

SUPREME COURT  
**FILED**

Case No. S229762

JUN 16 2016

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA ~~Frank~~ Frank A. McGuire Clerk

Deputy

---

**McMILLIN ALBANY, LLC, et al.**  
**Petitioners,**

v.

**SUPERIOR COURT OF KERN COUNTY,**  
**Respondent.**

---

**CARL & SANDRA VAN TASSEL, et al.,**  
**Real Parties in Interest.**

---

Kern County Superior Court Case No. S-1500-CV-279141  
Honorable David R. Lampe, Presiding Judge, Dept. 11

---

**From the Published Opinion of the Court of Appeal, Fifth Appellate  
District Civil Case No. F069370**

---

**McMILLIN'S MOTION FOR JUDICIAL NOTICE OF  
LEGISLATIVE HISTORY OF SB800**

---

**BORTON PETRINI, LLP**  
Calvin R. Stead (State Bar No. 129358)  
\*Andrew M. Morgan, (State Bar No. 266833)  
5060 California Avenue, Suite 700  
Bakersfield, CA 93309  
(661) 322-3051 Fax (661) 322-4628  
Email: cstead@bortonpetrini.com  
Email: amorgan@bortonpetrini.com  
Attorneys for Petitioners,

McMillin Albany, LLC, a Delaware Limited Liability Company; and  
McMillin Park Avenue, LLC, a Delaware Limited Liability Company

Pursuant to Rules 8.54 and 8.252 of the California Rules of Court and Evidence Code §§452, 454 and 459, McMillin Albany, LLC, et al. (“McMillin”) moves for judicial notice of the legislative history of California's “Right to Repair Act,” also known as SB 800.

SB800's legislative history is acutely relevant to the issues before this Court on petition for review proceedings because it speaks directly against the notion that “[n]owhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage,” as stated in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove LLC* (2013) 163 Cal.Rptr.3d 600, 604. The holding in *Liberty Mutual* was the fundamental premise of the order McMillin under review in this appeal. McMillin did not in the underlying action request that Respondent court take judicial notice of SB800's legislative history because under the doctrine of stare decisis Respondent is bound to follow *Liberty Mutual's* holding, erroneous as it may be. Consequently, requesting Respondent to take judicial notice of SB800's legislative history would have been of no effect. SB800's legislative history is subject to judicial notice by this Court under Evidence Code sections 452, 454 and 459, as all of the portions of the legislative

history upon which McMillin relies are “[o]fficial acts of the legislative, executive, and judicial departments” of California. (See Evidence Code section 452(c).)

The complete legislative history is found in the record as Exhibits 1 and 2 to McMillin’s Motion for Judicial Notice of Legislative History of SB800, filed on or around May 20, 2014 with the Fifth District Court of Appeal (granted on September 9, 2014).

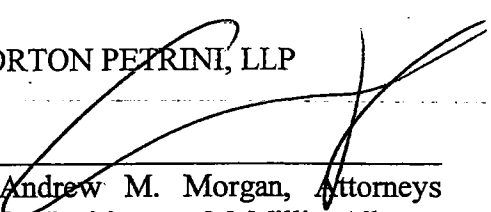
This motion is based on this motion, the supporting memorandum of points and authorities that follow, and any other documentary or oral evidence the Court sees fit to consider.

DATED: June 15, 2016

Respectfully submitted,

BORTON PETRINI, LLP

By

  
Andrew M. Morgan, Attorneys  
for Petitioners, McMillin Albany,  
LLC, a Delaware Limited  
Liability Company; and McMillin  
Park Avenue, LLC, a Delaware  
Limited Liability Company

## MEMORANDUM OF POINTS AND AUTHORITIES

This motion seeks judicial notice of the legislative history of California's "Right to Repair Act," also known as SB800. Numerous parts of SB800's legislative history support McMillin's argument that the intent of SB800 was to abrogate common law claims for residential construction defects, which is directly contrary to one of the main premises of the holding in *Liberty Mutual Insurance Co. v. Broolifield Crystal Cove LLC* (2013) 163 Cal.Rptr.3d 600, wherein it is stated that "[n]owhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage." (*Id* at 604.) A motion for judicial notice is the appropriate procedure for bringing the above mentioned legislative history before this Court. (See Evidence Code §§ 452, 454, 459; *In re Marriage of Perry* (1998) 61 Cal.App.4th 295, 308; *Grubb & Ellis Co. v. Bello* (1993) 19 Cal.App.4th 231, 240.)

### **CALIFORNIA COURTS ARE AUTHORIZED TO TAKE JUDICIAL NOTICE OF LEGISLATIVE HISTORY BY EVIDENCE CODE §§452, 454 AND 459**

The Legislature's intent in enacting SB800 is material to the ultimate determination of whether common law tort claims are abrogated by SB800, as argued by McMillin. Evidence Code §452(a) states that judicial notice may be taken of "[t]he decisional, constitutional and statutory law of any state of the United States and the resolutions and private acts of the Congress of the

United States and of the Legislature of this State.” Evidence Code §452(c) also states that judicial notice may be taken of “official acts of the Legislature, Executive, and Judicial Departments of the United States and of any state of the United States.” Additionally, Evidence Code §459 requires appellate courts to take judicial notice of matters specified under Evidence Code §452. Thus, the documents concerning the legislative history of SB 800 (Civil Code §895 et seq.) are items that this Court may properly judicially notice under Evidence Code § 452.

“It is settled that a person has a constitutional right to a judicial determination of questions of law such as those dealing with the interpretation and application of statutes.” (*Superior Strut & Hanger Co. v. Port of Oakland* (1977) 72 Cal.App.3d 987, 1000.) “As emphasized time and again, the fundamental rule of statutory interpretation is to ascertain the intent of the Legislature so as to effect the purpose of the law. (*County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 199.) The legislative intent may be ascertained not only by considering the words used but also by taking into account other matters as well, such as the object in view, the evils to be remedied, the legislative history, public policy and contemporaneous administrative construction (Citations omitted).” (*English v. County of Alameda* (1977) 70 Cal.App.3d 226, 233-234.)

There is direct support and authorization for judicial notice of materials compiled by the Legislative Intent Service (such as those McMillin has

offered here). (See, *Frio v. Superior Court* 203 Cal. App. 3d 1480, 1487 at fn. 3, “We utilize certain documents regarding legislative history furnished by the Legislative Intent Service, a commercial service which provides documents relating to the origin of California statutes. For an example of its use by the Supreme Court, see *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 218-219”; and, *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (1993) 12 Cal. App. 4th 1371, 1381, Judicial notice of legislative materials for purpose of determining legislative intent.) Consequently, this Court may justifiably grant McMillin’s request.

Attached as Exhibit 1 to McMillin’s Motion for Judicial Notice of Legislative History of SB800, filed on or around May 20, 2014 with the Fifth District Court of Appeal (granted on September 9, 2014), part of the appellate record herein, is the entire legislative history as produced by Legislative Intent Service, Inc., Bates numbered 000001 to 000428 (Vol. 1 000001-000300, Vol. 2 000301-000428). Attached as Exhibit 2 to that Motion is a Declaration of Maria A. Sanders describing the method by which Legislative Intent Service, Inc. gathered the documents contained in Exhibit 1 and authenticating the same.

In the Answer Brief on the Merits, McMillin cites to less than all documents contained in Exhibit 1. However the entirety of the results of Legislative Intent Service, Inc.’s compilation is included in Exhibit 1 so as to

avoid the appearance of selectively including only the documents favorable to  
McMillin's position.

DATED: June 15, 2016

Respectfully submitted,

BORTON PETRINI, LLP

By 

Andrew M. Morgan, Attorneys  
for Petitioners, McMillin Albany,  
LLC, a Delaware Limited  
Liability Company; and McMillin  
Park Avenue, LLC, a Delaware  
Limited Liability Company

**PROOF OF SERVICE**

I am employed in the County of KERN, State of California. I am over the age of 18 and not a party to the within action; my business address is Borton Petrini, LLP, 5060 California Avenue, Suite 700, Bakersfield, California 93309.

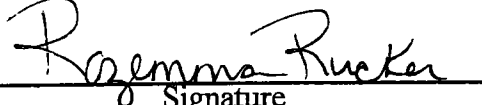
On June 15, 2016, I served the foregoing document described as **McMILLIN'S MOTION FOR JUDICIAL NOTICE OF LEGISLATIVE HISTORY OF SB800**, on the other parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

**SEE ATTACHED SERVICE LIST**

- BY MAIL:** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice the envelope would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business.
- BY FACSIMILE:** I caused each document to be delivered by electronic facsimile to the listed above. The facsimile machine I used complied with California Rules of Court, Rule 2.301 and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2.306.
- BY OVERNIGHT SERVICE:** I caused each envelope with postage fully prepaid to be sent by overnight.
- BY PERSONAL SERVICE:** Pursuant to C.C.P. section 1011, I caused to be delivered such envelope by hand to the offices of the addressee(s) listed on the attached mailing list.
- BY ELECTRONIC SERVICE:** Pursuant to Code of Civil Procedure section 1010.6 and California Rules of Court, Rule 2.251, service shall be completed via electronic transmission to the attached person(s) transmission of such is at the e-mail address(es) indicated on the attached mailing list.
- FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this June 15, 2016, at Bakersfield, California.

<b>Rozemma (Sissy) Rucker</b>	
Type or Print Name	Signature



**SERVICE LIST**

<p>Mark A. Milstein, Esq.          Fred M. Adelman, Esq.          *Mayo L. MaKarczyk, Esq.  <b>MILSTEIN ADELMAN, LLP</b>          10250 Constellation Blvd.,          Suite 1400          Los Angeles, CA 90067</p>	<p>Tel: (310) 393-9600          Fax: (310) 396-9635  <a href="mailto:mmakarczyk@milsteinadelman.com">mmakarczyk@milsteinadelman.com</a>  <i>Attorneys for Plaintiffs, Van Tassel,          et al.</i></p>
<p>Kathleen F. Carpenter, Esq.          Donahue Fitzgerald LLP          1646 N California Blvd., Suite 250          Walnut Creek, CA 94596</p>	<p><i>Attorneys for Amicus Curiae,          California Building Industry          Association</i></p>
<p>Alan H. Packer, Esq.          Jon Nathan Owens, Esq.          Newmeyer &amp; Dillion          895 Dove Street, 5th Floor          Newport Beach, CA 92660</p>	<p><i>Attorneys for Amicus Curiae,          Leading Builders of America</i></p>
<p>Clerk of the Court          Kern County Superior Court          1415 Truxtun Avenue          Bakersfield, CA 93301</p>	<p>Honorable David R. Lampe</p>
<p>Civil Clerk of the Court          Fifth District Court of Appeal          2424 Ventura Street          Fresno, CA 93721</p>	

