S229762

IN THE SUPREME COURT OF CALIFORNIA

MCMILLIN ALBANY LLC et al.,
Petitioners,

v.

THE SUPERIOR COURT OF KERN COUNTY,
Respondent;

CARL VAN TASSELL et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH APPELLATE DISTRICT
CASE NO. F069370

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

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ATTORNEYS FOR AMICUS CURIAE
MWI, INC.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f)(1) of the California Rules of Court, amicus curiae MWI, Inc. respectfully requests permission to file the attached brief. MWI's proposed amicus brief supports the result sought by real parties in interest Carl and Sandra Van Tassel (Van Tassel), but advances new arguments and authorities.

Interest of Amicus Curiae

Amicus MWI is the defendant/appellant in a case now pending before the California Court of Appeal, which is captioned *Acqua Vista Homeowners Association v. MWI, Inc.* (D068406, app. pending) (*Acqua Vista*). MWI was sued by the Acqua Vista Homeowners Association (the HOA) as a supplier of cast iron pipe

for use in a high-rise residential construction project in downtown San Diego. Designed, permitted and substantially constructed as apartments, the 382 dwelling units in the building were then sold as condominiums. The HOA alleged there were deficiencies in the building's plumbing system, for which MWI was liable under Civil Code section 895 et seq., otherwise known as Senate Bill Number 800 (SB 800) and the "Right to Repair Act." A jury returned a verdict against MWI and awarded the HOA almost $24 million to replace all the sewer and storm drain pipe in the building.

One of the issues raised at the trial and on MWI's appeal from the judgment concerns the basis for a product distributor's liability to a homeowner claimant under SB 800. The first sentence of Civil Code section 936 states that distributors ("material suppliers" or "product manufacturers") are liable to the extent that they contributed to "a violation of a particular standard [of construction] as a result of a *negligent act or omission* or a breach of contract." (Emphasis added.) However, the *Acqua Vista* trial court ruled that the negligence standard did *not* apply to MWI due to the last sentence of section 936, which states: "[t]he negligence standard in this section does not apply to any . . . [distributor] . . . with respect to claims for which strict liability would apply." The trial court ruled that, because the HOA might have alleged that MWI was strictly liable under the common law for any product defects and the actual harm they caused, the issue of negligence should not be submitted to the jury under SB 800. MWI has argued on its appeal that the court misconstrued section 936.

MWI and the HOA have attributed conflicting meanings to the word "claims" as used in connection with "strict liability" in the

last sentence of Civil Code section 936. MWI has argued that "claims" refers to common law tort causes of action for strict product liability, and that the Legislature intended the last sentence to clarify that section 936's negligence standard did not change the common law, which persists alongside SB 800. Conversely, the HOA contends that SB 800 completely preempted the common law, so MWI's position cannot be correct. According to the HOA, the word "claims" must refer to the right to recover under SB 800, and the intent of the last sentence in section 936 was to deny product distributors the benefit of the negligence standard of proof described in the first sentence of section 936.

Thus, the issue of statutory preemption that Van Tassel has presented to this Court could be significant to the proper disposition of MWI's appeal. The briefs of the parties have not heretofore focused on Civil Code section 936. However, as explained in MWI's proposed amicus brief, section 936 is highly germane to the statutory interpretation issue.

In addition, MWI's amicus brief comments on the proper understanding of Civil Code sections 896, 943 and 944, on which the *McMillin Albany* Court of Appeal relied to find preemption. Finally, MWI dispels the *McMillin Albany* Court of Appeal's concern that in the absence of preemption of the common law, enactment of SB 800 could not further the Legislature's goal of reducing the overall costs of new home construction defect litigation.

Accordingly, MWI respectfully requests that this Court accept and file its attached brief, because it will assist the Court in deciding the issue presented.

No Other Party Involved

MWI's liability insurers are paying for the preparation and submission of this brief. No party or its counsel, or other person or entity, has authored this brief in whole or in part, or made a monetary contribution to fund the preparation or submission of this brief. (Cal. Rules of Court, rule 8.520(f)(4).)

August 12, 2016

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ATTORNEYS FOR AMICUS CURIAE MWI, INC.

AMICUS CURIAE BRIEF

INTRODUCTION

MWI, Inc. submits this brief in support of real parties in interest Carl and Sandra Van Tassel (Van Tassel). MWI's brief presents new arguments and authority for why this Court should reverse the Court of Appeal and hold that SB 800 (otherwise known as the "Right to Repair Act") does not preclude a common law cause of action based on a defect in construction of a new home that caused physical damage to the home, such as a claim for negligence or strict liability. MWI writes separately to discuss the implications of Civil Code section 936 [1]; to provide some additional perspective on the purpose of sections 896, 943 and 944 (the provisions of SB 800 on which the Court of Appeal principally relied to reach its contrary conclusion); and to dispel the Court of Appeal's misplaced concern that common law preemption was necessary to further the Legislature's goal of reducing the costs of new home construction-defect litigation.

Specifically, it appears that neither the Court of Appeal nor the parties have heretofore considered the significance of section 936. Section 936 is, however, highly germane to the statutory preemption issue presented in this case, because a finding of preemption of the common law cannot be reconciled with section 936, which expressly contemplates the continued existence of

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[1] SB 800 has been codified at Civil Code section 895 et seq. All further statutory references are to the Civil Code unless otherwise indicated.

"claims for which strict liability would apply." This language was added by an amendment to section 936 a year after SB 800 was originally enacted. The Legislature would not refer to strict liability claims in that amendment if the common law had already been preempted.

As for sections 896, 943,and 944, the provisions of SB 800 that have been briefed by the parties, MWI will explain why they do not clearly and unequivocally demonstrate the Legislature's intent to preempt the common law theories of recovery that were already available to new home buyers, which is the test for preemption. Rather, the intent underlying these provisions was to ensure that SB 800 is construed as a statute of limited application that is strictly applied according to its terms, and that courts refrain from incorporating its novel obligations and remedies elsewhere in the law.

Finally, MWI will explain why the Legislature may have believed that SB 800 and the common law can coexist without compromising the goal of reducing the long-term costs of litigation over new home construction defects.

ARGUMENT

I. THE PURPORTED PREEMPTION OF THE COMMON LAW BY SB 800 CANNOT BE RECONCILED WITH SECTION 936, WHICH EXPRESSLY REFERS TO STRICT LIABILITY CLAIMS.

A. The Legislature amended the last sentence of section 936 in 2003 to clarify that the negligence standard of proof for a nonbuilder construction participant's liability under SB 800 does not change the common law of strict liability for actual harm caused by defective products.

The issue before this Court is whether the Legislature intended SB 800 to preclude common law construction defect claims that would otherwise be available to the SB 800 homeowner claimant. Section 936 is compelling authority, in addition to the authorities that have already been briefed, why the Court should conclude that the Legislature did not so intend.

The first sentence of section 936 provides: "Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals"—what we will call "nonbuilders"[2]—"to the extent that the [nonbuilder] caused, in

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[2] This is to distinguish the listed construction participants from a statutorily defined "builder." (§ 911.)

whole or in part, a violation of a particular standard [of construction] as a result of a negligent act or omission or a breach of contract." However, as originally enacted in 2002, *the last sentence* said that "this section [936] *does not apply* to any [nonbuilder] to which strict liability would apply." (See MJN 77-78, emphasis added.)[3]

Read literally, the last sentence exempted a nonbuilder from the scope of section 936 if the nonbuilder fell within the class of persons, like distributors, that were subject at common law to strict liability in tort for defective products that caused actual harm (e.g., "material suppliers" or "product manufacturers"). And since section 936 was *the only basis* for a nonbuilder's statutory liability to a homeowner, the language effectively barred SB 800 actions against an exempted nonbuilder.[4]

However, that total exemption from SB 800 was clearly *not* what the Legislature wanted. The next year, it unanimously passed "technical"/"noncontroversial"/"cleanup" amendments to SB 800, which inter alia added the following (underlined) language to the last sentence of section 936: "<u>the negligence standard in</u> this section [936] does not apply to any [nonbuilder] <u>with respect</u> to <u>claims for</u> which strict liability would apply." (MJN 1, 23, 36-40, 66, 78, 85-89.)

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[3] "MJN" refers to the legislative history of Assembly Bill 903 (2003-2004 legislative session), which accompanies the motion for judicial notice that MWI is filing along with this brief.

[4] Section 895 states that nonbuilders are liable for construction standard violations under SB 800 "to the extent set forth in Chapter 4 (commencing with Section 910) . . . ." Section 936 is the provision within Chapter 4 that makes nonbuilders liable.

Thus, as originally worded, the phrase "strict liability" in section 936 related back to the listed nonbuilders, but after the amendment "strict liability" related back to "claims." This technical amendment clarified that section 936 was never intended to exempt a product distributor from SB 800 and its remedies for a purely economic loss, and the section was likewise not intended to alter the distributor's common law strict liability for actual harm resulting from product defects.

That is understandable. A few months after SB 800 was originally enacted, this Court decided *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 479-481 (*Jimenez*), holding that distributors are strictly liable for defective products that cause actual harm in the context of new home construction. The proof of negligence required by section 936 would be irrelevant to such a common law theory of liability. The amendment to the last sentence clarified that the negligence requirement for the purpose of SB 800 did not extend to any common law strict liability claim that could also be asserted.

In *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194 (*Greystone*), the Court of Appeal explained the trade-off the Legislature made. (*Id.* at pp. 1213-1216.) Under SB 800, a product distributor can be held liable for a homeowner claimant's otherwise non-compensable economic losses, *but only if* the claimant proves the supplier acted negligently (or in breach of contract) in a way that contributed to construction deficiencies. (*Id.* at pp. 1216-1217; § 936.) In other words, the greater damages recoverable from the distributor under SB 800 (economic losses)

were balanced by the greater burden of proof on the claimant seeking to recover them (negligence).

However, at common law, the supplier remains strictly liable for defects in the manufacture or design of its products—*but only to the extent* the claimant suffered *actual harm*. (See *Aas v. Superior Court* (2000) 24 Cal.4th 627, 636 (*Aas*); see also *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 292-295 [property owner was not entitled to recover the costs to repair and replace defective windows on a strict liability theory, because that was an economic loss to the owner, not actual harm].) Indeed, "[t]he common law [of strict liability] has expanded the liability of product manufacturers in this regard, albeit subject to the economic loss rule, beyond that provided in section 936." (*Greystone, supra*, 168 Cal.App.4th at p. 1216, fn. 14.) Where SB 800 and the common law overlap, the claimant may pursue either or both claims, which is consistent with the holding in *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, 109 (*Liberty Mutual*). (See also *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1414 ["We hold that the Right to Repair Act does not provide the exclusive remedy for a homeowner seeking damages for construction defects that have resulted in property damage, as here"]; *id.* at pp. 1417-1418.)

B. The Legislature would not refer to "claims" for "strict liability" in section 936 if SB 800 had preempted them.

Courts interpret statutory language in light of its usual meaning. (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58

Cal.4th 482, 490.) The phrase "strict liability" is a shorthand expression for the common law concept that a distributor is strictly liable in tort for defects in its product and for the injuries the defective product causes. (*Jimenez, supra*, 29 Cal.4th at pp. 479-481, 484; *Murphy v. E. R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 676; *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227-229.) "[T]he term 'claims' appears to refer to a claim of liability. In the context of litigation, a claim of liability against another party generally connotes a cause of action for damages."[5] (*Reed v. Wilson* (1999) 73 Cal.App.4th 439, 444 [construing Code of Civil Procedure section 877].)

The reference to "claims" in connection with "strict liability" in the last sentence of section 936 shows the Legislature contemplated that this common law theory of recovery would continue to be available alongside SB 800 in the context of defective new home construction.[6] Indeed, when urging Governor Davis to sign his bill with the 2003 amendments, Assembly Member Darrell Steinberg wrote that the amendment clarified that SB 800 "did not change the law regarding . . . strict liability . . . ." [7] (MJN 89.)

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[5] See, e.g., *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 803; *People v. Barragan* (2004) 32 Cal.4th 236, 253; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.

[6] This was the only place the Legislature used the phrase "strict liability" in SB 800.

[7] Courts may look to such communications from authors of legislation when ascertaining legislative intent. (See *Martin v. Szeto* (2004) 32 Cal.4th 445, 450-451 ["to the extent they constitute 'a reiteration of legislative discussion and events leading to adoption

(continued...)

Preempting the common law would obviously have been an enormous change in the law. It follows that none was intended.

One unconvincing response, asserted by the HOA in the *Acqua Vista* case, is that the word "claims" in the last sentence of section 936 means claims *under SB 800*, not the common law. According to the HOA, the rationale for this use of the word in the 2003 amendments was to exclude certain types of nonbuilders from section 936's negligence standard in an action under SB 800—e.g., those, like distributors, who are within the class of persons traditionally subject at common law to "strict liability" for product defects and the actual harm the defects cause.

Under the HOA's construction of section 936, product distributors are stripped of the protection of the negligence standard in section 936, and effectively put on par with builders in terms of their absolute liability under SB 800.[8] What the first sentence of section 936 gives to distributors by way of the

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(...continued)
[of legislation] rather than merely an expression of personal opinion' "].)

[8] We say that a builder's liability under SB 800 is "absolute" because all the homeowner claimant has to prove is a violation of the applicable statutory construction standard. (§ 942.) Unless the builder carries its burden of proof on an affirmative defense, the homeowner is entitled to all the remedies that the statute allows *without* proof of fault (if fault can be equated with the responsibility for placing a defective product into the stream of commerce as well as with negligence). (*Ibid.*; § 945.5; see *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1188-1189.)

heightened negligence standard of proof on the claimant in an SB 800 action, the last sentence takes away.[9]

Yet when the Legislature meant to refer to SB 800 claims or actions elsewhere in the statute, it used the phrase "under this title" or something equivalent, unless that was already clear from the context. (See, e.g., §§ 895, subd. (e), 941, subd. (e), 942, 943, subd. (a), 944.) There is no discernible reason why the Legislature would make the liability of conceivably remote product distributors under SB 800 identical to that of builders (who possess nearly total control over the construction project), while making other nonbuilders much closer to the project (e.g., contractors/design professionals) liable under SB 800 only if their negligence contributed to a construction deficiency.

Had the Legislature really intended the 2003 amendment to exclude product distributors from the negligence standard of section 936, there would have been a much simpler way to achieve that result. All the Legislature would have had to do was add the four new words near the beginning of the last sentence, so it would read: "However, the negligence standard in this section [936] does not apply to any [nonbuilder] to which strict liability would apply." In this way, the amended statute would have excluded product distributors as a class from the *negligence standard* instead of the *entire section 936.*

But the Legislature did not enact that simple amendment to section 936. Instead, it also added the (underlined) words "with

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[9] This effectively rewrites the first sentence of section 936 to say: "Each and every provision of the other chapters of this title apply to product distributors"—*period.*

respect to claims for which strict liability would apply" at the end of the sentence, something it could have stated more expansively as "claims [of product defects causing actual harm] for which strict liability would apply [against the product distributor]." These changes made clear that the negligence standard that applies against nonbuilders in SB 800 actions does not apply to strict liability "claims" against nonbuilders, which continue to exist as common law causes of action separate and distinct from SB 800.

To uphold the Court of Appeal's decision, one must reconcile its rationale for preemption of the common law with the ongoing reference to common law strict liability claims in the last sentence of section 936. That cannot be done.

II. SECTIONS 896, 943, AND 944, DO NOT JUSTIFY PREEMPTION OF COMMON LAW CLAIMS.

"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." (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 (*California Assn.*), internal quotation marks omitted.) There is a presumption that a statute does not, by implication, repeal the common law. (*Ibid.*; see also *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 326.)

Enacted in 2002, SB 800 was groundbreaking insofar as it set forth specific standards for new residential construction intended for sale. (§ 896.) It required builders to meet those standards and

gave homeowners a cause of action for violation of the standards without regard to fault (e.g., a product defect or negligence) or causation. (§ 942.) It also provided new remedies for economic loss without proof of actual harm, something this Court had just held was not compensable at common law. (§ 944; see *Aas*, *supra*, 24 Cal.4th at pp. 632, 636.)

Though SB 800 effected dramatic changes in the context of construction defect litigation, this Court has characterized a claim under the statute as a "limited new cause of action . . . ." (*Jimenez*, *supra*, 29 Cal.4th at p. 483, fn. 2.) Consistent with that observation, the Legislature defined the scope of the statute narrowly. Its obligations and remedies apply only to "original construction intended to be sold as an individual dwelling unit," and they do not apply to "condominium conversions." (§ 896.)

Here, the Court of Appeal relied on the wording of certain sections of SB 800 to conclude the Legislature intended that, where it applies, SB 800 provides *the exclusive remedy* for construction defects. However, the language of those sections does not support that conclusion. Properly understood, it merely confirms the Legislature's intent that the novel provisions of SB 800 should not extend beyond the new legislation itself.

Specifically, the Court of Appeal construed section 896 to say that SB 800 preempts any otherwise overlapping common law. (Typed opn. 9, 14-15.) However, *Liberty Mutual* got it right when it described as "circular" the interpretation of section 896 that the builder in that case said compelled preemption. (*Liberty Mutual*, *supra*, 219 Cal.App.4th at p. 108 [the "argument is essentially that any action arising out of the Act is an action under the Act"].)

Section 896 is neither clear nor unequivocal with respect to preemption. (See *California Assn., supra,* 16 Cal.4th at p. 297.)

Rather, reduced to its essentials, the pertinent language of section 896 states:

> In any action seeking recovery of damages arising out of, or related to [construction] deficiencies . . . , the claimant's claims or causes of action shall be limited to violation of [SB 800's construction] standards . . . . [10]

The Court of Appeal read this as an express statement by the Legislature that common claims were preempted by SB 800 if they were factually based on a construction defect that would also qualify as a construction deficiency under SB 800.

However, a different and more sensible reading of the statutory language is that an action under SB 800 must be based on violation of the construction standards described in the statute and not on other perceived deficiencies—such as a deviation from an expert-declared or building code requirement that, while arguably a defect in construction, will not adversely affect a function or component of the structure. Because there is nothing in this reasonable interpretation to compel the conclusion that a claim

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10 The full text of the quoted language reads as follows: "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, and to the extent set forth in Chapter 4 (commencing with Section 910), a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional, 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." (§ 896.)

under SB 800 is *the only action* that may be brought, the common law must be presumed to have survived enactment of the statute. (*California Assn., supra,* 16 Cal.4th at p. 297.)

The Court of Appeal also referred to section 943, which provides that "[e]xcept 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."[11] (Typed opn. 10-11, 13, 15; see also typed opn. 12, 19.) The court believed this was another expression of the Legislature's intent to preempt the common law where it overlapped with SB 800. But once more, the court read too much into the quoted language.

Section 943 says that SB 800 is the exclusive source for the kind of construction deficiency claim that the statute created, one that (so far as builders are concerned) amounts to absolute liability for breach of what is the equivalent of a statutorily created warranty. Thus, section 943 prohibits courts from grafting SB 800's novel provisions onto other theories of recovery. However, that does

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[11] McMillin Albany refers the Court to the "heading" for section 943 that appears in certain publications of the Civil Code, including the West annotations: "Exclusiveness of title; exceptions." (ABOM 18; see also ABOM 17 [§ 896: "Building standards for original construction intended to be sold as an individual dwelling unit"], 49 [§ 931: "Causes of action or damages exceeding scope of actionable defects; applicability of standards"].) However, the heading was not part of SB 800 as it was originally enacted or amended. (Contrast *In re Forthmann* (1931) 118 Cal.App. 332, 336.) As explained in the forward to the West series, "section headings for West's Codes are prepared by the West editorial staff, except for certain headings which are supplied by the Office of Legislative Counsel." (6 West's Ann. Civ. Code (2007 ed.) foll. CALIFORNIA CODES, p. XVI.) As a result, the heading cannot be considered to ascertain legislative intent. (See *People v. Avanessian* (1999) 76 Cal.App.4th 635, 641.)

not mean the Legislature intended the statute to preempt existing common law where they may overlap.

The items of damages recoverable for an owner's economic losses that are enumerated in section 944 are likewise unique to the SB 800 cause of action. Section 943 forbids courts from incorporating them elsewhere.

As *Liberty Mutual* observed, section 944 does allow a homeowner claimant to recover the "reasonable cost of repairing and rectifying any damages *resulting from* the failure of the home to meet [SB 800's construction] standards." (*Liberty Mutual, supra*, 219 Cal.App.4th at p. 107, emphasis added.) However, that is only "[i]f a claim . . . is made under [SB 800]" (§ 944), in which event the claimant can recover the resulting damages from the builder *without proof of fault.* In that respect, the right to recover such damages remains unique to an SB 800 action.

Including that single item of damages within the longer list of SB 800 remedies did not signal the Legislature's intent to preempt the common law *where there is* proof of fault and the injured homeowner has reason not to proceed under SB 800. Such reason could include a catastrophic loss requiring immediate attention that allows no time for the homeowner to comply with SB 800's mandatory prelitigation notice/inspection/repair process.[12] (See

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[12] McMillin Albany interprets this argument to mean that "the best and fastest fix for sudden catastrophic damage in a home is to file a common law action in Superior Court . . . ." (ABOM 28.) Not true. The "best and fastest fix" is for the homeowner or its insurer to immediately repair the damage to make the home livable again, after which engaging in the SB 800 notice/inspection/repair process may be neither feasible nor useful.

§ 910 et seq.; *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1478; *Liberty Mutual, supra,* 219 Cal.App.4th at pp. 105-106.) Alternatively, there may be a statute of limitations problem that precludes an action under SB 800 that would still be timely under the common law. (See, e.g., *Liberty Mutual,* at pp. 101-103.[13]) Or the homeowner may want to claim punitive damages, which are not recoverable under SB 800. (§ 944.)[14]

In sum, sections 896, 943, and 944 do not compel the conclusion that SB 800 is a homeowner's only theory of recovery in the context of new home construction defect litigation. In the absence of the clear and unequivocal indication of such a legislative intent that would be required to find preemption, this Court should hold that the common law survived SB 800's enactment intact.

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[13] Under SB 800, a claim that a plumbing or sewer system was not installed properly or materially impaired use of the structure by its inhabitants must be brought within four years after close of escrow on the property. (§ 896, subd. (e).) At common law, such a claim for a latent deficiency may be brought as late as 10 years after substantial completion of the home. (Code Civ. Proc., § 337.15, subd. (a).) Actions based on willful misconduct may be brought even later than that. (*Id.* at § 337.15, subd. (f).)

[14] Section 944 describes the "only" items of damages that a homeowner may claim under SB 800. Those items do not include punitive damages, which are therefore not recoverable as part of the statutory cause of action. (Cf. *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 450 [wrongful death]; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 824-829 [same].)

III. PREEMPTION OF THE COMMON LAW WAS NOT NECESSARY TO THE LEGISLATIVE GOAL OF REDUCING THE COSTS OF LITIGATION.

The Court of Appeal reasoned that unless it preempted the common law, SB 800 could not achieve the Legislature's goal of reducing the costs of litigation over new home construction defects. "[I]t is unlikely the Legislature or the bill supporters would have expected that creating a new statutory cause of action for defects that have not yet caused damage, and leaving the common law causes of action available once property damage has occurred, would significantly reduce the cost of construction defect litigation and make housing more affordable." (Typed opn. 19; see also ABOM 13, 46 [McMillin Albany agrees].) The court took too narrow and shortsighted a view of the anticipated cost-saving effect of SB 800.

The trigger for SB 800 was the *Aas* decision, insofar as it held that homeowners who became aware of construction defects had no recourse for a known economic loss until the defects caused actual harm. (*Aas, supra*, 24 Cal.4th at pp. 632, 639, 647.) The defects in *Aas* included shear and fire walls that allegedly violated building safety code requirements intended to protect health and safety. (*Id.* at p. 633, fn. 1.) In dissent, Chief Justice George questioned why an owner had to wait until the home collapsed or was gutted by fire to collect the costs to repair the problems. (*Id.* at p. 653 (dis. opn. of George, C.J.).) SB 800 provided the solution: the owner could make an immediate claim for repairs, and having done so, would avoid the potentially *much greater losses* to person and property if disaster

struck, for which the owner would have had the right to sue the builder under the common law.[15]

Thus, creating the new statutory cause of action did not require preemption of the common law to reduce the overall costs of litigation. Providing the alternative means to claim and compel repair of constructions defects *before they caused* actual harm would avoid more expensive lawsuits in the long term. (See *Aas, supra,* 24 Cal.4th at p. 649 ["to require builders to pay to correct defects as soon as they are detected rather than after property damage or personal injury has occurred might be less expensive"].)

Stated differently, the Legislature may have expected that the more construction deficiencies that were resolved pursuant to SB 800 (with or without litigation), the fewer negligence or strict liability actions would have to be filed in the future with damage claims for actual harm *in addition to* repair costs. Allowing owners the option to pursue their common law remedies when it is too late to avoid actual harm does not defeat that expectation.

Of course, the owner may have a mixed SB 800 claim: a claim for the costs to repair deficiencies, plus compensation for any actual harm that the deficiencies may have already caused. SB 800 allows the owner to claim both types of damages in the same action. (§ 944; see typed opn. 12.) Furthermore, SB 800 allows the owner to recover the repair costs and compensation *without* having to prove fault on the part of the builder *for either*. The trade-off is

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[15] It's analogous to an automobile recall. Manufacturers pay to fix the defects in their cars today in order to avoid the greater expense of personal injuries and property damage in the future.

compliance with SB 800's prelitigation notice/inspection/repair process—which is itself designed to reduce or avoid litigation.

However, when compliance is not realistic, as in the case of substantial actual harm requiring immediate attention, or there is other reason why the homeowner cannot or does not want to rely exclusively on SB 800, then the common law should be available. So long as the owner has the proof of fault that the common law but not SB 800 requires—i.e., a product defect or negligence—the common law can provide a remedy to the owner without sacrificing any legislative goal.

CONCLUSION

For the foregoing reasons and those stated by Van Tassel and other amici curiae, the Court should reverse the Court of Appeal and hold that, where it applies, SB 800 does not preclude a new home buyer from pursuing common law causes of action for defective conditions that resulted in physical damage to the home.

August 12, 2016

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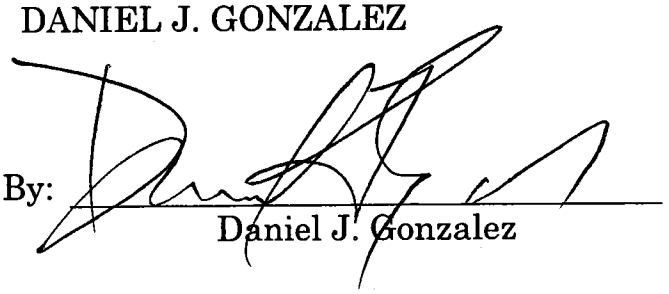
DANIEL J. GONZALEZ

By: 
Daniel J. Gonzalez

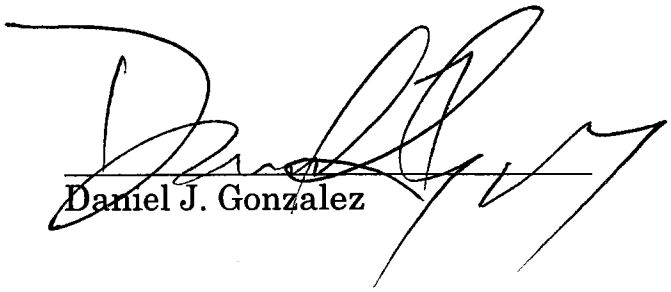
ATTORNEYS FOR AMICUS CURIAE MWI, INC.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 4,715 words, as counted by the Microsoft Word version 2010 word processing program used to generate it.

August 12, 2016



Daniel J. Gonzalez

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 W. Olive Ave., 8th Floor, Burbank, California 91505-4681.

On August 12, 2016, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on August 12, 2016, at Burbank, California.

Kathy Turner

SERVICE LIST
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(Van Tassel)
Fifth District Case No.: F069370 • Supreme Court Case No. S229762

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