S229762

IN THE SUPREME COURT OF CALIFORNIA

McMILLIAN ALBANY, LLC, et al.,
Petitioners,

v.

SUPERIOR COURT OF KERN COUNTY,
Respondent.

(After a Decision by the Court of Appeal,
Fifth Appellate District - Case No. F069370)

PROPOSED AMICUS CURIAE BRIEF OF ULICH GANION BALMUTH FISHER & FELD LLP

Donald W. Fisher (Bar No. 149562)
ULICH GANION BALMUTH FISHER
& FELD LLP
4041 MacArthur Blvd., Suite 300
Newport Beach, California 92660
(949) 250-9797; Fax (949) 250-9777
dfisher@ulichlaw.com
Attorneys for Amicus Curiae
ULICH GANION BALMUTH FISHER
& FELD LLP

S229762

IN THE SUPREME COURT OF CALIFORNIA

McMILLIAN ALBANY, LLC, et al.,
Petitioners,

v.

SUPERIOR COURT OF KERN COUNTY,
Respondent.

(After a Decision by the Court of Appeal,
Fifth Appellate District - Case No. F069370)

PROPOSED AMICUS CURIAE BRIEF OF ULICH GANION BALMUTH FISHER & FELD LLP

Donald W. Fisher (Bar No. 149562)
ULICH GANION BALMUTH FISHER
& FELD LLP
4041 MacArthur Blvd., Suite 300
Newport Beach, California 92660
(949) 250-9797; Fax (949) 250-9777
dfisher@ulichlaw.com
Attorneys for Amicus Curiae
ULICH GANION BALMUTH FISHER
& FELD LLP

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

STATE CASES **PAGE NO.**

STATUTES **PAGE NO.**

TABLE OF AUTHORITIES

STATUTES **PAGE NO.**

TABLE OF AUTHORITIES

STATE CASES **PAGE NO.**

OTHER AUTHORITIES **PAGE NO.**

I. ISSUE PRESENTED

In 2002, the California Legislature enacted Title 7 of Part 2 of Division 2 of the *Civil Code*, commonly known as the Right to Repair Act (the Act). (Stats. 2002, ch. 722.) It declared:

> "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."

(*Id.*, § 1, subd. (b).)

Amici, on behalf of itself as counsel for numerous developers and contractors in the construction industry, as well as being counsel for Brookfield Crystal Cove LLC ("Brookfield") in the *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98 ("*Liberty Mutual*") matter, believes that the Fourth Appellate District in the *Liberty Mutual* opinion placed a completely arbitrary and artificial condition on the Act in an effort to accommodate the request of a homeowner's insurer, *Liberty Mutual*, in a subrogation case, opining that "the Act covers instances where construction defects were discovered before any actual damage had occurred." (*Id.*, 219 Cal.App.4th at pp. 105, 108–109.) Conversely, Amici believes the Fifth Appellate District's opinion in the *McMillian* matter is the correct application of the Act requiring

homeowners to follow the pre-litigation mandates of the Act prior to filing suit, and to file suit thereafter exclusively under SB800, not common law. Amici respectfully asserts that *Liberty Mutual* was a misguided attempt at "judicial legislation" in order to achieve a specific result for homeowner's insurance carriers, an attempt that resulted in erroneous law being made and which should have been left to the Legislature to determine.

II. THE *LIBERTY MUTUAL* DECISION IS WRONG

A. The Act Applies To All Construction Defect Claims

The Act consists of five chapters. Chapters 1, 2, 3, and 5 apply to all construction deficiency matters. (*Civil Code* §896.) Chapter 4 applies when builders so elect and comply with its terms. (*Civil Code* §912, subd. (i).)

Civil Code §895, subdivision (f) defines "'[c]laimant' or 'homeowner'" to include owners of single-family homes and units of attached dwellings. A homeowners association of a common interest development is also a claimant. (§895, subd.(f).)

Civil Code §896, in the first paragraph before subdivision (a), provides the scope and exclusivity of the Act, noting that the Act replaces common law standards of due care in construction and strict liability with statutory standards that all new construction *must* meet but that no builder must exceed unless the builder contracts to do so. According to that Code section, the Act applies "[i]n 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. . . ." It expresses the liability of persons involved in housing development and construction,

as well as the exclusivity of claimants' remedies in the next phrase: "a builder, and [others], 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." (*Civil Code* §896.) The plain meaning of this text is that claimants and homeowners have no cause of action for loss or harm "arising out of or relating to" conditions of new housing except for (i) violation of standards, and (ii) other liabilities created by the Act or excepted from its preemptive scope.

B. The Act Supplants Common Law On Its Face

The first paragraph of Section 896 overrules the common law in many important ways, including:

- When the relationship of claimant to defendant would have allowed a common law cause of action for strict liability, the Act relieves the claimant of such burdens as proving the product deviated from intended quality (see, *Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 792) or failed either the consumer expectation or risk/benefit test (see, *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429-430). The claimant must prove only violation of a statutory standard. (see, *Civil Code* §§896 and 942.[1])

- When under common law the claimant would have needed to prove negligence, the Act relieves the claimant of the burden to establish the standard of care and breach. The claimant must prove only

[1] "[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."

a violation of a statutory standard. (*Civil Code* §896; see also *Civil Code* §942.)

- Although the common law would have permitted a homeowner to try to prove negligence or violation of consumer expectations, the standards foreclose those claims when a builder complies with the standards. "[T]he claimant's claims or causes of action shall be limited to violation of the following standards. . . ." (*Civil Code* §896; see also, *Civil Code* §897 [unintentionally omitted functions and components].) For example, if an untreated steel fence component corrodes in five years after close of escrow, the homeowner has no claim, even if the homeowner expected the fence to last 10 years. (*Civil Code* §896(g)(9).)

Section 896 ends in two critical sentences. "This title applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law." These two sentences teach that the Legislature knew the Act superseded statutory and common law as to original construction and wanted to do so, so the Legislature explicitly excepted condominium conversions from the scope of supersession.

C. The Act Does Not Abrogate Common Law, The *Liberty Mutual* Opinion Is Inconsistent With The Act

The text of *Civil Code* §896, discussed *ante,* is so clear that some courts would stop the analysis with that section and hold the Act abrogates or preempts common law under the plain meaning rule. In addition, the full text of the Act shows it was intended to be – and must

be – exclusive, or the Legislature's purpose in implementing the statutory scheme fails.

i. The Act As a Whole Was Framed To Preempt The Common Law

The Legislature expressed that it intended the substantive quality standards of *Civil Code* §896 to cover every aspect of residential housing. (*Civil Code* §897.) "The standards set forth in this chapter are intended to address every function or component of a structure." (*Ibid.*) This Section teaches that the Legislature meant for the new cause of action created by Section 896 to embrace everything that could go wrong with residential construction, to the extent the Legislature provided claimants and homeowners legal rights to recover from builders and other constituents of the housing industry. Should anything have been missed in that regard, Section 897 provides: "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." (*Ibid.*)

The Legislature also compelled builders to grant buyers of homes one-year express warranties "covering the fit and finish" of certain components. (*Civil Code* §900.) Requiring warranties is further evidence of the Legislature's intent for the Act to be comprehensive, except for its express exclusions.

Section 944, specifying the elements of recoverable damages, has two vital functions operating with Section 896. First, it assures that the claimant can recover consequential damages for property damage. These are "the reasonable costs of repairing and rectifying any damages resulting from the failure of the home to meet

the standards, ... reasonable relocation and storage expenses, reasonable investigative costs for each established violation, and all other costs or fees recoverable by contract or statute." (§944.) Second, it provides damages not formerly available under *Aas v. Superior Court* (2000) 24 Cal.4th 627, 632. These are "damages for the reasonable value of repairing any violation of the standards set forth in this title. . . ." (*Ibid.*; see §943, subd.(b) [confirming that the section 944 remedy includes diminution of value if it is less than the cost of repair].) Damages caused by doing the repairs and damages for replacing any defective repairs are included. (*Ibid.*)

Section 943 reconfirms the preemptive effect of Section 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).) And it states the exceptions: "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." (*Ibid.*; see *id.* at subd. (b) [preserving the "personal use exception as developed under common law" to the statute's limits on damages to single-family homes].)

An additional consequence of the *Liberty Mutual* opinion is permitting plaintiffs to choose their form of action to shop for a favorable statute of limitations. The Legislature enacted what is tantamount to statutes of repose for certain functions and components within the Act. (See, *Civil Code* §896, subd. (f), (g), (g)(3)(D), (g)(7), (g)(8), (g)(9), (g)(10), and (g)(12).) If common law actions exist in parallel, these statutes of repose are meaningless.

For well over 10 years, construction defect litigation has followed the preemptive and orderly path as determined by the Legislature through the Act. Unfortunately, with the clever arguments by the plaintiffs' bar, the entire statutory scheme has been thrown into a chaotic scramble whereby the mandatory pre-litigation procedures of the Act are largely being discarded by plaintiffs resulting in the wholesale failure of the right to repair process.

ii. The Right To Repair Is Now Merely An Option

Chapter 4 embodies the process that gave the Act its common name – the pre-litigation right to repair. (see, *Civil Code* §§914, 917 & 918.) The *Liberty Mutual* opinion destroyed that right by allowing plaintiffs to pick and choose what causes of action they wish to proceed under, mostly circumventing the Act and denying developers their right to repair and what is tantamount to an effort to appease the concerns of a homeowner's insurance carrier that argued the Act did not protect its rights in subrogation. A builder opts into Chapter 4 on a project-by-project and buyer-by-buyer basis by recording a notice of the Act's procedures (*Civil Code* §912, subd. (f)), including a notice of the procedure in sales documents (*ibid.*), assuring that the builder and the buyer initial and acknowledge the applicability of the procedure (*ibid.*), providing a copy of the Act (initialed by the buyer and the builder's sales representative) to the buyer (§912, subd.(g)), and complying with exacting requirements for claimants to know how to give the builder notice of a claim (§912, subd.(e)). "Any builder who fails to comply with any of these requirements within the time specified is not entitled

to the protection of this chapter. . . ." (§ 912, subd. (i).)[2]. In plain terms, a builder who does not timely perform its obligations under Chapter 4 may not claim any benefits of Chapter 4.

The *Liberty Mutual* opinion takes a narrow – and incorrect – view that Chapter 4 applies only to repairing a defective component, and not to the damage that may be caused by such a component. Indeed, one may interpret the *Liberty Mutual* opinion to say the Act applies *only* when no actual damage has occurred. To the contrary, the second sentence of Section 917 requires that a builder's offer of repair "shall also compensate the homeowner for all applicable damages recoverable under section 944, within the timeframe for repair set forth in this chapter." And, as explained *ante*, Section 944, damages include "the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards [and] reasonable relocation and storage expenses. . . ." (§ 944.)

There is no middle ground here. Either "a homeowner who suffers actual damages as a result of a construction defect" always "has a choice of remedies" as provided in the *Liberty Mutual* opinion, or the homeowner always must proceed under the chapters and sections of the Act that apply. The *Liberty Mutual* opinion relegates the provisions of the Act, an option denying the Legislature's purpose by stealing the right to repair from builders – and from homeowners whose property

[2] If the builder opts out of or fails to comply with Chapter 4, "the homeowner is released from the requirements of this chapter and may proceed with the filing of an action, in which case the remaining chapters of this part shall continue to apply to the action." (§912, subd. (i).) The homeowner is released from only "the requirements of this chapter," not the provisions of the Act. And the Legislature specifically declared that the other four chapters "shall continue to apply to the action." (*Ibid.*) That is, the homeowner that is *not* subject to Chapter 4 receives both the benefits and the burdens of Sections 896 and 897.

could be fixed but unwittingly become involved in protracted litigation that impairs their title and ultimately frustrates repair.

iii. The California Supreme Court's Prior Contacts With The Act Demonstrate *Liberty Mutual* Is Wrong

In *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 382, fn.16, the Court rejected a homeowner's contention that the Act evidenced legislative support for tolling a statute of limitations for actions concerning housing completed before the Act. *Lantzy* described the Act in comprehensive terms that conflict with the *Liberty Mutual* court's narrow reading. (*Id.* at p. 382, fn. 16.) This Court stated: "This statutory scheme comprehensively revises the law applicable to construction defect litigation for individual residential units, other than condominium conversions, first sold after January 1, 2003. [Emphasis added.] (*Civil Code* §§896, 938.)" (*Ibid.*) The *Liberty Mutual* court gave *Lantzy* no regard.

III. STATEMENT OF THE *LIBERTY MUTUAL* CASE

A. The Underlying Action

The *Liberty Mutual* appeal arose from the trial court's determination that the statutory provisions of *Civil Code* §§896, et seq. ("SB800") applied to a subrogation action in which Liberty Mutual, the insurer of homeowner, Eric Hart, sought reimbursement for damages arising out of a plumbing leak at a single-family home that was sold after January 1, 2003 (hereinafter referred to as the "Action").

Brookfield Crystal Cove LLC (hereinafter referred to as "Brookfield") was a residential real property developer that constructed single-family homes located within a development known as The Strand

project in Newport Coast, California (hereinafter referred to as the "Project"). The subject property in the Action where the alleged plumbing leak occurred was 172 Sidney Bay Drive, Newport Coast, California (hereinafter referred to as the "Subject Property"). The owner of the Subject Property, and Liberty Mutual's insured, was Eric Hart (hereinafter referred to as the "Insured").

On December 21, 2003, Brookfield entered into a Purchase and Sale Agreement with the Insured for the purchase of the Subject Property. By virtue of the date of sale and as a matter of law, the SB800 statute governed any action seeking recovery of damages relating to the construction of the Subject Property.

On or about January 8, 2010, and over 7 years after the contract was entered into between the Insured and Brookfield for the purchase/sale of the Subject Property, a plumbing leak was alleged to have occurred at the Subject Property resulting from a ruptured plumbed fire sprinkler line (the alleged plumbing leak is hereinafter referred to as the "Incident"). Brookfield repaired the plumbing leak at the Subject Property and the Insured filed a claim with his homeowner's insurance company, Liberty Mutual, for damages to his personal property and for living expenses arising out of the Incident and during the time the repairs were being made by Brookfield. On August 8, 2011 (almost 7 years after the date of sale/close of escrow, which was December 16, 2004), Liberty Mutual, standing in the shoes of its Insured, filed a subrogation action against Brookfield seeking reimbursement of the monies paid to its Insured for alleged damages arising out of the plumbing leak.

In its original Complaint, Liberty Mutual alleged the following causes of action against Brookfield: (1) Strict Liability; (2) Negligence; and

(3) Breach of Contract. Brookfield demurred to the Complaint on several grounds including the fact that by virtue of the date of sale of the Subject Property, the provisions of SB800 governed the Action and, consequently, the causes of action alleged in the Complaint were precluded as being inconsistent with SB800. Brookfield also demurred on the ground that Liberty Mutual's claim was time-barred as it arose out of a plumbing leak, which per *Civil Code* §896(e), must have been brought within four (4) years from the close of escrow date of the Subject Property to be timely. Liberty Mutual's Complaint was filed 7 years after the close of escrow – nearly twice as long as the permitted statutory period of 4 years.

Prior to the hearing on the demurrer, Liberty Mutual filed a First Amended Complaint ("FAC"). The FAC attached the Purchase and Sale Agreement ("PSA") pertinent to the Subject Property, which confirmed that the Action was governed by SB800 as the Subject Property was sold almost a year after the statute became effective. Nevertheless, Liberty Mutual continued to assert common law causes of action against Brookfield in the FAC.

Brookfield demurred to the FAC claiming: 1) the Subject Property was sold after January 1, 2003 and was therefore within the purview of *Civil Code* section 896, et seq.; 2) the damages sought arose out of a construction deficiency covered by the SB800 statutes (i.e., plumbing leak) and were time-barred because the Action was not filed within 4 years from the date of close of escrow on the Subject Property; and 3) the FAC did not allege sufficient facts in support of the equitable estoppel and declaratory relief causes of action.

At the hearing on Brookfield's demurrer to the FAC, the trial court ruled that the provisions of *Civil Code* §§896, et seq. governed the Action

by virtue of the date of sale of the Subject Property and regardless of the fact that the Action is a "subrogation action" involving one single-family home and not a class action involving multiple homes. The trial court sustained the demurrer with leave to amend but Liberty Mutual declined to amend.

B. The Fourth District Court Of Appeal

Liberty Mutual's appeal to the Fourth District Court of Appeal followed. During oral argument, the justices' questioning was focused on 1) the SB800 4 year statute of limitations period for plumbing leaks and whether a plumbed fire sprinkler line fell within the definition of a "plumbing leak", and 2) about the repairs made by Brookfield and the expenses incurred by Mr. Hart. After oral argument, the Court of Appeal reversed the trial court's ruling. Thereafter, Brookfield petitioned for rehearing. The Court of Appeal modified its opinion and denied the petition for rehearing.

Brookfield argued on appeal that *Civil Code* §896(e) addressed all issues related to plumbing and plumbing leaks and that the statute is comprehensive in that it sets forth 1) building standards; 2) statute of limitation periods; 3) permissible causes of action; and 4) pre-litigation procedures that must be followed prior to filing suit. Brookfield also argued that Liberty Mutual was subject to all of the statutory requirements of SB800, just as its Insured was.

Liberty Mutual argued on appeal that the Act does not control the situation when a construction defect causes immediate, one-time property damage and that, by contrast, an insurance company must expeditiously adjust covered losses. In essence, Liberty Mutual argued that the Court of Appeal should judiciously legislate an exception to the Act to accommodate

homeowner's insurance carriers in subrogation matters. Without directly so stating, that is what the Court of Appeal effectively did in the *Liberty Mutual* case, which has since thrown the entire statutory scheme of the Act into chaos, ultimately requiring intervention by this Court. Respectfully, the Court of Appeal acted beyond its authority.

IV. THE *LIBERTY MUTUAL* OPINION

A. To The Extent The Court Of Appeal Considered Statutory Text, It Erred

The *Liberty Mutual* opinion provides that the Act does not apply when the right to repair is made irrelevant by events. This errs even as to Chapter 4. The builder's right "to inspect the claimed unmet standards" (§916, subd.(a)) remains pertinent to formulating an offer under either Section 917 or Section 929, subdivision (a) to resolve the claim entirely by cash.

It is not an argument against application of Chapter 4 to deficiencies that cause damage that the inspection rights of Section 917 facilitate repair before a deficiency causes damage. Yet the *Liberty Mutual* opinion, without reasoning to the deduction, claims that the Legislature's intent to protect structures and contents somehow signifies an intent for the statute not to cover claims for damages. There is no logical reason that the statute cannot do both.

Liberty Mutual incorrectly claims that inspection rights result in "unnecessary and nonsensical" activities and "timeframes." To the contrary, the builder has a maximum of 14 days to make an initial inspection (§916, subd. (a)) and at most 40 days to make a second inspection if there is good cause explained in writing (§916, subd. (c)), followed by only 30 days to offer to repair (§917). A builder is free to

follow the Chapter 4 steps without receiving a homeowner's statutory notice, as *Liberty Mutual* acknowledged, Brookfield did. Moreover, it behooves a builder to respond promptly because delay increases the potential monetary liability. (§945.5, subd. (b).) The *Liberty Mutual* opinion appears to be shaped by concern that the deficiency in that case may have caused an emergency. Yet the opinion actually impairs remedies for emergencies, ignores the vast number of property damage events that are not emergencies, and makes bad law for all cases, regardless of emergency.

The discussion of Section 931 in the *Liberty Mutual* opinion errs. Section 931 is part of Chapter 4, and it deals with actions that are partly covered by the Act and partly excluded from the Act. Section 931's illustration of causes of action not covered by Chapter 4 refers to actions otherwise statutorily excluded, such as personal injury, fraud, class actions, and other statutory remedies. (§931; see §943 [excluding fraud, personal injury, and violation of a statute from the entire Act].) The extent of Section 931's exclusion of actions from preemption should be limited to express statutory exclusions according to the principle of *noscitur a sociis*. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960.) Judicial construction should not grab the dissimilar common law action for property damage and thrust it into the exclusions. It is thus error to argue Section 931 refutes the preemption of Section 896.

Likewise, Section 942 is not inconsistent with preemption. The statute provides that a homeowner need not prove causation or damages to prove a violation of a Chapter 2 standard. Section 942's companion Section, 945.5 – cross-referenced in its text – also supports preemption.

In Section 945.5, the Legislature made somewhat modified common law affirmative defenses applicable to actions under the Act; no need would have existed to codify defenses if the Legislature was not creating a new statutory and preclusive regulation of construction defect claims.

B. Legislative History Confirms Abrogation Of Common Law

Although the *Liberty Mutual* Court of Appeal should not have needed to consider extrinsic evidence of the Legislature's intent, an inclusive analysis of the sources demonstrates abrogation of common law actions by homeowners against builders.

The *Liberty Mutual* Opinion begins by giving the Act context in *Aas v. Superior Court, supra,* 24 Cal.4th 627 and extrinsic evidence of legislative history showing the Act abrogated the bar on recovering for value diminution without actual damage. Amici does not disagree with the descriptions of *Aas* and *one* purpose of the Act, but that history does not exclude the Act having a broader reform agenda. The extrinsic evidence amply demonstrates the Legislature intended preemptive, comprehensive reform.

i. Declaration Of Intent And Legislative Counsel Analysis

As to the scope of Senate Bill 800 (2001-2001 Reg. Sess.) (SB800), the uncodified declaration of intent states: "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." (Stats. 2002, ch. 722, § 1, subd.(b).) Simply, the problem to be solved was not limited to *Aas v. Superior Court*, *supra*, 24 Cal.4th 627, the parties suffering were not only homeowners, and the solution was not limited to abrogating a damages rule and adopting an optional right to repair. Further, "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." (*Id.*,§ (c).) Again, the problem encompassed the whole mire of construction defect litigation.

Legislative Counsel also understood the sweep of SB800. In a remarkably short description of a long and complex bill, the Digest states: "The bill would 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 pre-litigation procedure, and the obligations of the homeowner." (Stats. 2002, ch. 722, Leg. Counsel Dig.) Note the Digest does not say "some rights and requirements" or "alternative rights and requirements" nor does it suggest that the bill create an alternative procedure. It speaks of "*the* rights and requirements" for any action "for construction defects. . . ." (*Ibid.*, italics added.)

ii. Committee Reports Tell The Same Story

The Assembly Committee Report on the penultimate version of the bill[3] frames the "key issue" as "should construction defects be governed by specific standards and builders be given an opportunity to repair alleged violations before a homeowner may file a civil action in order to promote safe and affordable housing?" (Assem. Com. on Judiciary, Rep. on SB800 as amended Aug. 26, 2002, p. 1.) In short, at least when the right to repair applies, the homeowner must honor that right as a condition to filing any civil action. The synopsis makes the same point. (*Ibid.*)

A numbered point in the summary refers to the right to repair as "absolute . . . before a claimant may sue." (*Id.* at p. 1-2.) Comments include that "this bill represents groundbreaking reform for construction defect litigation." (*Id.* at p. 2.) The same report states: "As many prior bill analyses on this subject have noted, the problem 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." (Assem. Com. on Judiciary, Rep. on SB800 as

---

[3] The last amendment made no change in the sweep or structure of the legislation. (Compare SB800 as amended Aug. 26, 2002 with SB800 as amended Aug. 28, 2002.) The August 28 version is the final version. (Complete Bill History, SB800.)The reform would not be groundbreaking if it consisted merely of providing a track of dispute management alternative to the dysfunctional status quo. It was groundbreaking because it was "absolute" (*id.* at pp. 1-2) and "mandatory" (Sen. Com. on Judiciary, Rep. on SB800 as amended Aug. 28, 2002, p. 2).

amended Aug. 26, 2002, p. 2.) It would make no sense for builders, liability insurers, or legislative leaders to negotiate so long and hard, only to reach consensus on an optional track for just some construction defect litigation.

The same Judiciary Committee staffer made substantially the same report to the Assembly floor after the final amendment. (Assem. Floor Analysis, SB800 as amended Aug. 28, 2002.) Further: "In a significant departure from existing law, the bill imposes a procedure that a homeowner must follow before bringing suit against a builder." (*Id.* at p. 3.) Simply, at least when Chapter 4 applies, it is the exclusive path to legal action.

The final Senate Committee Report observes that "the bill seeks to respond to concerns expressed by builders and insurers over the costs associated with construction defect litigation. . . ." (Sen. Com. on Judiciary, Rep. on SB800 as amended Aug. 28, 2002, p. 1.) Again, legislators voting on the bill knew it was not just about abrogating the damages rule of *Aas v. Superior Court*, *supra*, 24 Cal.4th 627. The Report notes as a change in existing law that "any action against a builder . . . seeking damages arising out of or relating to deficiencies in residential construction . . . shall be governed by detailed standards set forth in the bill. . . ." (*Id.* at p. 2.) That is, all lawsuits about residential construction fall within the sweep of the bill. It refers to Chapter 4 as "a mandatory procedure prior to the filing of a construction defect lawsuit." (*Ibid.*) It contains the "groundbreaking reform" language and reports the grand compromise among industry, insurers, and consumer lawyers. (*Id.* at p. 3.) In the discussion of details, it includes the requirement for a

builder's offer to compensate for "all applicable damages recoverable." (*Id.* at p. 5.) The final Senate floor report picks up many of those comments including "all applicable damages recoverable." (Off. of Sen. Floor Analyses, Rep. on SB800 as amended Aug. 28, 2002, p. 4.)

iii. Summary

The extrinsic evidence of the Legislature's intent establishes first that the Legislature perceived the construction defect litigation system was broken. Second, the extrinsic evidence establishes that the interested parties – consumers and industry – agreed on and the Legislature knowingly enacted a complete replacement for the broken common law. The text of the Act meant to the Legislature what it says on its face: all claims based on deficient construction are to be managed under the Act, and that is so regardless of whether there is no actual damage, or a little, or even catastrophic actual damage. By concluding otherwise, the *Liberty Mutual* opinion not only reinvented the exact defective litigation system that the Legislature abolished but also did away with the Chapter 4 right to repair, making it an alternative process that any plaintiff may disregard on whim, even by sham pleading.

C. The Court Of Appeal Relied Unduly On A Presumption Against Legislative Change Of Common Law

Particularly in its modification, the Court of Appeal relied heavily on a presumption that the Legislature does not repeal the common law. The text of the Act, with or without extrinsic evidence of its enactment, meets any applicable standard of proof that the

Legislature intended to abrogate or preempt the common law of negligence and strict liability in construction defect cases, except when an exception – like personal injury – applies. (See *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) And if the Act does not meet the standard, the standard itself should be the subject of review and reconsideration. While stability has value, and requiring clarity is appropriate, the Fourth District Court of Appeal's functional requirement of a statement that "we the Legislature mean to preempt common law" as the exclusive means to express legislative intent is a relic of judicial hostility to legislative power in civil affairs. (See, e.g., Scalia and Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 318- 319.)

V. CONCLUSION

The California Supreme Court should not condone or allow "judicial legislation" as was promoted in the *Liberty Mutual* opinion but should, instead, follow the Fifth District Court of Appeal's proper and reasoned opinion in *McMillian* that the Act is to be followed for construction defect litigation and, if that manner is incorrect, the Legislature should take to task anything that is broken within the Act.

Respectfully Submitted,

Date: May 9, 2016

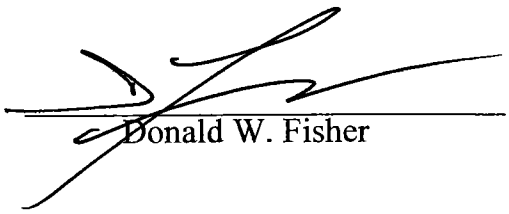
ULICH GANION BALMUTH
FISHER & FELD LLP

By: _____
Donald W. Fisher, Esq.
Attorneys for Amicus Curiae
ULICH GANION BALMUTH
FISHER & FELD LLP

CERTIFICATE OF WORD COUNT
(*Cal. Rules of Court*, Rule 8.204(c)(1).)

The text of this Brief consists of 5300 words as counted by the Microsoft Word word processing program used to generate this Brief.

Dated: May 9, 2016



Donald W. Fisher

PROOF OF SERVICE

CALIFORNIA CODE OF CIVIL PROCEDURE §1011

STATE OF CALIFORNIA, COUNTY OF ORANGE

1. I am employed in the County of Orange, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4041 MacArthur Boulevard, Suite 300, Newport Beach, California 92660.

2. On **May 11, 2016**, I caused a true and correct copy of the Application to File Amicus Curiae Brief of Ulich, Ganion, Balmuth, Fisher & Feld LLP; and Proposed Amicus Curiae Brief of Ulich, Ganion, Balmuth, Fisher & Feld LLP to be **personally delivered** by First Legal Support to the following parties:

SUPERIOR COURT OF KERN COUNTY 1415 Truxtun Avenue, Suite 212 Bakersfield, CA 93301 Honorable David R. Lampe **Respondent**	Andrew M. Morgan, Esq. BORTON PETRINI LLP 5060 California Avenue, Suite 700 Bakersfield, CA 93301 **Attorneys for Petitioners McMillian Albany, LLC; and, McMillin Park Avenue, LLC**
Aaron Michael Gladstein, Esq. Mayo Lawrence Makarczyk, Esq. MILSTEIN ADELMAN JACKSON FAIRCHILD & WADE, LLP 10250 Constellation Blvd., Suite 1400 Los Angeles, CA 90067 **Attorneys for Real Parties-in-Interest** **Carl Van Tassell and Sandra Van Tassell**	Alan H. Packer, Esq. NEWMEYER & DILLION LLP 1333 North California Boulevard Suite 6 Walnut Creek, CA 94596 **Attorneys for Amicus Curiae Leading Builders of America**

Kathleen F. Carpenter, Esq. DONAHUE FITZGERALD LLP 1646 N California Blvd., Suite 250 Walnut Creek, CA 94596 **Attorneys for Amicus Curiae California Building Industry Association**	Civil Clerk of the Court Fifth District Court of Appeal 2424 Ventura Street Fresno, CA 93721

3. On **May 11, 2016** I caused, via First Legal Support, an Original and 8 hardcopies of the Application to File Amicus Curiae Brief of Ulich, Ganion, Balmuth, Fisher & Feld LLP; and Proposed Amicus Curiae Brief of Ulich, Ganion, Balmuth, Fisher & Feld LLP to be filed directly with:

Supreme Court of California
San Francisco Office
350 McAllister Street
San Francisco, CA 94102-7303
(415) 865-7000

4. On **May 11, 2016** I caused a true and correct copy of the Application to File Amicus Curiae Brief of Ulich, Ganion, Balmuth, Fisher & Feld LLP; and Proposed Amicus Curiae Brief of Ulich, Ganion, Balmuth, Fisher & Feld LLP to be electronically submitted to the above-referenced Supreme Court using the e-submission portal on the Court's website www.courts.ca.gov/supremecourt.htm.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **May 11, 2016** at Newport Beach, California.

Amanda M. Despujol
Print Name

Signature