SUPREME COURT
FILED
CRC 8.25(b)
JUN 16 2016
Frank A. McGuire Clerk
Deputy

S229762

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al., *Petitioners*, v. SUPERIOR COURT OF KERN COUNTY, *Respondent*, CARL & SANDRA VAN TASSEL, et al., *Real Parties in Interest.*	)	Kern County Superior Court Case No. S-1500-CV-279141 Honorable David Lampe, Judge Presiding, Dept. 11

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

REPLY BRIEF ON THE MERITS

MILSTEIN ADELMAN JACKSON
FAIRCHILD & WADE, LLP
Mark A. Milstein, SBN 155513
Fred M. Adelman, SBN 131658
*Mayo L. Makarczyk, SBN 203035
(mmakarczyk@milsteinadelman.com)
10250 Constellation Blvd., 14th Floor
Los Angeles, California 90067
Phone: (310) 396-9600
Fax: (310) 396-9635

Attorneys for Real Parties in Interest Carl & Sandra Van Tassel, et al.

S229762

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al., *Petitioners,* v. SUPERIOR COURT OF KERN COUNTY, *Respondent,* CARL & SANDRA VAN TASSEL, et al., *Real Parties in Interest.*	Kern County Superior Court Case No. S-1500-CV-279141 Honorable David Lampe, Judge Presiding, Dept. 11

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

REPLY BRIEF ON THE MERITS

MILSTEIN ADELMAN JACKSON
FAIRCHILD & WADE, LLP
Mark A. Milstein, SBN 155513
Fred M. Adelman, SBN 131658
*Mayo L. Makarczyk, SBN 203035
(mmakarczyk@milsteinadelman.com)
10250 Constellation Blvd., 14th Floor
Los Angeles, California 90067
Phone: (310) 396-9600
Fax: (310) 396-9635

Attorneys for Real Parties in Interest Carl & Sandra Van Tassel, et al.

TABLE OF CONTENTS

Page

INTRODUCTION 1

1. The Enactment of SB800 Did Not Nullify the Right of California Homeowners to Recover in Tort for Damage-Causing Defects 2
   a. The Prohibitory Language in the Relevant Statutory Provisions Is Not Inconsistent with the *Liberty Mutual* Court's Interpretation of SB800 2
   b. The "Exception" Clauses in the Relevant Statutory Provisions Are Not Inconsistent with the *Liberty Mutual* Court's Interpretation of SB800 5
   c. McMillin Fails to Address the Problem of Damage-Causing Defects Discussed in *Liberty Mutual* 7
2. There Is No Cause of Action Under Civil Code Section 897. If SB800 Is the Exclusive Remedy for Conditions that Violate the SB800 Building Standards, then Plaintiffs May Still Sue in Tort for Defects that Are Not Covered by the Standards 12
3. Plaintiffs May Likewise State Causes of Action for Breach of Contract and Breach of Express Warranty 14
4. Plaintiffs Who Assert only Non-SB800 Causes of Action Are Not Required to Comply with the SB800 Prelitigation Procedure 15

CONCLUSION 21

CERTIFICATE OF WORD COUNT 22

TABLE OF AUTHORITIES

Cases

Page(s)

Aas v. Superior Court
24 Cal.4th 627 (2000) .... *passim*

Burch v. Superior Court
223 Cal.App.4th 1411 (2014) 4, 11

County Sheriff's Department v. Stiglitz
60 Cal.4th 624 (2014) 3

KB Home Greater Los Angeles v. Superior Court
223 Cal.App.4th 1471 (2017) 8, 9

Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC
219 Cal.App.4th 98 (2013) .... *passim*

People v. Elmore
59 Cal.4th 121 (2014) 3

Verdugo v. Target Corporation
59 Cal.4th 312 (2015) 13

Statutes

Cal. Civ. Code

section 896 .... *passim*
section 897 .... *passim*
section 910 .... *passim*
section 912 .... 15, 20
section 913 .... 8, 9
section 914 .... 15, 19
section 916 .... 8, 9, 10, 11
section 917 4

section 918 11
section 921 11
section 930 .... 7, 16
section 941 20
section 942 .... 19, 20
section 943 .... *passim*
section 944 .... 5, 9, 13
section 945.5 .... 8, 19

S229762

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al., *Petitioners,* v. SUPERIOR COURT OF KERN COUNTY, *Respondent,*	)	Kern County Superior Court Case No. S-1500-CV-279141 Honorable David Lampe, Judge Presiding, Dept. 11
CARL & SANDRA VAN TASSEL, et al., *Real Parties in Interest.*	)	

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

REPLY BRIEF ON THE MERITS

INTRODUCTION

In its Answer, McMillin does not take issue with the manner in which the issues are framed in Plaintiffs' Opening Brief. (See Answer, p. 2, and Opening Brief, pp. 1-2.) Initially, the question is what, if any, common law rights belonging to California homeowners the Legislature nullified with the

enactment of SB800. As discussed below and in Plaintiffs' Opening Brief, the answer is none, precisely as the Fourth District Court of Appeal found in *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC* (2013) 219 Cal.App.4th 98. And, to the extent that any such incursion has taken place, it is limited to the ability to recover in tort for the defects that are listed in Civil Code section 896. Finally, in no event is any person who seeks no relief under SB800 required to comply with the SB800 prelitigation procedure.

1. The Enactment of SB800 Did Not Nullify the Right of California Homeowners to Recover in Tort for Damage-Causing Defects

In addressing the first issue before this Court, the primary question is whether the right to sue in tort for damage-causing defects survived the enactment of SB800. McMillin has failed to demonstrate in its Answer that the Legislature intended to take this long-held right away from California homeowners.

a. The Prohibitory Language in the Relevant Statutory Provisions Is Not Inconsistent with the *Liberty Mutual* Court's Interpretation of SB800

McMillin devotes a lengthy section of its Answer to a discussion of the rules that this Court has established governing the construction of statutes. (Answer, pp. 8-12.) Frequently, these rules state that the plain meaning of the terms of a statute is subordinate to the task of interpreting the statute in a

manner that comports with the Legislature's intent. (See Answer, pp. 8-11, citing to *People v. Elmore* (2014) 59 Cal.4th 121, 139-140 ["'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with the other provisions of the statute"]; and *Riverside County Sheriff's Department v. Stiglitz* (2014) 60 Cal.4th 624, 630 ["[The Court] may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results"].)

Applying these authorities, the primary issue before this Court is whether the *purpose* of SB800 is to nullify the common law right of homeowners to bring a tort action for damage-causing construction defects, as set forth in *Aas v. Superior Court* (2000) 24 Cal.4th 627, or simply to establish a separate means by which homeowners may seek to recover for defects that have not yet caused physical damage.

Initially, McMillin takes issue with Plaintiffs' contention that the Legislature sought to streamline construction defect litigation by permitting recovery for defects that have not resulted in physical damage to the claimant's home. (Answer, pp. 14-16.) However, the legislative history is clear that this is precisely what the Legislature intended. (See Opening Brief, pp. 9-10.) The Legislature's hope was that by permitting claims for identifiable but non-damage-causing defects, SB800 would promote early-stage resolution, both by

way of the mandatory prelitigation procedure and by eliminating the need for the claimant to prove resulting damages. This in turn would lessen the need for traditional construction defect litigation, reduce the cost of liability insurance, and ultimately reduce the cost of new homes. The legislative history of SB800 does not reflect any finding by the Legislature that in order to accomplish this goal, it would need to eliminate California homeowners' long-held common law right to recover in tort for damage-causing defects. For this reason, SB800 should not be read to do so unless its plain terms allow for no other rational conclusion concerning the Legislature's intent.

As for the prohibitory language in Civil Code section 896, the statute can rationally be read to state that SB800 is the exclusive means by which to recover for a violation of the building standards in section 896(a) through (g), or it can be read to state that SB800 is the exclusive means by which any homeowner can seek to recover for construction defects, period. Since the latter reading nullifies the common-law rights of California homeowners, this Court should adopt the reasoning of *Liberty Mutual* and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, and find that the regulatory ambit of SB800 extends to actions to recover for defects that have not caused damage to the claimant's home.

If the Court accepts this interpretation of section 896, then the prohibitory language in section 943(a), stating that, "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," must be construed the same way. That is, that the strictures of SB800 provide the sole means by which a homeowner may seek to recover for a violation of the building standards set forth in section 896. This, too, is not inconsistent with the conclusion that SB800 seeks to provide a means of recovery for non-damage-causing defects, but does not nullify the common law rights of homeowners.

b. The "Exception" Clauses in the Relevant Statutory Provisions Are Not Inconsistent with the *Liberty Mutual* Court's Interpretation of SB800

In contending that SB800 nullifies the common law rights of California homeowners, McMillin points to several "exception" provisions in SB800. First, it cites to the language in Civil Code section 896 stating that, "As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law." (Answer, pp. 23-24.) McMillin claims that, if the Plaintiffs were correct in their contention that SB800 does *not* abrogate the common law right of homeowners to sue for construction defects in tort, then "the condominium conversion law exception in section 896 would be a completely superfluous and absurd provision." (Answer, p. 24.)

Of course, in recognizing the common law right of homeowners to recover in tort, *Aas v. Superior Court*, *supra*, 24 Cal.4th 627 places a

fundamental limitation on such actions--namely, that the defective conditions at issue must cause physical damage to the home. (*Id.* at pp. 635-636 and 652-653.) While leaving the common law rights intact, SB800 "supersedes" this limitation by enabling homeowners to bring a statutory action for violation of the standards set forth in Civil Code section 896 even in the absence of resulting damage. However, in the language cited by McMillin, section 896 simply states that this statutory cause of action does not extend to condominium conversions. This is not inconsistent with the Plaintiffs' interpretation of SB800.

The same is true of the next provision that McMillin points to--Civil Code section 896(g)(3)(E), which states that, "This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure." (Answer, p. 25.) Of course, *Aas* would not permit such recovery either. So, this provision simply means that the effect of SB800--that a homeowner may recover for certain defects even if they have not caused damage to the home--does not apply if the defect in question consists solely of a defective manufactured product. Indeed, section 896(g)(3)(E) primarily exists in order to clarify the breadth of section 896(g)(3)(A), which permits a homeowner to recover if a manufactured product's useful life is shortened because it was installed incorrectly. In any

event, section 896(g)(3)(E) is in no way inconsistent with the Plaintiffs' contention that SB800 does not limit the right to tort recovery set forth in *Aas*.

Finally, McMillin cites to the language in Civil Code section 943(a) stating that, "In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute." (Answer, pp. 25-26.) However, this too may be read as simply saying that SB800 "applies to" common law tort actions by statutorily overriding the requirement stated in *Aas* that defects are not actionable unless they have resulted in physical damage to the home. As to the remaining causes of action listed in this portion of section 943(a)--actions for breach of contract, fraud, or personal injury--the *Aas* limitation never affected them to begin with.

c. McMillin Fails to Address the Problem of Damage-Causing Defects Discussed in *Liberty Mutual*

In their Opening Brief, Plaintiffs point to the fact that the statutory timeline set forth in the SB800 prelitigation is mandatory, strictly applied, and does not change, except by mutual agreement of the parties. (See Opening Brief, pp. 25-26; see also Civ. Code sec. 930(a) ["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 in accordance with this chapter, shall govern the rights and obligations under this title."]) Under Civil

Code section 913, for example, a builder has 14 days to respond to a homeowner's notice of claim, and under section 916(a) and (c), respectively, the builder has another 14 days in which to conduct its initial inspection, and another 40 days after that to conduct its second inspection. A builder has no statutory obligation to respond or conduct inspections or repairs according to any timetable other than this.

McMillin does not deny this, however it does acknowledge that homeowners and their insurers do *not* get the benefit of this timetable under SB800. It states, "[T]here is nothing in the SB800 statutory scheme or any published case that prevents [sic] homeowners (or their insurers) to wait 14 days before beginning reasonable mitigation efforts in connection with a catastrophic loss. Indeed, taking that reasonable mitigation action is the homeowner's/insurer's duty under section 945.5(b)." (Answer, p. 32.)

While McMillin acknowledges that SB800 requires immediate action by a homeowner to address a damage-causing defect, while placing no such burden on the builder, McMillin claims that "built into the SB800 statutory scheme are strong incentives for builders to respond quickly to catastrophic events." (Answer, p. 32.) McMillin cites to *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, for the proposition that, since a builder is responsible for consequential damages under Civil Code

section 944, the builder has an incentive to act quickly to respond in the event of an emerging loss. (Answer, p. 32.)

However, *KB Home* stands for the rule that if a homeowner repairs a loss without giving notice to the builder under SB800, then the homeowner (or his or her insurer in a subrogation action) has no standing to pursue the builder under SB800, and the builder is entitled to summary judgment. (*KB Home*, *supra*, 223 Cal.App.4th at pp. 1475-1476.) *KB Home* did *not* confront the question of what happens when a homeowner *does* give notice, but the builder's inspection and repair rights are still defeated, because the builder opts to use the amount of time allotted to it under sections 913 and 916, and the repairs are completed before it ever gets around to conducting an inspection. Would the builder in such a case lose its right to conduct an inspection and repairs because it did not respond in *less than* the statutory period that it is allowed under sections 913 and 916? Would the builder be entitled to summary judgment of a subsequent SB800 action under *KB Home*? The language of SB800 indicates that it would be. Indeed, there is nothing in SB800 to suggest that it would not be.

However, perhaps less important than the answer to this question is what the question itself indicates about how SB800 as a whole should be

construed.[1] There is little to suggest any intention on the Legislature's part that SB800 would apply to defects which, at the time of the claim, are actively causing damage to the claimant's home and require immediate attention. This is apparent from the language of section 916, which clearly contemplates a situation in which no damage has yet been caused by any defect. Section 916 states, in pertinent part:

> (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative's office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. . . . The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. . . .
>
> . . . .
>
> (c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. . . . .
>
> . . . .

[1] This is why it makes no difference that, as McMillin points out, the "catastrophic loss" situation is outside the factual context of this case. (Answer, p. 29.)

> (e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. . . . .

These provisions in section 916, along with similar ones found in sections 917, 918, and 921, clearly reflect an assumption that the defects at issue in a given claim will not require immediate attention by the builder. They do not require the builder to act except in the specified timeframe.

Since the SB800 prelitigation process does not contemplate defects that require immediate attention, and is in fact entirely incompatible with such defects, the *Liberty Mutual* court reasonably concluded that SB800 is intended to apply to defects that have not resulted in damage, and that SB800 is not intended to nullify the common law rights that permit a homeowner to bring a tort action for defects that *are* causing physical damage to his or her home. (See *Liberty Mutual, supra*, 219 Cal.App.4th at pp. 104, 106.) This is the essential holding of both *Liberty Mutual* and *Burch v. Superior Court*, *supra*, 223 Cal.App.4th 1411, and it should be upheld by this Court.

2. There Is No Cause of Action Under Civil Code Section 897. If SB800 Is the Exclusive Remedy for Conditions that Violate the SB800 Building Standards, then Plaintiffs Still May Sue in Tort for Defects that Are Not Covered by the Standards.

Assuming that the exclusionary language in section 896 is to be read in the manner that McMillin contends, then a claimant may seek to recover only for "violation of the following standards, except as specifically set forth in this title." The logical reading of "the following standards" is "the following lengthy list of building standards in this particular code section." However, McMillin asks this Court to read the phrase "the following standards" in section 896 to include not only the detailed and highly particular list of standards which does in fact follow, but *also* the language in the following section, 897, which 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 McMillin's view, *this* language--all of it, apparently--is *itself* a building standard. (Answer, pp. 39-40.)

McMillin makes this bizarre contention because it must, in order to defend the Fifth District's unexplained conclusion that there exists a cause of action under section 897. (Notably, while the Fifth District reached this

conclusion, even it never said that section 897 is *itself* a building standard.) This is because the prelitigation procedure applies on its face only to "claimed violations" of "the standards set forth in Chapter 2" (Civ. Code sec. 910) and a homeowner may recover in SB800 only for a "violation of the standards set forth in this title" (Civ. Code sec. 944).

McMillin defends this position by claiming that there is "no reason" why section 897 cannot be interpreted in this manner. (Answer, p. 39.) Of course there is -- the reason is that words have meaning, and if the Legislature wanted the term "building standard" to be construed in such an utterly counterintuitive manner, then it most likely would have said so. A provision stating that some unidentified function or component which by definition "is not addressed by these standards" is *itself* a building standard on its face does not make sense.

More importantly, however, is that McMillin seeks to shift the presumption for when a statute overrides the common law. The parties have both cited to the language in *Verdugo v. Target Corporation* (2015) 59 Cal.4th 312, 326, that "[A]s a general rule, unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules." (See Answer, pp. 11-12, Opening Brief, p. 11.) There is no dispute that, prior to the enactment of SB800, building defects were actionable under the common law, provided that they caused damage.

That was, undisputedly, the common law rule, as articulated in *Aas*. So, the presumption is in favor of the common law being kept in place, absent some express statement by the Legislature to the contrary. McMillin has pointed to no such indication of a desire by the Legislature to change the common law as to defects that do not violate the section 896 building standards.

In short, section 897 can either be interpreted simply to maintain the common law as to defects which do not violate the SB800 building standards, or, through some tortured construction of the term "building standard," it can be interpreted to supplant the common law rule, such that conditions which do not violate the SB800 building standards must nonetheless be sued upon in an action under SB800. The law is clear. Section 897 simply keeps the common law in effect as to any defect which does not violate the section 896 building standards. It does not set up its own "cause of action" under SB800.

3. Plaintiffs May Likewise State Causes of Action for Breach of Contract and Breach of Express and Implied Warranty.

McMillin concedes that under what it contends to be the correct reading of Civil Code section 943(a), Plaintiffs may bring "actions . . . to enforce a contract or express contractual provision." (Answer, p. 52.)

McMillin furthermore concedes that the same is true of actions for breach of implied warranty, *if* such actions are "contractual in nature." (Answer, p. 57, f.n. 6.) In their Opening Brief, the Plaintiffs explain at length

that an action for breach of implied warranty *is* an action on a contract. (See Opening Brief, p. 35, f.n. 5.) McMillin has made no contention to the contrary.

4. Plaintiffs Who Assert Only Non-SB800 Causes of Action Are Not Required to Comply with the SB800 Prelitigation Procedure

Plaintiffs set forth at length in their Opening Brief their contention that a claimant who alleges only non-SB800 causes of action is not required to comply with the SB800 prelitigation procedure. (Opening Brief, pp. 36-44.)

In response, McMillin first contends that the prelitigation procedure is an "absolute right" which is not subject to the claimant's "pleading whims." (Answer, p. 41.) First, <u>the right is not absolute</u>. <u>The word "absolute" is nowhere in the text of SB800</u>. At best, the right is qualified, on the basis of many different things, including (but not limited to) the builder's compliance with the disclosure requirements in Civil Code section 912, the builder's compliance with the various time requirements in the statutory procedure, and the enforceability of the builder's alternative procedure under Civil Code section 914(a), if it chooses to adopt one. And second, a plaintiff is the master of his or her own action, and may choose from among different theories of recovery, whether based on contract, tort, or statute. This is a fundamental precept of litigation, not a "pleading whim." If a plaintiff sues in tort for construction defects, then he or she must prove resulting damage, a substantive requirement that does not exist in a cause of action brought under SB800.

Next, McMillin contends that a homeowner must comply with the prelitigation process before initiating litigation, and therefore must do so regardless of what cause of action he or she later pleads after the procedure is complete. (Answer, pp. 43-47.) This contention is clearly incorrect. A homeowner will of course know at the outset what theories of recovery he or she will pursue. If, on this basis, he or she believes that the SB800 prelitigation procedure does not apply, then he or she can file an action in court, just as the Plaintiffs herein did before the trial court. If the builder believes that the homeowner is obligated to complete the prelitigation procedure, then the builder may move for a stay under Civil Code section 930(b), just as McMillin did before the trial court. If the builder is successful, then the trial court may award it its fees and costs. (Civ. Code sec. 930(b).)

McMillin suggests that a homeowner cannot contest the applicability of the SB800 prelitigation procedure until after he or she has filed an action, which must take place *after* he or she has already complied with the procedure. This makes no sense, obviously, because a party can hardly contest the applicability of a procedure that he or she has already complied with.

McMillin does not dispute that the only statutory provision that requires anyone to comply with the prelitigation procedure is Civil Code section 910, which states, in pertinent part, that "Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2

(commencing with Section 896), the claimant shall initiate the following prelitigation procedures." (See Opening Brief, p. 38.) McMillin likewise does not dispute that words of a statute are to be given their ordinary meaning, nor does it directly dispute that the ordinary meaning of section 910 is that, before a person may seek relief *under SB800*, he or she must complete the SB800 prelitigation procedure.

Instead, McMillin parses section 910, stating that if the Legislature had wanted to confine the prelitigation procedure to persons who actually sought relief under SB800, then section 910 would refer to "an action in which a party is alleged to have contributed to a violation of the standards" instead of "an action against any party alleged to have contributed to a violation of the standards." (Answer, p. 44.) McMillin apparently believes that the latter formulation requires compliance with the SB800 prelitigation procedure even in the absence of a claim for relief under SB800, while the former formulation would not. (Answer, p. 44.) The reason for this is obscure, but seems to have something to do with whether an "action" is contemplated to exist at the time that the claimant serves his or her notice of claim. (Answer, pp. 44-45.) This distinction is irrelevant for the reasons stated above. Obviously, a person has a basis for recovery in mind before he or she commences a claim of any kind against the builder. The simple fact that a procedure is supposed to take place

prior to litigation does not bar the claimant from contending that it does not apply based upon his or her theory of recovery.

Then, McMillin changes its mind, and contends that regardless of how section 910 is worded, it must be read to require compliance with the prelitigation procedure regardless of the claimant's theory of recovery, because otherwise "the Legislature could not have achieved its purpose of reducing litigation as the result of the prelitigation process." (Answer, p. 46.) The problem with this is that if the Legislature thought the best way to fulfill the purpose of SB800 was to make it applicable to anyone with a defect claim, regardless of whether or not that person seeks any relief under SB800, then it would have written the requirement into the statute, and it did not. McMillin also ignores the fact that section 910 requires the notice of claim to state on its face that "the claimant alleges a violation pursuant to this part against the builder." (See Opening Brief, p. 40.)

McMillin then posits that an action for breach of contract or a tort action based upon defects which violate the SB800 building standards *is* in substance an action under SB800. (Answer, pp. 46-47.) This is clearly wrong. It is one thing for a court to overrule a demurrer because it finds that the facts pled constitute a valid cause of action, albeit one that is improperly labeled in the complaint. It is another thing to infer that a *validly* pled cause of action for strict liability or breach of warranty is in fact a cause of action under SB800,

for the purposes of determining whether the plaintiff is required to comply with the SB800 prelitigation procedure.

Plaintiffs contend in their Opening Brief that Civil Code section 914(a) states that if the prelitigation procedure does not resolve the dispute, then the one which follows will be to enforce *SB800*. (Opening Brief, p. 41.) McMillin does not deny that in referring to "a subsequent action to enforce the other chapters of this title," section 914(a) refers to an action that seeks relief under SB800. (Answer, p. 47.) It then makes much of the Legislature's use of the word "may" in section 914(a), suggesting that the failure of the prelitigation procedure "may" also result in an action for breach of contract. (Answer, p. 47.) This is a strained reading of the statute. The Legislature used the word "may" because the failure of the prelitigation procedure will not *necessarily* result in any lawsuit. But, if it does, then it will be an action under SB800.

Plaintiffs also explain why Civil Code section 942 supports their reading of section 910 -- because it refers to "a claim for violation of the standards set forth in Chapter 2" as one in which the homeowner need not prove causation, but only "that the home does not meet the applicable standard, subject to the affirmative defenses set forth in Section 945.5." (Opening Brief, pp. 41-42.) In other words, it identifies an action using words very similar to those in section 910 (which refers to "an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2"), and

then it makes clear that the action it refers to is one in which relief is sought *under SB800*. (Opening Brief, pp. 41-42.) McMillin's response is that, "There is no reason why section 942 should not be construed to apply only to claims that have not caused resulting damage, and at the same time require a showing of causation where claims where [sic] resulting damages are sought." (Answer, p. 48.) Plaintiffs do not understand this response.

Finally, specifically in regards to an action for breach of contract or express or implied warranty, Plaintiffs contend that section 910 can hardly apply because section 943(a) states that "*this title does not apply*" to such claims, and because section 941(e) states 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." (Opening Brief, p. 43.)

McMillin responds by ignoring the provisions cited by the Plaintiffs and instead discussing the requirements for enhanced protection agreements, and the disclosure requirements under Civil Code section 912. (Answer, pp. 53-57.) McMillin's discussion here is irrelevant and incomprehensible.

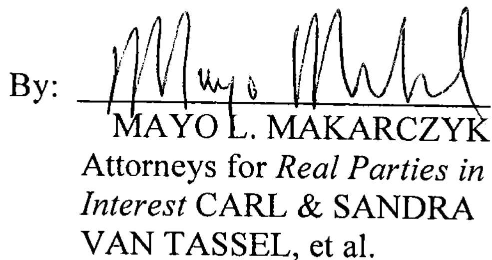
In short, SB800 is quite clear that in the absence of a claim for relief under SB800, the claimant has no obligation to comply with the SB800 prelitigation procedure at Civil Code section 910, et seq.

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: June 15, 2016

MILSTEIN ADELMAN JACKSON
FAIRCHILD & WADE, LLP
Mark A. Milstein
Fred M. Adelman
Mayo L. Makarczyk

By: 
MAYO L. MAKARCZYK
Attorneys for *Real Parties in Interest* CARL & SANDRA VAN TASSEL, et al.

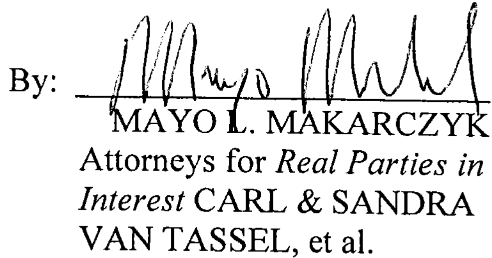
CERTIFICATE OF WORD COUNT

I certify that, under California Rules of Court, rule 8.520(c)(1), the preceding Reply Brief on the Merits contains 4,839 words.

Respectfully submitted,

Dated: June 15, 2016

MILSTEIN ADELMAN JACKSON
FAIRCHILD & WADE, LLP
Mark A. Milstein
Fred M. Adelman
Mayo L. Makarczyk

By: 
MAYO L. MAKARCZYK
Attorneys for *Real Parties in Interest* CARL & SANDRA VAN TASSEL, et al.

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 June 15, 2016, I served the foregoing document(s) described as:

REPLY 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

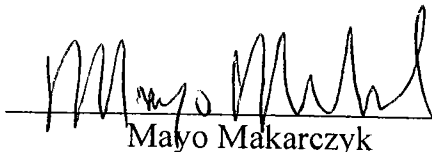
( ) **BY MAIL** as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed 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 June 15, 2016 at Los Angeles, California.



Mayo Makarczyk

SERVICE LIST

Calvin R. Stead Andrew M. Morgan BORTON PETRINI, LLP 5060 California Ave., Suite 700 Bakersfield, California 93309	Attorneys for *Petitioners* McMILLIN ALBANY, LLC; and McMILLIN PARK AVENUE, LLC
Alan H. Packer NEWMEYER & DILLION LLP 1333 North California Blvd., Suite 6 Walnut Creek, California 94596	Attorneys for *Objectors to Request for Depublication* CALIFORNIA BUILDING INDUSTRY ASSOCIATION, LEADING BUILDERS OF AMERICA, and BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION
Robert V. Closson HIRSCH CLOSSON 591 Camino de la Reina, Suite 909 San Diego, California 92108	Attorneys for *Objector to Request for Depublication* PROFESSIONAL ASSOCIATION OF SPECIALTY CONTRACTORS
Donald W. Fisher ULICH GANION BALMUTH FISHER & FELD LLP 4041 MacArthur Blvd., Suite 300 Newport Beach, California 92660	Attorneys for *Amicus Curiae* ULICH GANION BALMUTH FISHER & FELD, LLP