S229762

IN THE SUPREME COURT OF CALIFORNIA

McMILLIN ALBANY LLC ET AL.,
Petitioner,

v.

SUPERIOR COURT OF KERN COUNTY,
Respondent,

CARL VAN TASSEL ET AL.,
Real Parties in Interest.

From a decision by the Court of Appeal, Fifth Appellate District
Case No. F069370

AMICUS CURIAE APPLICATION AND PROPOSED AMICUS CURIAE BRIEF
(In Support of Petitioners/Real Parties in Interest)

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE BY

KASDAN LIPPSMITH WEBER TURNER LLP

IN SUPPORT OF PETITIONERS/REAL PARTIES IN INTEREST

The law firm of Kasdan LippSmith Weber Turner LLP ("Kasdan LippSmith") respectfully moves the Court for leave to file the accompanying brief as amicus curiae pursuant to California Rule of Court 8.520.

The proposed Amicus Curiae Brief was prepared by the undersigned. Counsel for the parties have not participated in the drafting of the brief. No party or counsel for a party has made a monetary contribution intended to fund the preparation of submission of the proposed brief. Kasdan LippSmith has no interest in or connection with any of the parties in this case.

Kasdan LippSmith primarily represents consumer homeowners and community associations in construction defect actions against builders and subcontractors throughout the State of California. Kasdan LippSmith desires to submit the accompanying amicus curiae brief to provide the Court with the perspective of consumer homeowners and community associations facing construction defects in their homes and communities.

DATED: August 12, 2016

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AMICUS CURIAE BRIEF

I. INTRODUCTION

Residential construction defect law presents a distinct set of challenges requiring tailored rules developed through experience to ensure the fair treatment of consumer homeowners. Although construction defect matters are inherently large and complex, economic and judicial efficiency, along with the protection of consumers, are key.

As with any large enterprise, there is always a temptation to seek procedural oversimplification as a sop to unavoidable structural complexities. SB800 achieved a great deal in solving a problem unique to construction defect litigation by filling the gap that existed in the common law resulting from the dual nature of the home as both a product and a set of large, separable elements of the physical environment. However, oversimplifying the limited cause of action in SB800 to carry the full weight for actual and ongoing damage to new homes caused by builder negligence would be a great disservice to homeowners.

SB800 was enacted to solve the problem of the lack of a remedy for defective construction that has not yet manifested the type of physical damage necessary to overcome the economic loss rule. The economic loss rule may make sense when applied to balance the interests of the consumers and manufacturers of individual products. But a mass-market home is better conceived as both a single product and an agglomeration of hundreds of interrelated products purchased simultaneously, making application of the economic loss rule unfair and uneconomical without an additional solution to the problem it creates. Thus, SB800 provides a remedy despite the lack of "damage" of the sort the economic loss

rule requires. A limited cause of action that was universally understood to be necessary at the time of its enactment, and the exclusive remedy for violation of the functionality standards it delineates, which balances interests by also providing builders with the prelitigation option to conduct repairs to avert litigation.

When the boundary between low quality construction that breaches a functionality standard is crossed, however, and actual damage to a new home is already manifest through builder negligence—the boundary defined by the economic loss rule—then the existing common law causes already provide appropriate remedies. Those common law remedies were the context within which SB800 was enacted and, critically, they are a necessary backstop to prevent the creation of new inefficiencies in California construction and construction defect litigation.

II. SB800 WAS ENACTED TO SOLVE THE PROBLEM OF A GAP IN COMMON LAW UNIQUE TO NEW RESIDENTIAL HOUSING.

There is no dispute that SB800 was enacted in response to this Court's suggestion, in the last analytical sentence of *Aas v. Superior Court* (2000) 24 Cal.4th 627 ("*Aas*"), that "the Legislature may add whatever additional protections it deems appropriate" to impose "liability for construction defects that have not caused harm of the sort traditionally compensable in tort" (*id.* at 652-53). This Court subsequently confirmed that the Legislature had answered the call: "In the wake of our decision in *Aas* . . . , the Legislature established a limited new cause of action for certain specified housing defects." *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 483, fn. 2.

That "limited new cause of action" was SB800; a swift legislative response to *Aas*'s holding that the economic loss rule applied to preclude tort recovery for construction defects that had not yet caused damage to the home, which Chief Justice George characterized as "a ruling that offends both established common law and basic common sense." *Aas*, 24 Cal.4th 627, 653 (George, C.J., concurring and dissenting). In his dissenting opinion, the Chief Justice described the problem as follows: "Why should a homeowner have to wait for a personal tragedy to occur in order to recover damages to repair known serious building code safety defects caused by negligent construction?" *Id.*

A. SB800 provided a solution to the problem created by the economic loss rule through legislative compromise.

While Chief Justice George believed the common law permitted homeowners to recover for construction defects before they caused physical damage, the Majority opinion in *Aas* firmly established that the economic loss rule "reflects the line of demarcation between tort theory and contract theory." *Id.* at 640 (citing *Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 Cal.App.3d 289, 294). Thus, under California common law, homeowners do not find a remedy in causes of action for negligence or strict liability until "a defective component damages other parts of the same product" or other components of the home. *Id.* at 641.

Petitioners herein admit that SB800 was enacted because, as the *Aas* Majority had asserted, only the Legislature could appropriately solve the problem articulated by Chief Justice George—i.e., the nonsensical consequences of the application of the economic loss

rule to construction defects in the newly constructed residences of California consumers. (Answer, § III.B.) As the Majority explained, "Legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views." *Id.* at 652 (citations and internal quotation marks omitted). The result of the legislative process was SB800, with the goal of "prompt and fair resolution of construction defect claims" in the interests of all parties and California's growth and vitality. CONSUMER PROTECTION-HOMEOWNERS-CONSTRUCTION, 2002 Cal. Legis. Serv. Ch. 722 (S.B. 800).

B. SB800 and the interest-balancing solution did not implicate the existing common law.

Despite the consumer protection motivation behind the legislative activity that resulted in SB800, Petitioners and their supporters emphasize the profit interests of the building industry as the critical voice in the legislative ferment that culminated in SB800. For example, the amicus brief of Leading Builders of America ("Leading Builders"), under the heading "The Legislature's stated goal of the Right to Repair Act was to amend the common law and reduce litigation," states that SB800's purpose "was to change, not supplement, the common law – a goal not secured if homeowners retained all common law construction defect claims." (Amicus Brief of Leading Builders, § IV.) The Leading Builders then go on to quote parts of the legislative history which, in fact, emphasize fairness to all interested parties more than the need to reduce litigation, and which fail to

confirm a legislative intent to repeal all common law causes of action. And given the contrary conclusion of the Fourth District in *Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, 103-04 ("*Liberty Mutual*") after its own careful consideration of the legislative history, it is apparent that there is no tangible evidence of a legislative intention to repeal all common law causes, and certainly nothing capable of overcoming the presumption, discussed below, that a statute does not, by implication, repeal the common law.

> Nowhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage. Instead, the legislative history shows that the legislation was intended to grant statutory rights in cases where construction defects caused economic damage; the Act did nothing to limit claims for actual property damage.

Id. at 604.

The notion that SB800 had impliedly "abrogated common law claims for damages for construction defects" was again rejected, this time by the Second District in the context of a direct homeowner action against a builder, in *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1415, *review denied (June 11, 2014)*. The Second District vacated summary adjudication as to the homeowner's causes of action for common law negligence and breach of implied warranty (*id.* at 1423), holding that SB800 "does not provide the exclusive remedy for a homeowner seeking damages for construction defects that have resulted in property damage" (*id.* at 1414). Again finding no support in the language of the statute for any abrogation of all common law causes, the court confirmed that SB800

provides "a remedy for particular residential construction defects," and specifically agreed with the Fourth District's finding in *Liberty Mutual* that SB800 "does not limit or preclude common law claims for damages for construction defects that have caused property damage." *Id.* at 1418.

Analysis of the court's reasoning reveals what is perhaps the source of the misapprehension that common law causes themselves were somehow abrogated by SB800. The *Burch* decision makes clear that creation of a cause of action for failure to meet the particular functionality standards delineated in Civil Code section 896 mean that SB800 "abrogates the holding in *Aas*." *Id.* Since both *Aas* and *Burch* stand for the proposition that homeowners may pursue common law negligence causes against builders (where, given the economic loss rule, actual damage has already occurred), the holding in *Aas* is "abrogated" only in the sense that its finding that no cause was available absent actual damage was superseded by SB800 creating such a cause—which the *Aas* Majority had indicated was the Legislature's privilege, and the *Aas* dissenters had considered legally and practically critical to rationalize construction defect law.

Thus, following the clear suggestions of this Court in *Aas*, the Legislature fixed an unfair gap in California law by providing a statutory mechanism for consumers encountering low quality construction to enforce delineated functionality standards.[1] Those functionality standards complement the existing common law causes in tort, meeting at the line of demarcation defined by the economic loss rule. In short, the finding in *Aas* that a

[1] This statutory consumer right is balanced against the statutory right of builders to choose to investigate their functionality standard violations and perform repairs.

homeowner had no remedy absent actual damage was abrogated, because statutorily superseded, but the correlate finding that tort law requires actual damage was not. This reasoning is consistent across the holdings in *Aas*, *Liberty Mutual*, and *Burch*, and harmonious with SB800.

III. SB800 HARMONIZES WITH EXISTING COMMON LAW.

The briefing of the Parties and other Amici Curiae have delved extensively into the interpretation of the many statements of legislators and conflicting interpretations of SB800 clauses, and further briefing on those topics would likely not be helpful to the Court. This brief focuses on the purpose and consequences of SB800 and the rational basis for harmonizing SB800's construction deficiency standards with the existing right of homeowners under common law to seek a remedy for damage occurring to their new homes as a result of negligence. Critically, when SB800 is considered in the context of California construction defect law at the time of its enactment, and the logic of its purpose and consequences for all interested parties, it is compelling to conclude that fairness, judicial economy, and economic efficiency are consistent with maintenance of common law causes.

To mirror Chief Justice George's rhetorical formulation in posing the original problem: Why should a homeowner have to wait for a lengthy building standards investigation that ultimately requires a builder to repair nothing in order to begin litigation to recover for known, existing and ongoing damage caused by negligent construction?

Petitioners and the building industry combine their inverted policy argument for the genesis of SB800 with an expansive notion of the relationship of statutory enactment to common law, to conjure the conclusion that the Legislature intended not only to correct the problem with the application of the economic loss rule, but more grandiosely, to entirely repeal all existing common law relating to residential construction defects—by implication alone, without ever simply saying so.

This is too much weight of implication for the imperfect language of SB800 to carry. Fortunately, the careful development of California law is safeguarded by the "presumption that a statute does not, by implication, repeal the common law. Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws." *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 326 (citations and internal quotation marks omitted).

When SB800 is read in light of the appeal to common sense urged by Chief Justice George and Justice Mosk when arguing for an exception to the economic loss rule (in their separate concurring and dissenting opinions in *Aas*), and in light of the common sense decision of the Majority opinion in *Aas* to require a legislative solution to fix the problem, the policy tradeoffs embodied by SB800 make sense, without any need to impliedly repeal all common law rights held by California homeowners. The ability of a homeowner to pursue common law causes was already circumscribed by the economic loss rule and the requirement to prove strict liability or negligence by the builder. And SB800 offers a mechanism by which a builder might foreclose its liability, even where it had been

negligent, through early repair to the home. These changes brought by SB800 represent a significant revision to California's construction defect law—simultaneously solving the problem of the economic loss rule while providing builders with a mechanism to avoid litigation through repairing their newly sold product, if they so choose.

Specifically, in return for the actionable functionality standards in Civil Code section 896, homeowners must allow builders the prerequisite option to inspect and repair all conditions failing those functionality standards, at the sole discretion of the builder, during the potentially lengthy procedures defined in Civil Code sections 910 through 938. Indeed, builders may also, at their sole discretion, opt out of the statutory time-limits of this repair procedure and adopt their own procedures, potentially even more lengthy than the statutory scheme, bounded only by the time limits of reasonableness. *McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1352, *review denied (June 25, 2014).*

Thus, SB800 represents a significant and balanced response by the Legislature to solve the problem. The specific functionality standards in Civil Code section 896 set the bar for construction quality and make actionable any failure of a builder to meet those basic standards, before such failure compounds into actual damage—which is fair, and respects judicial and economic efficiency because it places the burden for defective construction on the builder rather than the homeowner, encourages better construction practices, and allows the builder wide latitude to fix its product before litigation is permitted. But where actual damage has already occurred to a consumer's new home due to provable negligence on the part of the builder, the common law already provides remedies consistent with the

economic loss rule and it would be inefficient and unnecessarily burdensome on homeowners to have their basic tort rights forestalled.

A. Repealing all common law rights of California homeowners by implication would create unfair and inefficient consequences similar to those SB800 was designed to prevent.

Despite the balanced solution offered by SB800 to the economic loss rule problem, Petitioners and the building industry want more. Dissatisfied with the legislative tradeoffs won by its lobbyists when fixing the problem of a remedy for construction defects that have not yet caused damage, they seek to create new problems by introducing delay and burdening homeowners where damage has already occurred and common law causes already exist to remedy that damage. Common law causes of action address actual damage already occurring early in the life of the new home, before the four and ten year statutes of limitation for patent and latent defects contained in California Code of Civil Procedure sections 337.1 and 337.15. (See *Liberty Mutual, supra*, 219 Cal.App.4th at 108.) And such damage is not merely the result of a failure to comply with a building standard, but the result of actual negligence on the part of the builder.

Justice Mosk's dissent in *Aas* was premised on the lack of economic efficiency in waiting for known construction defects to cause damage before addressing them, informed by his understanding that "cutting corners is a prevailing problem in the development industry" and his skepticism about whether builders would "pass along the savings realized by poor construction to their customers." *Aas, supra*, 24 Cal.4th at 673-74 (Mosk, J., concurring and dissenting). Given these practical realities, Justice Mosk concluded that

application of the economic loss rule would "create an invitation for developers, general contractors and subcontractors to ignore [construction] Code requirements when building and developing homes." *Id.* at 674 (internal quotation marks omitted).

With that invitation to cut corners revoked by SB800, as was the intention of SB800, it would be odd to conclude that the Legislature intended to issue a new invitation to profit-driven misconduct by builders, and cynical to conclude that the Legislature sought to do so through ambiguous inference in the same piece of legislation. Nevertheless, this is the conclusion resulting from Petitioner's position that homeowners no longer possess their basic legal rights to seek immediate redress for negligently inflicted damage to their new homes. Where the economic loss rule is not implicated because homeowners are already suffering actual damage—to likely the most expensive product they will purchase, and most valuable and meaningful asset they will own and bequeath—it makes no sense to suspend a homeowner's legal rights for almost a year while the builder engages in a prelitigation process that need not result in anything more than an ineffectual repair attempt. Cf. Civ. Code, § 933.

Viewing California's construction defect law as a whole, SB800's "right to repair" may also be viewed as an invitation to builders to cut corners, knowing that they have the right to consider a fix if anyone complains. But with existing common law causes of action as the backstop against more serious, indeed tortious, corner cutting that manifests early damage, any cost-benefit analysis by a builder contemplating a new development is pushed in the direction of improved construction quality. This goes a long way toward resolving

the irrational and unfair economic inefficiencies identified by both the dissenters in *Aas* and the building industry before *Aas*, by attempting to maximize economic efficiency.

Without the backstop of the common law, however, the incentive to cut corners in construction is restored. Under SB800, builders already have the opportunity to fix negligent construction provided no actual and actionable damage has yet occurred. But if builders know they will always be afforded the opportunity to try to fix everything, even negligently constructed homes manifesting early damage, the benefits of SB800 for both economic and judicial efficiency will be lost.

B. Requiring common law claims to go through the SB800 prelitigation process would result in additional inefficiency and uncertainty.

These inefficiencies would be compounded without the common law backstop, given the realities of the SB800 prelitigation process (Civ. Code, §§ 910-938). SB800 allows builders multiple opportunities to reenter homes before a legal remedy can be pursued, which is a burden on homeowners balanced by their enforcement rights as to SB800's functionality standards. A negative correlate of this process is that builders with no motivation to pursue meaningful repairs are nevertheless incentivized to play-out the prelitigation process by failing to adequately repair negligent construction, based on the realistic expectation that circumstances may intervene that discourage or preclude a certain portion of homeowner claimants from pursuing post "repair" legal action. Time and delay favor defendants and inform cost-benefit analyses.

This inefficiency would be magnified exponentially if the value of a builder's liability was disproportionately larger, relative to the cost of tinkering through the prelitigation process, because of the inclusion of already occurring actual and negligently caused damage in the SB800 process. Meanwhile, the homeowner would be left to endure the damage for an extended period of time because of the prelitigation procedures.

The subrogation issues in catastrophic cases have been addressed by other Amici Curiae and in detail by the Fourth District in *Liberty Mutual*. But there is also a mitigation risk issue created by including all actual damage claims in SB800. Subsection (b) of Civil Code section 945.5 potentially makes the builder responsible for the cost of worsening damage in a home after the homeowner's initial section 910 notice by exempting "damages due to the untimely or inadequate response of a builder to the homeowner's claim" from the homeowner's duty to mitigate damage. Civ. Code, § 945.5(b). As described above, some builders will nevertheless be disinclined to address worsening damage in the hope of later avoiding liability in any future legal action. The homeowner and their insurer would then be faced with the choice of attempting mitigation or risking later recovery from the builder.

This situation will result in either the uneconomical outcome of unmitigated damage, or a mitigation burden on the homeowner, who is already bearing the additional burden of SB800 prelitigation procedures prior to being permitted to pursue a legal remedy. While a homeowner filing a common law suit based on actual damage from negligent construction would also bear the burden of mitigation, they would not be required to endure a lengthy prelitigation procedure that does not require effective repairs by the builder.

without the backstop of common law causes of action, SB800 would create significant economic and legal inefficiencies and new problems beyond those identified at the time of its enactment, while also placing an additional and unfair burden on consumer homeowners, directly contrary to the intentions of the legislation.

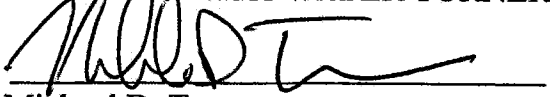
IV. CONCLUSION

As the Fourth District correctly held in *Liberty Mutual*, SB800 does not abrogate all common law causes of action for construction defects causing actual damage to the new homes of California consumers. Rather, SB800 provides a necessary and limited remedy to fill the gap created by the economic loss rule, where low quality construction breaches basic functionality standards. SB800 was enacted within the context of existing common law and only makes sense in that context.

Like any piece of legislation, SB800 is imperfect and contains ambiguities and conflicts. But those ambiguities support the conclusion that SB800 should not be interpreted as impliedly abrogating all common law causes. And critically, not only is there a rational basis for harmonizing SB800 with existing common law, there is a compelling justification for maintaining common law causes to ensure the fairness and efficiency of construction defect litigation.

DATED: August 12, 2016

KASDAN LIPPSMITH WEBER TURNER LLP

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that the total word count of the Amicus Curiae Brief of Kasdan LippSmith Weber Turner LLP, excluding the Application to File Amicus Curiae Brief, Table of Contents, Table of Authorities, and Certificate of Compliance is 3,655 words.

DATED: August 12, 2016

KASDAN LIPPSMITH WEBER TURNER LLP

By: _____

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PROOF OF SERVICE
Case No. S229762
McMillin Albany LLC v. Superior Court of Kern County

I, the undersigned, declare that at the time of service, I was at least 18 years of age and not a party to this legal action. My business address is Kasdan LippSmith Weber Turner LLP, 19900 MacArthur Blvd., Suite 850, Irvine, CA 92612.

On August 12, 2016, I mailed a copy of the following document by placing the envelopes for collection and mailing on the date and at the place shown below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in sealed envelopes with postage fully prepaid. I am employed in Irvine, Orange County, State of California where the mailing occurred. The following documents were mailed:

AMICUS CURIAE APPLICATION AND PROPOSED AMICUS CURIAE BRIEF BY KASDAN LIPPSMITH WEBER TURNER LLP IN SUPPORT OF PETITIONERS

The envelopes were addressed to the addressees on the attached service list.

On August 12, 2016, I caused a true and correct copy of the above document to be electronically submitted on behalf of Kasdan LippSmith Weber Turner LLP to the Supreme Court of California using the e-submission portal of the Court website at www.courts.ca.gov/supremecourt.htm.

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

DATED: August 12, 2016 By: _____
Christina Barajas

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