his or her home could sue the builder, and state common law causes of action for negligence and strict liability, provided it had not been ten years since the home was originally completed and put up for sale. This case presents the question of whether a homeowner may still do that, and, if not, then how *much* of an incursion SB800 has made into the homeowner's common law rights.

As shown below, the Legislature did not intend to take these rights away, but instead to set up a system whereby defects that have not yet caused damage to the home can be reported to the builder, and the builder can have the opportunity to inspect and repair them. The purpose of this system is to reduce litigation and to allow recovery for purely economic losses that are otherwise not recoverable in tort.

Finally, to the extent that the common law rights of homeowners have been lessened as a result of the enactment of SB800, the incursion is limited to the ability to bring tort claims based upon defects that violate the SB800 building standards. Homeowners remain free to bring tort claims based upon damage-causing defects that are not addressed in the SB800 building standards, and their right to sue for breach of contract or breach of express or implied warranty is entirely unaffected by SB800.

FACTUAL SUMMARY

This matter arises from a construction defect action involving 37 homes in Bakersfield, California. (1 Writ Exh., Tab 2.) The homes are owned by the plaintiffs, and were originally sold by McMillin sometime after January 1, 2003. (1 Writ Exh., Tab 4 at 23-24 and 31-32; 1 Writ Exh., Tab 5; and 2 Writ Exh., Tab 5.) The homes are accordingly subject to the requirements of Title 7 of the Civil Code at section 895, et seq., commonly referred to as SB800. (Cal. Civ. Code sec. 938; 1 Writ Exh., Tab 4 at 23; 2 Writ Exh., Tab 7 at 464.)

Plaintiffs alleged that their homes suffered from a variety of defective conditions, which had resulted in damage to the homes and their component parts. (1 Writ Exh., Tab 2 at 556, para. 18.) Initially, plaintiffs stated a total of seven causes of action against McMillin sounding in tort and contract (including causes of action for breach of express and implied warranty), along with a single cause of action for violation of the building standards at Civil Code section 896, also referred to as the SB800 building standards. (1 Writ Exh., Tab 2.) Later, however, plaintiffs dismissed their cause of action under SB800. (1 Writ Exh., Tab 3.)

McMillin never demurred or moved to dismiss to any of the remaining causes of action in plaintiffs' First Amended Complaint. (See 1 Writ Exh., Tab 1.) However, shortly after plaintiffs' dismissal of their cause of action under SB800, McMillin moved to stay the matter under Civil Code section 930(b),

based upon the plaintiffs' failure to complete the SB800 prelitigation procedure at Civil Code section 910, et seq. (1 Writ Exh., Tab 4.)

Plaintiffs opposed McMillin's motion on the ground that they no longer stated any cause of action or sought any relief under SB800 and consequently were under no obligation to complete the SB800 statutory prelitigation procedure. (2 Writ Exh., Tab 7 at 465.) Plaintiffs also contended that their ability to proceed exclusively by way of common law causes of action, regardless of whether the alleged defects violated the SB800 building standards, had been established in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98. (2 Writ Exh., Tab 7 at 464-469.)

The trial court denied McMillin's Motion to Stay, but stated in its order that it believed that substantial grounds existed for difference of opinion in regards to the governing question of law, and stated pursuant to Code of Civil Procedure section 166.1 that resolution of the question would materially advance the conclusion of the litigation. (3 Writ Exh., Tab 13 and Tab 16.)

McMillin filed its Petition for Writ of Mandate with the Fifth District Court of Appeal on May 16, 2014. In it, McMillin's primary contention was that *Liberty Mutual* was wrongly decided, and that SB800 is in fact the exclusive remedy for homeowners who seek to recover for any manner of construction defect, and that the Legislature had by enacting SB800 abolished the common law causes of action which remained in plaintiffs' First Amended

Complaint. (See Petition for Writ, pages 19-42.) Plaintiffs were invited to and did file an Informal Response, to which McMillin filed a Reply. On September 12, 2104, the Fifth District issued an Order to Show Cause why the relief sought in McMillin's Petition should not be granted, and ordered plaintiffs to file a Return.

In their Return, plaintiffs contended that, because McMillin had moved to stay the action instead of demurring or moving to dismiss, the only question properly before the Court of Appeal was whether a stay order was proper in the absence of a cause of action for SB800, and *not* whether it was proper for the plaintiffs to proceed under non-SB800, common law causes of action based upon the existence of resulting damage. (Return, pp. 14-21.) Plaintiffs further contended that the trial court had properly denied McMillin's motion to stay, because, given the absence of a cause of action under SB800, McMillin was not entitled to a stay under Civil Code section 930(b). (Return, pp. 21-29.) Finally, plaintiffs contended that SB800 did not nullify the common law right of California homeowners to bring defect claims based upon resulting damage, for the reasons stated in *Liberty Mutual* and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, a Second District case which had been issued during the pendency of the Petition, and which adopted the reasoning of *Liberty Mutual* on facts similar to those at issue in the plaintiffs' action against McMillin. (Return, pp. 32-36.)

The Fifth District issued its opinion on August 25, 2016. The court granted the writ relief sought by McMillin, finding that SB800 is the exclusive remedy for homeowners who seek to bring a defect-related action against the builder of their home, and that *Liberty Mutual* was therefore wrongly decided. (Typed Opn., pp. 7-19.) The Fifth District also held that, even in the absence of a cause of action or claim for relief under SB800, a builder is still entitled to an order under Civil Code section 930(b) staying the homeowners' court action pending their completion of the SB800 prelitigation procedure at Civil Code section 910, et seq. (Typed Opn., pp. 8-9 and 15.)

Plaintiffs filed a Petition for Review with this Court, stating the two issues for review that are set forth above. This Court granted review on November 24, 2015. (The Court's Order does not itself specify issues for review.)

THE PASSAGE AND CONTENT OF TITLE 7 OF THE CIVIL CODE, COMMONLY KNOWN AS SB800

In 2002, the Legislature enacted SB800 (giving it no formal name) at Civil Code section 895, et seq. SB800 sets forth a detailed list of building standards at Civil Code section 896, and makes the violation of the standards actionable for most all new residential construction sold on or after January 1, 2003. (Civ. Code §§ 896, 938.) SB800 sets up a standard of strict liability for builders--if a homeowner shows the existence of an unmet standard, then he or

she need not prove causation or damages in an action against the builder, although the builder may assert various affirmative defenses bases upon, e.g., the homeowner's failure to perform necessary maintenance or alteration of the property. (Civ. Code §§ 942, 945.5.)

Before a homeowner may bring an action under SB800, he or she must serve a notice of claim upon the builder describing the building standard violations in his or her home. (Civ. Code sec. 910.) The builder then has the opportunity to inspect and repair in accordance with a lengthy prelitigation process that is set forth in Chapter 4 of SB800 at Civil Code section 910, et seq. Although, as explained below (see sec. 1.c.ii, f.n. 2), opinions issued by the Fifth District Court of Appeal in recent years have broadly interpreted Civil Code section 914(a) to allow builders to opt out of the statutory prelitigation procedure, and to replace it with alternative contractual procedures that impose no meaningful deadlines for action, and that delete the homeowner protections that are written into Chapter 4 of SB800.

A homeowner is entitled to recover damages as provided in Civil Code sections 943(b) and 944. Homeowners are entitled to the lesser of the cost of repair or the diminution in value due to the defects, subject to the "personal reason" exception, and can also recover damages for loss of use and investigative costs.

McMillin submitted an extensive legislative history in support of its Petition for Writ of Mandate. (See Exhibits to Motion for Judicial Notice of Legislative History of SB800, Volumes I and II.) The legislative history contains various reports analyzing the likely effect of the proposed legislation. For example, the August 26, 2002 report of the Assembly Committee on Judiciary states the following "synopsis" of SB800:

> 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. If the builder failed to acknowledge the claim within the time specified, elected not to go through the statutory process, failed to request an inspection within the time specified, or declined to make the offer to repair, or if the repair is inadequate, the homeowner is relieved from any further pre-litigation process.
>
> (Exhibits to Motion for Judicial Notice of Legislative History of SB800, Volume I, page 202.)

A general declaration of the legislative purpose of SB800 is found at Section 1 of Stats.2002, c. 722 (S.B.800). It states:

> The Legislature finds and declares, as follows:
>
> (a) The California system for the administration of civil justice is one of the fairest in the world, but certain

procedures and standards should be amended to ensure fairness to all parties.

(b) The prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state's continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need clear standards and mechanisms for the prompt resolution of claims.

(c) It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects.

DISCUSSION OF THE ISSUES BEFORE THE COURT

1. SB800 Does Not Eliminate the Common Law Rights and Remedies Enjoyed by California Homeowners

The first issue before this Court is whether and to what extent the enactment of SB800 nullified the common law rights that have long benefited California homeowners who seek to obtain compensation for defective conditions in their homes. Plaintiffs contend that none of California homeowners' common law rights have been supplanted by SB800. To the extent that the Court is inclined to find otherwise, plaintiffs contend that the only right affected by SB800 is the right to bring a tort action based upon conditions which violate the building standards set forth in Civil Code section 896.

a. Common Law Rights Are Not Nullified by Statute Absent Express Language to the Contrary

This Court has often recognized that, in the absence of an express statement that a statute alters a rule of common law, statutes are interpreted in a manner that is consistent with the common law. In *California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, this Court stated the rule as follows:

> As a general rule, "[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] 'A statute will be construed in light of common law decisions, unless its language "'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common law rule concerning the particular subject matter . . . .' [Citations.]" [Citation.]'"
>
> (*Id.* at p. 297, quoting *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676.)

The statute at issue in *California Association of Health Facilities* authorized monetary sanctions to be imposed on nursing home facilities that violated state or federal regulations, but provided that such citations would be dismissed if the nursing home was found to have acted reasonably under the circumstances in its attempts to comply with the regulation. (*Id.* at p. 288.) Under the common law, the duties of nursing home operators are nondelegable. (*Id.* at p. 296.) Finding no indication in the statutory language that the statute intended to override the common law, this Court concluded that the statute

"should be understood to be consistent with the common law rule that licensees are responsible for the acts and omissions of their agents." (*Id.* at p. 299.) This Court further stated that, "[W]hen the Legislature intends to provide exceptions to the rule of nondelegable duties for licensees in the context of administrative enforcement actions, it does so expressly." (*Id.* at p. 302.)

This Court provided additional explanation of the basis for this rule in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, stating:

> "The Civil Code was not designed to embody the whole law of private and civil relations, rights, and duties; it is incomplete and partial; and except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject matter, a section of the code purporting to embody such doctrine or rule will be construed in light of common-law decisions on the same subject."
>
> (*Id.* at p. 815, quoting *Estate of Elizalde* (1920) 182 Cal. 427, 433.)

At issue in *Li* was Civil Code section 1714, which states in pertinent part that "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." This Court acknowledged that the language of section 1714 "seems to provide in specific terms for a rule of *comparative* rather than *contributory* negligence -- i.e., for a rule whereby plaintiff's recovery is to be diminished *to the extent* that his own

actions have been responsible for his injuries," as opposed to the rule of contributory negligence, whereby any negligence by the plaintiff bars recovery altogether. (*Li* at pp. 816-817. Orig. emphasis.) However, this is not the interpretation that this Court gave to section 1714. This Court examined the development of the common law in this and various other jurisdictions, and determined that, "the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance." (*Li* at p. 821.)

More recently, in *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, the plaintiffs in a wrongful death action contended that the common law duty of care owed by the defendant store chain to its customers included the duty to have on hand a defibrillating device (an "AED") for use in the event that a customer suffered a heart attack while in the store. (*Id.* at p. 316.) The defendant claimed that it was excused from any such duty by Health and Safety Code section 1797.196(f), which states that, "Nothing in this section or Section 1714.21 of the Civil Code may be construed to require a building owner or a building manager to acquire and have installed an AED in any building." (*Id.* at p. 325.)

This Court rejected defendant's claim that it was insulated from liability by section 1797.196(f). (*Verdugo* at p. 331.) This Court quoted the rule as

stated above in *California Association of Health Facilities* that a statute does not alter the common law "unless expressly provided." (*Id.* at p. 326.) This Court then found that because the statute stated only that liability cannot arise from certain statutory provisions, and said nothing about liability arising from the defendant's common law tort duty, the statute could not be found to have altered the common law. (*Id.* at pp. 326-327.) This Court found that, "In other contexts, the Legislature has used much clearer and more explicit statutory language when it has intended to entirely preclude the imposition of liability upon an individual or entity under common law principles for acting or failing to act in a particular manner." (*Id.* at p. 326.)

As an example, this Court cited to Civil Code section 1714(c), which states that "no 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." (*Verdugo* at pp. 326-327.) This Court also cited to Health and Safety Code section 1799.102(a), which states that that a person who provides emergency medical or nonmedical care at the scene of accident is immunized from liability arising therefrom, and to Civil Code section 846, which states that a landowner owes no duty of care to keep his or her premises safe for others for any recreational purpose or to give any warning of hazardous conditions, except as otherwise provided by statute. (*Id.*

at p. 327.) This Court found that each of these statutes expressly conflicted with and altered the applicable common law tort duty. (*Id.* at p. 327.)

b. The Common Law Rights Accorded to California Homeowners Who Seek to Recover for Defective Conditions

In *Aas v. Superior Court* (2000) 24 Cal.4th 627, this Court had occasion to discuss at length the right of California homeowners to recover in tort for defective conditions in their homes against the homebuilder and other responsible parties. The question before the Court was whether such defects were compensable in tort if they had not yet caused any physical injury to another component in the home. (*Id.* at pp. 632, 635.)

This Court answered the question in the negative, basing its holding upon the distinction between economic loss and physical damage. (*Aas* at pp. 632, 635-636.) At the outset, the Court summarized the limitations on tort recovery reflected in the reported authorities:

> Speaking very generally, tort law provides a remedy for construction defects that cause property damage or personal injury. Focusing on the conduct of persons involved in the construction process, courts in this state have found such a remedy in the law of negligence. Viewing the home as a product, courts have also found a tort remedy in strict products liability, even when the damage consists of harm to a sound part of the home caused by another, defective part.
>
> (*Id.* at pp. 635-636.)

Then, the Court explained that economic losses for defects which have not caused damage are typically recoverable in action for breach of contract or warranty. The Court stated:

> For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain. Any construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. [Citation.] This general principle, the so-called economic loss rule, is the primary obstacle to plaintiffs' claim.
>
> (*Aas* at p. 636.)

This Court upheld the limitation imposed by the economic loss rule, leaving any future deviations from this common law principle up to the Legislature. The Court also provided a summation of California homeowners' rights at common law concerning defect claims:

> In our view, the many considerations of social policy this case implicates, rather than justifying the imposition of liability for construction defects that have not caused harm of the sort traditionally compensable in tort [citation], serve to emphasize that certain choices are best left to the Legislature. . . . .
>
> Home buyers in California already enjoy protection under contract and warranty law for enforcement of builders' and sellers' obligations; under the law of negligence and strict liability for acts and omissions that cause property damage or personal injury; under the law of fraud and

> misrepresentations about the property's condition; and an exceptionally long 10-year statute of limitations for latent construction defects (Cal. Civ. Proc., § 337.15).
>
> (*Aas* at pp. 652-653.)

Additional cases have established other rights belonging to homeowners at common law which were not specifically at issue in *Aas* or were not discussed at length therein. For example, a homeowner who brings a claim in tort for defects that have resulted in physical damage is entitled to the lesser of the diminution in the property's fair market value, or the cost to repair the damage and restore the property to its pretrespass condition, plus the value of any lost use. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 450. See also *Aas* at p. 651, f.n. 15.) This measure of damages is not rigid, however, and under the "personal reason exception," a homeowner may recover restoration costs in excess of the diminution in value if he or she has a personal reason to restore the property to its former condition. (*Kelly*, *supra*, at pp. 450-451, citing to *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687. See also *Aas* at p. 651, f.n. 15.)

Also, contemporaneously with *Aas*, the case of *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611, established that the fees a homeowner incurs to his or her experts in order to establish the cost to repair the defects in his or her home or the repair plan are recoverable as an element of damages in a tort action against the builder. (*Id.* at pp. 624-625.)

Finally, long before *Aas*, this Court established in *Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal.3d 374, that the law implies a warranty of merchantability in contracts for sale of all new residential construction. (*Id.* at pp. 378-380.) This Court found that "[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction." (*Id.* at p. 378.) Accordingly, the Court held that, "[B]uilders and sellers of new construction should be held to what it impliedly represented--that the complete structure was designed and constructed in a reasonably workmanlike manner." (*Id.* at p. 380.)

c. SB800 Neither Nullifies Nor Limits the Common Law Right of Homeowners to Sue in Tort for Damage-Causing Defects

The first question before this Court is whether and to what extent the common law rights set forth above survived the enactment of SB800.

Plaintiffs submit that in enacting SB800, the Legislature intended to streamline construction defect litigation, to provide homeowners with a means to recover for defects that have not caused physical damage, and to grant homebuilders the right to inspect and repair any such defect claims in advance of litigation. However, the Legislature did not intend to take away the basic rights guaranteed to homeowners at common law.

i. The Exclusionary Provisions in SB800 May Be Interpreted in a Manner that Is Consistent with the Common Law Rights of California Homeowners

Civil Code section 896 states the following, in pertinent part:

> In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder . . . shall 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.

Civil Code section 943, subd. (a) states the following:

> 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.

These two provisions are the basis for the Fifth District's finding that SB800 extinguishes the common law rights of homeowners to bring an action in tort for defects that have resulted in physical damage to their home. Based upon the language in section 896, the Fifth District found that "[T]he 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." (Typed Opn., p. 9. Orig. emph.)

Then, based upon the prohibitory language in section 943(a), the Fifth District found that the statute "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." (Typed Opn., p. 10.)

Not until later in its Opinion does the Fifth District concern itself with the question of whether, under the rules established by this Court in *Li* and *California Association of Health Facilities*, these provisions in SB800 satisfy the standard set by this Court for interpretation of a statute in such a way as to contravene the common law. When confronting this issue, the Fifth District cites to this Court's discussion in *Verdugo v. Target Corp.* (summarized above in section 1.a) of various statutes which this Court found to have overriden the common law. (Typed Opn. at pp. 14-15, citing to *Verdugo*, *supra*, at pp. 326-327.) The Fifth District finds that under section 896 and 943(a), "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." (Typed Opn., p. 15.)

In arriving at this conclusion, the Fifth District does not concern itself with whether section 896 and section 943(a) *can be* read in a manner that is consistent with the common law rights of homeowners set forth in *Aas* and the other authorities discussed above. However, they clearly can be. SB800's legislative purpose is to provide a means for homeowners to recover for defects that have not caused physical damage, to give builders the right to inspect and cure any such defects, and thereby to streamline and reduce construction defect litigation. If, in accordance with this purpose, section 896 is read to refer *only* to claims concerning defects that have not yet caused damage, then SB800 would exist side by side with the common law rights that have long been enjoyed by California homeowners.

Section 896 states that builders "shall be liable" for violation of the standards set forth therein. It then modifies that provision by stating that, *in an action under SB800*, homeowners cannot go outside of the section 896 building standards in seeking to impose liability on builders or other parties responsible for defects in their homes. In other words, a homeowner cannot impose liability on a builder under SB800 except by way of the SB800 building standards.

This dovetails with Civil Code section 897, which states that, to the extent that a homeowner seeks to recover for a defect that is *not* covered by the SB800 building standards, then he or she must do so in the manner prescribed

by the common law, i.e., in an action that is based upon the existence of resulting physical damage.

The first sentence of section 943(a) is essentially redundant with the prohibitory language in section 896. Based upon the above reading of section 896, the phrase "covered by this title" in section 943(a) simply means "any action based upon a defect which has not resulted in physical damage and which violates the building standards in section 896."

Under this reading, there is no express intention to nullify the common law right of California homeowners to bring a tort action for defects that have resulted in physical damage to real property. Since this construction is consistent with the common law, it is presumptively the correct one under the authorities discussed in section 1.a above.

ii. The Interpretation Given to the Exclusionary Provisions in SB800 by the Fifth District Leads to Consequences that Were Clearly Not Intended by the Legislature

Liberty Mutual illustrates the hazards that would flow from a contrary interpretation. In *Liberty Mutual*, a homeowner suffered a sudden loss because of a burst pipe, just over three years after he had purchased his home. (*Liberty Mutual, supra*, 219 Cal.App.4th at pp. 100-101.) The homeowner's insurer paid to repair the home and also paid for several months of relocation expenses. (*Id.* at p. 101.) The insurer brought a subrogation action against the

builder, and the builder demurred successfully on the ground that SB800 is the exclusive remedy, and the four-year statute of limitations applicable to plumbing defects under Civil Code section 896(e) had run by the time the insurer filed its complaint. (*Id.* at pp. 101-102, f.n. 1.)

The *Liberty Mutual* court reversed the order sustaining the builder's demurrer. It found that even though the defect which caused damage to the homeowner's residence violated one of the SB800 building standards, the homeowner could still bring an action in tort because the defect caused physical damage to the home. (*Liberty Mutual* at p. 109.) 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.
>
> (*Liberty Mutual* at p. 104.)

Two factors illustrate why this is the correct conclusion:

First, California courts have long recognized that, much like the defect at issue in *Liberty Mutual*, most significant construction defects are latent, and the homeowner often does not become aware of their existence *until* they begin to cause damage to other parts of the home. This is the reason for the ten-year statute of limitations for latent defects under Code of Civil Procedure section 337.15, coupled with the three-year statute of limitations for patent defects.

(See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 366 [tort cause of action based upon injury to real property from construction defect must be brought within three years after "the defect would be discoverable by reasonable inspection"]; and *El Escorial Owners' Association v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1356 ["'structural quality . . . is nearly impossible to determine by inspection after the house is built, since many of the most important elements . . . are hidden from view'"].)

If SB800 were the exclusive remedy for homeowners, then recovery would oftentimes be precluded altogether by its four-year limitation applicable to plumbing defects (sec. 896(e)), its four-year limitation applicable to electrical defects (sec. 896(f)), its four-year limitation applicable to excessive cracking in patios, driveways, and other hardscape (sec. 896(g)(1)), its two-year limitation applicable to decay caused by improper installation of untreated wood posts (sec. 896(g)(8)), and its four-year limitation applicable to corrosion caused by improper installation of untreated steel fences and adjacent components (sec. 896(g)(9)).

Second, the SB800 prelitigation procedure is mandatory for claims brought under SB800. Indeed, builders are very fond of referring to their "absolute right" to conduct repairs. (See Answer to Petition for Review, pages 6, f.n. 2, 7, 8, 9, 30, 31, 33, and 37.) A homeowner who performs emergency repairs without complying with the procedure is disqualified from bringing a

cause of action under SB800. Like *Liberty Mutual*, the recent case of *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, concerned a sudden loss due to a water leak, which was repaired by the homeowner's insurer--however in *KB Home*, unlike *Liberty Mutual*, the insurer sought to recover against the builder in a subrogation action under SB800. (*Id.* at pp. 1473-1475.) The court found that KB Home was entitled to summary judgment because repairs had already been conducted, and the homeowner had not complied with the prelitigation procedure. (*Id.* at pp. 1475-1476, 1479.)

Also, the procedure's deadlines and other requirements are strictly construed. "The time periods and all other requirements in this chapter are to be strictly construed, and, unless extended by the mutual agreement of the parties . . . , shall govern the rights and obligations under this title." (Cal. Civ. Code sec. 930(a).) This means that, any time a homeowner suffers a loss and wishes to bring a claim under SB800, he or she must serve the builder with a notice of claim (sec. 910(a)), to which the builder has 14 days to respond (sec. 913). The builder then has 14 days from the time of its response to complete its initial inspection (sec. 916(a)), and another 40 days after that to conduct a second inspection, if it chooses to do so (sec. 916(c)). Then, the builder has

another 30 days to serve the homeowner with an offer to repair, which must "set[] a reasonable completion date for the repair." (Sec. 917.)[2]

In *Liberty Mutual*, the court recognized that this scheme is utterly incompatible with the need to repair a sudden loss. If SB800 is the exclusive remedy, then the mandatory prelitigation procedure will frequently have the effect of extinguishing *any* right of recovery that the homeowner or his or her insurer have against the builder. The court 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

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[2] This assumes that the builder has opted at the time the home is sold to utilize the *statutory* prelitigation procedure in the event of a future defect claim. Under Civil Code section 914(a), the builder may at the time of sale elect to utilize an alternative contractual procedure. The effect of such an election by the builder has been the subject of three reported opinions by the Fifth District. (See *Anders v. Superior Court* (2010) 192 Cal.App.4th 579; *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214; and *McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330.) Most recently, in *McCaffrey Group v. Superior Court*, the Fifth District determined that the builder may adopt procedural requirements that differ sharply from the statutory requirements, and may choose to omit any deadlines for action by the builder. (*Id.* at pp. 1346-1347.) If a builder adopts such a "procedure", then it is simply required to act or not act in response to a notice of claim within a "reasonable" period of time. (*Id.* at pp. 1350-1351.)

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

In sum, SB800 contains no express provision stating that its purpose is to nullify the common law rights of California homeowners. Its purpose is to allow claims for defects that have not caused damage, to ensure that the builder has the opportunity to repair any such claimed defects, and ultimately to streamline construction defect litigation in California. Its provisions can be read in harmony with the common law rights of California homeowners. And, not only does the interpretation urged by McMillin and adopted by the Fifth District nullify those rights, but in many cases will, as a practical matter, foreclose any recovery at all by the aggrieved homeowner. For these reasons, this Court should find that the enactment of SB800 did not nullify any of the common law rights enjoyed by California homeowners.

d. To the Extent that the Exclusionary Provisions in SB800 Are Found to Limit the Common Law Rights of Homeowners, the Limitation Applies Only to Tort Actions Based Upon Conditions that Violate the Building Standards in Section 896

If Civil Code sections 896 and 943(a) are read to nullify rights possessed by homeowners at common law, then the question before this Court becomes which rights are nullified and to what extent. Plaintiffs submit that if SB800 limits the common law rights of homeowners, then the limitation

applies only to tort actions that are based upon the building standards set forth in Civil Code section 896. Homeowners may still bring tort actions for defects that do not violate the section 896 building standards, and they still may seek relief under any contract or warranty theory to the same extent that they could prior to the enactment of SB800.

i. SB800 Does Not Affect the Right of Homeowners to Bring Causes of Action for Negligence and Strict Liability for Damage-Causing Defects that Do Not Violate the SB800 Building Standards

Civil Code section 897 states:

> 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 its opinion, the Fifth District concludes, for reasons unknown, that the Legislature intended by way of this provision to set up a cause of action under SB800 for defects that do not violate the building standards in section 896. The Fifth District states:

> 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.
>
> (Typed Opn., pp. 9-10.)

Here again, the question is whether the provision in question "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common law rule." (*California Association of Health Facilities*, *supra*, 16 Cal.4th at p. 297.) If it does not, then it must be construed in a manner that is consistent with the common law. (*Ibid.*) As shown above, the common law gives homeowners the right to sue in tort for actions that cause physical injury to the home. If we are to assume that SB800 does nullify this common law right as to defects that violate the building standards in Civil Code section

896, then must section 897 be read to nullify the common law right as to defects which do not violate the standards?

The answer is that section 897 clearly should not be read in this manner.

First and foremost, there *is no* express intention to depart from the common law rule. Section 897 states that, "To the extent that a function or component is not addressed by these standards, it shall be actionable if it causes damage." This is entirely consistent on its face with the common law, which holds that a defect is actionable in tort if it causes damage. There is no reason to assume that in recognizing that such a defect is actionable, the Legislature intended that it be actionable *under SB800*, as opposed to being actionable in the manner provided for by common law tort principles.

Additionally, there are two reasons why the Fifth District's finding that section 897 sets up a cause of action under SB800 is clearly untenable. Again, defects which fall under section 897 are by definition ones which "[are] not addressed by these standards." (Civ. Code sec. 897.) This being the case, it is not clear how a homeowner who brings a supposed cause of action under section 897 would ever recover anything, because Civil Code section 944 permits recovery only for "the reasonable value of repairing any violation of the standards set forth in this title," "the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards," and so forth. (Civ. Code sec. 944.) If a cause of action existed

under section 897, then it would be plainly futile, inasmuch as there would be no way for the homeowner to recover any damages.

Nor would there be any way for the homeowner to complete the SB800 prelitigation procedure. Section 910(a) requires the claimant to give notice of his or her "claim that the construction of his or her residence violates any of the standards set forth in Chapter 2." Similarly, the builder's right to inspect under section 916(a) pertains to "claimed unmet standards," and its repair offer under section 917 must "identify[] the particular violation that is being repaired." Section 924 states that, "If the builder elects to repair some, but not all of, the claimed unmet standards, the builder shall, at the same time it makes its offer, set forth with particularity in writing the reasons, and the support for those reasons, for not repairing all claimed unmet standards."

In short, SB800 is based through and through upon the building standards set forth in section 896. Defects which fall under section 897 are defined as ones which are "not addressed by these standards." It makes little sense to conclude, as the Fifth District did, that an action to recover for such defects must be brought under SB800.[3]

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[3] The suggestion in McMillin's Answer to Plaintiffs' Petition for Review, that section 897 is *itself* a building standard, is likewise baseless and incoherent. Section 897 refers to functions or components of a structure that "[are] not addressed by these standards." If McMillin were correct, then section 897's definition of itself would be incorrect, because such functions or components *would* be addressed by the standards. Furthermore, the natural reading of the
(Cont. on next page)

In short, even if SB800 is interpreted to nullify the common law right of California homeowners to seek to recover in tort for any and all defects that cause physical damage to their home, it certainly does not cut off that right as to defects which do not constitute violations of the SB800 building standards.

ii. SB800 Neither Nullifies Nor Limits the Right of California Homeowners to Bring Contract and Warranty Causes of Action for Any Defects Which Violate Their Rights Under Contract or Warranty

Also at issue are homeowners' common law rights under contract and warranty, which fundamentally are not dependent on the existence of physical damage resulting from a defect. (See *Aas, supra*, at p. 636 ["[T]he difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence."])

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term "building standard" is that it applies to something specific, as all of the standards in section 896 do. A catch-all provision applying to unspecified functions or components clearly does not meet the definition of a "building standard." And finally, if the Legislature wanted section 897 to be interpreted in such a counterintuitive manner, then it no doubt would have said so.

In its opinion, the Fifth District is somewhat confused in regards to whether a homeowner's ability to bring causes of action for breach of contract and breach of express or implied warranty survived the enactment of SB800.[4]

The Fifth District states broadly that Civil Code section 943(a) "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 . . . or one brought pursuant to section 897." (Typed Opn., p. 10.) The Fifth District then acknowledges, however, that "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).)" (Typed Opn., p. 11.) Later on, however, the Fifth District states that the list of exceptions in section 943(a) does not "include[] common law causes of action, such as negligence or strict liability." (Typed Opn., p. 13.)

Of course, causes of action for breach of contract and breach of express and implied warranty *are* common law causes of action, and this Court has on occasion applied the standard discussed in section 1.a above in determining whether a given statute does or does not supplant the common law of contracts.

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[4] *Moose v. Superior Court*, Case No. S230342, arises from a matter in which the trial court dismissed plaintiffs' causes of action for breach of contract and breach of warranty based upon the Fifth District's decision in *McMillin*. This Court granted review in *Moose* but deferred further action pending its determination of this matter.

(See *Donovan v. RRL, Corp.* (2001) 26 Cal.4th 261, 286; *City of Moorpark v. Moorpark Unified School District* (1991) 54 Cal.3d 921, 927.)

In the present case, the relevant statutory provisions in SB800 are uncompromisingly clear that they do *not* supplant the common law. As noted, Civil Code section 943(a) states in pertinent part 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." The statute even goes on to state that, "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." This sentence clearly contemplates a situation in which a cause of action for breach of contract or breach of warranty is brought along with a cause of action under SB800, and the same defects are at issue in both causes of action. To the extent that certain damages are awarded under both causes of action, this provision prevents double-recovery by the plaintiff.

A similar provision is found in Civil Code section 941, which concerns the ten-year statute of limitations for actions under SB800. Section 941 states at subdivision (e) (in pertinent part) that, "The time limitations established by this title do not apply to any action by a claimant for a contract or express contractual provision. Causes of action and damages to which this chapter does not apply are not limited by this section."

The meaning of these provisions is very clear. Causes of action for breach of contract and breach of warranty are not covered by SB800, and a homeowner's right to bring such claims against the builder of his or her home is in no way affected by SB800. There is no possible basis in SB800 to find that a homeowner's right to bring an action for breach of a "contract or express contractual provision" is affected by any prohibitory provision therein.[5]

Indeed, the Legislature *could not* validly have nullified the contractual rights of homeowners. For it to have done so would violate the Contracts Clause of the federal Constitution, which states that "No state shall . . . pass any . . . Law impairing the obligation of contracts . . . ." (U.S. Const., article I, section 10, clause 1; see *Olson v. Cory* (1980) 27 Cal.3d 532, 539 [setting forth factors necessary for legislative impairment of vested contract rights to be permissible under the Contracts Clause--the factors require, among other

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[5] The term "action by claimant to enforce a contract or express contractual provision" includes causes of action for breach of implied warranty, like the one brought by the plaintiffs herein against McMillin. An implied warranty is a part of the contract, as if explicitly set forth therein. (See *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 494-495 [an action for breach of implied warranty is an action to enforce the contract within the meaning of Civil Code section 1717--"The fact that a warranty is not stated in the written memorandum does not mean it is not part of the contract. . . . . The parties' 'total legal obligation' may be a composite of written terms, oral expression and responsibilities implied by law."]; see also *Nye & Nisson v. Weed Lumber Co.* (1928) 92 Cal.App. 598, 607 ["The implied warranty . . . became a part of the contract . . . as completely as though that warranty had been incorporated therein."]; and 1 Witkin Sum. Cal. Law Contracts §752 (2008) ["All applicable laws and ordinances in existence when the agreement is made become a part thereof as fully as if incorporated by reference."])

things, that the impairment be in response to an emergency, and that it be temporary].)

In sum, if SB800 is found to have nullified common law rights belonging to homeowners, then the incursion upon such rights is limited to tort actions based upon defects covered by the building standards in Civil Code section 896. Homeowners remain free to state tort causes of action against builders based upon damage-causing defects that are not covered by the standards in section 896, and the right of homeowners to sue under contract and warranty is entirely unaffected by SB800.

2. A Homeowner Who Seeks No Relief Under SB800 Is Not Required to Comply With the SB800 Prelitigation Procedure

The second issue before this Court is whether, in the absence of a claim for relief under SB800, a homeowner must nevertheless comply with the SB800 prelitigation procedure at Civil Code section 910, et seq. The clear answer is that the homeowner need not comply with the procedure.

i. The Fifth District's Resolution of this Issue Is Based Upon Its Understanding of the "Scope" of SB800. It Is Not Based Upon the Language of the Relevant Statute.

To resolve this issue, the Fifth District should have started with the text of the relevant statute. But this is not what court did. It its opinion, the court stated:

> 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.
>
> (Typed Opn., p. 8.)

The Fifth District then stated that, "The basic scope of the claims to which the Act applies is set out in section 896." (Typed Opn., p. 9.) The court found that "[T]he Act applies broadly to '*any* action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction.'" (Typed Opn., p. 9, quoting Civ. Code sec. 896. Orig. emph.)

Then, as recounted above (see section 1.c.i), the court quoted the prohibitory language in sections 896 and 943(a), and based thereon concluded that SB800 "bar[s] any cause of action for damages related to residential construction defects other than a cause of action brought in compliance with the Act." (Typed Opn., p. 15.)

The court then further concluded that, regardless of what causes of action a homeowner states, or whether he or she seeks relief under SB800, the homeowner must nevertheless complete the SB800 prelitigation procedure. The court stated its holding as follows:

> Consequently, we conclude the Legislature intended that all claims arising out of defects in residential construction . . . be subject to the standards and 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.
>
> (Typed Opn., p. 15.)

ii. Section 910 Does Not Require Compliance with the SB800 Prelitigation Procedure in the Absence of Any Claim Under SB800

The Fifth District's reasoning omits any textual analysis of the one and only statute that actually compels anyone to comply with the SB800 prelitigation procedure. That statute is Civil Code section 910, and it 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 prelitigation procedures."

If a person who seeks no relief under SB800 *is* nonetheless required to complete the SB800 prelitigation procedure, then it is necessarily because *section 910* requires him or her to do so. So, the question is: If a homeowner sues a builder based upon construction defects which violate the building standards set forth in Civil Code section 896, but the homeowner states no cause of action under SB800 and seeks no relief under SB800, then does the

homeowner nevertheless "allege[] . . . a violation of" the SB800 building standards within the meaning of section 910? This question must be answered in the negative.

Initially, this is because words in a statute are to be understood in accordance with their ordinary meaning. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 ["The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context."]) Ordinarily, if one is said to have "alleged a violation of" some legal standard, then it is assumed that this means that the allegation is made in the context of an action brought to enforce that standard.

In the case of SB800, if the Legislature intended for the prelitigation procedure to apply even to a homeowner who does not seek to enforce the SB800 building standards, then it would certainly have made that clear. The statute would say something to the effect of, "In any action, whether brought under this title or not, that is based upon allegations of defective conditions which would be actionable under this title, then the claimant is required, prior to filing his or her action in court, to comply with the following prelitigation procedures." This is true also because a prelitigation procedure within a certain statutory framework is naturally assumed to be a precondition to bringing an action under *that* framework. One would not naturally assume, as

the Fifth District did, that the prelitigation procedure is a precondition to filing an action *outside* the statutory framework.

Furthermore, the statutory context confirms in several instances that the SB800 prelitigation procedure applies only to actions brought under SB800:

First, section 910(a) describes the notice that the homeowner must serve on the builder in order to commence the prelitigation procedure. It states that the notice "shall provide the claimant's name, address, and preferred method of contact, *and shall state that the claimant alleges a violation pursuant to this part against the builder*." (Emphasis added.) Clearly, if a homeowner were not attempting to enforce his or her rights under SB800, then the notice of claim (if he or she were required to serve one) would *not* say that he or she alleges a violation "pursuant to this part."[6] And, as noted above, section 910(a) must be strictly construed, just like every other statute in Chapter 4 of SB800 that states a requirement or a time period for action. (See, e.g., Cal. Civ. Code sec. 930(a). See also *KB Home Greater Los Angeles, Inc. v. Superior Court*, *supra*, 223 Cal.App.4th at pp. 1477-1478 [communications from homeowner regarding loss did not comply with section 910 because they did not mention the Act and thus did not "state that the claimant alleges a violation pursuant to this part against the builder."])

[6] "This part" refers to division 2, part 2 of the Civil Code, pertaining to Real or Immovable Property, at section 755, et seq.

Second, section 914(a) specifically describes the prelitigation procedure as being prior to an action *to enforce SB800*. It states, in pertinent part:

> 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*.
>
> (Emphasis added.)

An action in tort is not an action "to enforce the other chapters" of SB800. It is an action to enforce a homeowner's rights at common law. Nor is an action for breach of contract an action to enforce the building standards in SB800--it is an action to enforce the terms of a contract. The only action *to enforce* the SB800 building standards is a cause of action *under SB800*, and this is the only cause of action that a homeowner may not bring until after he or she has completed the SB800 prelitigation procedure.

Third, section 942 states the following:

> 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.
>
> (Emphasis added.)

Section 942 proves that the language in section 910 referring to "an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896)" cannot be read expansively to include a tort or contract action based upon defects that violate the SB800 building standards. This is because if, for example, a cause of action for negligence *were* a "claim for a violation of the standards set forth in Chapter 2 (commencing with section 896)" within the meaning of section 942, then that would mean that in such a cause of action, the plaintiff would not need to prove negligence or causation or resulting damage. But this is clearly untrue--a cause of action for negligence is by definition one which is requires proof of these very elements.

Ultimately, there is no reason to distinguish the language of section 910 ["an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2"] from the language of section 914(a) [an "action to enforce the other chapters of this title"] or the language of section 942 ["a claim for violation of the standards set forth in Chapter 2"]. Each refers to the same thing--a statutory action under SB800, as opposed to an action under a non-SB800 tort or contract theory.

Fourth, section 931 states, in pertinent part, that "If a claim combines causes of action or damages not covered by this part . . . , the claimed unmet standards shall be administered according to this part." This contemplates the

situation in which a claim under SB800 is combined with non-SB800 causes of action, and states that in such an action, the homeowner is obligated to comply with the SB800 procedure only to the extent that he or she states a claim under SB800 based upon violations of the SB800 building standards. This supports the inference that, if the homeowner states *no* claim under SB800, then he or she is not required to comply with the SB800 prelitigation procedure.

The foregoing discussion pertains to *any* action in which a homeowner seeks to recover for defects but states no claim under SB800. Additionally, however, there are reasons specific to tort and contract claims why a plaintiff homeowner has no obligation to comply with the procedure:

First, in a tort claim that is based upon defects which do not violate the SB800 building standards, there can hardly be any obligation to comply with the procedure, because there are no unmet standards to give notice of under section 910. (See discussion in section 1.d.i above.)

And second, SB800 itself states at section 943(a) that it "does not apply to any action by a claimant to enforce a contract or express contractual provision.," and, at section 941(e) that "[t]he time limitations established by this title do not apply to an action by a claimant for a contract or express contractual provision." (See discussion in section 1.d.2 above.) If SB800 *does not apply* to contract and warranty claims, then the SB800 prelitigation procedure can hardly be found to apply to them.

For all of the foregoing reasons, this Court should find that, absent a claim for relief in a cause of action brought under Civil Code section 896 for violation of the SB800 building standards, the claimant homeowner has no obligation to comply with the SB800 prelitigation procedure.

CONCLUSION

Based on the foregoing, Plaintiffs ask that this Court find that SB800 does not affect the common law rights long enjoyed by California homeowners, that the Court further find that a homeowner who states no cause of action under SB800 is not required to comply with the SB800 prelitigation procedure, and that the Court uphold the trial court's order denying McMillin's Motion to Stay.

Dated: February 9, 2016

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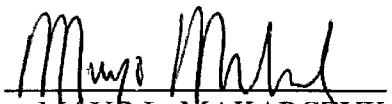
By: 
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CERTIFICATE OF WORD COUNT

I certify that, under California Rules of Court, rule 8.520(c)(1), the preceding Opening Brief on the Merits contains 10,949 words.

Respectfully submitted,

Dated: February 9, 2016

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By: _____
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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 10250 Constellation Blvd., 14th Floor, Los Angeles, California 90067.

On February 9, 2016, I served the foregoing document(s) described as:

OPENING BRIEF ON THE MERITS

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 Los Angeles, 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 February 9, 2016 at Los Angeles, California.

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