2nd Civil No. B137570

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BLAGO LEKO, et al.,

Defendants, Appellants and Cross-Respondents,

vs.

CRYSTAL HOME INSPECTIONS, et al.,

Cross-Defendants, Respondents and Cross-Appellants.

Appeal from the Superior Court of the County of Ventura
The Honorable Glen Reiser
Ventura County Case No. SC 021290

AMICUS CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF REALTORS®

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

RULES

INTRODUCTION

Although real estate brokers have a duty to visually inspect a home's accessible areas and disclose their findings to prospective buyers, buyers generally want more protection. Consequently, most residential real estate transactions include home inspections by one or more professional inspectors. Professional inspections foster fair housing prices because the problems they uncover induce seller reparations, purchase price adjustments or escrow cancellations. They also enhance public safety by uncovering potentially dangerous conditions that are hidden to the untrained eye.

For these reasons, California's legislature and judiciary have repeatedly sought to encourage professional home inspections and to ensure the competency and broad use of inspection reports. For example, California law imposes a statutory duty of care upon home inspectors and prohibits them from contractually circumscribing their liability for its breach (Bus. & Prof. Code, §§ 7195, 7198), exposes sellers and brokers to liability for failing to disclose to a prospective buyer material defects discussed in inspection reports they received (e.g., *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 165-166, 177), and limits seller and broker liability where they lack personal knowledge of a problem and reasonably rely on professional reports in making their required disclosures about a home (e.g., Civ. Code, §1102.4).

The trial court here held "as a matter of law and policy" that real estate brokers sued by a home buyer for failing to disclose material defects cannot hold home inspectors liable for their proportionate fault by a cross-complaint for equitable indemnity. This holding violates both settled California indemnity law and codified public policy. It largely rests on the

mistaken assumption that "the duty of an agent and broker is statutory as augmented by the common law [while] the duty of an inspection service company is contractual." (Reporter's Transcript ["RT"] 10.) Not only does that anachronistic privity concept contravene the rules for intentional and negligent misrepresentation established by *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, but it also wholly ignores Business and Professions Code section 7195 et seq.—under which home inspectors have a statutory duty of care that cannot be contractually circumscribed. An indemnity shield for home inspectors would be flatly irreconcilable with the Legislature's codified policy mandate that home inspectors face full liability exposure in order to further their industry's general competency. (Bus & Prof. Code, § 7195, Historical and Statutory Notes; *id.*, § 7198.)

California statutory and common law, the legislative intent underlying the statutes governing home inspectors, and fundamental public policy all compel reversal of the judgment. There is simply no legitimate reason to exempt culpable home inspectors from liability and potentially require other defendants to pay the inspectors' share of the damages merely because the inspectors were not named in the home buyer's original complaint.

FACTUAL OVERVIEW

Plaintiffs discovered their recently purchased home had suffered major structural damage from the 1994 Northridge earthquake. (Appellants' Appendix ["AA"] 5116; see AA 5375 [list of purported damages].) Believing the sellers had cosmetically disguised the problems to facilitate the sale, plaintiffs sued their own broker (Joe Pallat), the seller,

and the seller's broker (Sherry Oyler), alleging they intentionally or negligently failed to disclose the problems to plaintiff. (AA 5117-5126, 5198.) They also claimed the brokers had failed to "conduct a competent and diligent inspection of the property." (AA 5120-5121.) The buyer's broker and the seller's broker both worked for the same real estate firm, Century 21 Adobe Realty (collectively, the "broker defendants"). (AA 5198, 5200, 5243.)

The broker defendants cross-complained for equitable indemnity, contribution and declaratory relief against the home inspectors who had prepared inspection reports that plaintiffs received during escrow—Cornerstone Building Inspections Service ("Cornerstone"), Crystal Home Inspections ("Crystal"), and D-way Fireplace Inspection Service ("D-way"). (AA 5132-5138.) The cross-claims alleged that the home inspectors knew, or should have known, of the alleged problems but did not disclose them in their inspection reports and thus were partially or entirely responsible for plaintiffs' alleged damages. (AA 5135.)

Plaintiffs had hired Cornerstone during their escrow; Cornerstone provided copies of its inspection report to plaintiffs, the seller and the broker defendants. (AA 5199:¶ 6, 5255; AOB 5.)

The prospective buyer in a failed escrow immediately preceding plaintiffs' escrow had retained Crystal and D-way. (AA 5198-5199.) Crystal and D-way provided copies of their inspection reports to the prospective buyer, its broker, the seller, and the seller's broker. (AA 5199, 5270; AOB 5.)[1] To assure compliance with California law requiring sellers

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[1] Crystal's inspection report stated in the bottom margin that "This confidential report is prepared exclusively for Mr. Antonsen [who was the (continued...)

and brokers to disclose all known material defects, those inspection reports were referenced in and attached to the Transfer Disclosure Statement that the seller and the broker defendants provided plaintiffs during escrow, along with Cornerstone's report. (AA 5199-5200, 5251, 5255; AOB 5.) The broker defendants relied on all of the inspection reports in making disclosures to plaintiffs. (AA 5161, 5199-5200, 5251.)

The trial court dismissed the broker defendants' cross-claims, granting judgment on the pleadings for Cornerstone without leave to amend and granting summary judgment for Crystal and D-way. (AA 5081-5082, 5434-5435.) The court held that, even if the inspectors were at fault, as a matter "of law and policy" they could not be liable to the broker defendants for indemnity because plaintiffs had not sued them and the inspectors owed no duty to the broker defendants. (RT 2-3, 8, 18-21; AA 5081-5082; 5435.)

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[1](...continued)
prospective buyer]." (AA 5270-5285.)

LEGAL DISCUSSION

Section I below provides an overview of the inspection and disclosure duties of California home inspectors and real estate brokers. As that discussion explains, sometimes those duties overlap and sometimes the investigatory duties of home inspectors are broader given their heightened specialization and expertise and the broader scope of their inspections.

Sections II and III address the trial court's holding that the cross-defendant home inspectors may not be held liable for indemnity to the defendant brokers.[2] Since plaintiffs did not hire Crystal and D-way, the indemnity question as to them is a bit more complex than the indemnity question as to Cornerstone.

- *Cornerstone*. As we show in Section II, the indemnity question is quite simple as to Cornerstone. The allegations that Cornerstone and the broker defendants both failed to disclose material defects to plaintiffs makes them concurrent tortfeasors under California indemnity law, because their non-disclosures were each a proximate cause of the same indivisible injury—plaintiffs' unknowing purchase of an earthquake-damaged home.

Concurrent tortfeasors are generally liable to each other for indemnification according to their proportionate fault. Thus, the only issue as to Cornerstone is whether there is a special indemnity exemption for home inspectors. No court in the United States has ever recognized such an exemption, and such an exemption would violate settled California

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[2] This appeal only concerns equitable indemnity claims, not indemnity rights provided by contract. The references herein to "indemnity," indemnity shields and exemptions, and indemnity liability thus pertain solely to equitable indemnity.

indemnity law and codified public policy. The judgment on the pleadings for Cornerstone therefore must be reversed.

● *Crystal and D-way.* The question regarding Crystal and D-way entails an additional analytical step—determining whether the buyers would have the right to sue Crystal and D-way for its alleged loss even though they had no contractual relationship with them. A defendant seeking indemnity may assert any liability theory to apportion the damages that the plaintiff could have asserted against the potential indemnitor had it sued it directly. Section III shows that the absence of contractual privity would not have precluded the buyers from suing Crystal and D-way for intentional and negligent misrepresentation. The summary judgments for Crystal and D-way on the indemnity cross-claims therefore must be reversed.

I.

OVERVIEW OF THE INVESTIGATION/DISCLOSURE DUTIES OF CALIFORNIA HOME INSPECTORS AND REAL ESTATE BROKERS.

A. Home Inspectors.

Most home sale transactions include a comprehensive inspection of the home and all of its major systems and components by a professional home inspector, including the foundation, plumbing, electrical system, heating and air conditioning, appliances, roofing and chimney. In 1996, the California legislature imposed statutorily-defined duties on home inspectors through Business and Professions Code section 7195, et seq. It did so in response to the ever-increasing, widespread reliance on home inspectors,

the absence of any authority governing the numerous inspectors not licensed as general contractors, structural pest control operators, architects or professional engineers, and the public policy threat posed by home inspectors' prevalent use of contract provisions to disclaim liability or to limit their damages to the cost of inspection reports. (See, e.g., concurrently-filed Request For Judicial Notice ["RJN"], pp. 47, 53, 61-62, 67-68, 86-90, 95-96.)

The Legislature enacted the home inspector statutes "to assure that consumers of home inspection services can rely upon the competence of home inspectors." (See Bus. & Prof. Code, § 7195, Historical and Statutory Notes.) To that end, it decreed that home inspectors must "conduct a home inspection with the degree of care that a reasonably prudent home inspector would exercise." (Bus. & Prof. Code, § 7196.)[3] And it expressly precluded home inspectors from contractually curtailing their liability for breaching this duty:

> "Contractual provisions that purport to waive the duty owed pursuant to Section 7196, or limit the liability of the home inspector to the cost of the home inspection report, *are contrary to public policy and invalid.*" (Bus. & Prof. Code, § 7198, emphasis added.)

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[3] In ascertaining that level of care, courts may consider the codes and practices of "the California Real Estate Inspection Association ["CREIA"], the American Society of Home Inspectors, or other nationally recognized professional home inspection associations." (Bus. & Prof. Code, § 7195, Historical and Statutory notes; see Appellant's Appendix ("AA"), pp. 5021-5045 [CREIA Standards of Practice].)

B. Real Estate Brokers.

1. The general duty to investigate and disclose.

Real estate brokers have a statutory and common law duty "to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to [a] prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal . . . ." (Civ. Code, § 2079, subd. (a); Civ. Code, § 2079.16, subd. (c) [agency relationship form defining disclosure duties of buyer's and seller's brokers]; Civ. Code, § 1102.6 [statutorily-prescribed transfer disclosure form containing agent disclosures for buyer's and seller's brokers] .)

Brokers are not liable for defects in normally inaccessible areas or defects that only an expert inspector could recognize. (Civ. Code, § 2079.3; *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 307 [broker not liable for failing to discover foundation lacked steel reinforcement].)

The broker's visual inspection duty of care "is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience and examination, required to obtain a [real estate] license." (Civ. Code, § 2079.2.) Since they are not experts in structural or mechanical construction, plumbing, or electrical construction or engineering, their investigatory and disclosure duties are necessarily limited:

> "[T]he broker's duty of discovery must be limited to what is practical within the knowledge, education, and experience of

> a real estate licensee . . . . [S]ome areas . . . must be left to the experts . . . . Physical matters such as termites and dry rot, and structural defects that are not apparent to a layman, are types of matters that neither the broker nor the seller, who do not have actual knowledge, should be expected to know or discover." (1 Miller & Starr, Cal. Real Estate 2d (1989), § 1:121, pp. 413-414.)

Since sellers and brokers have a duty to disclose to the prospective buyer any *known* material adverse information about a home, they may be held liable for failing to disclose adverse material information revealed by inspection reports that they receive. (*Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 172-173; *Gilbert v. Corlett* (1959) 171 Cal.App.2d 116, 118; Miller & Starr, Cal. Real Estate, *supra*, at § 1:123, p. 427.) Thus, whenever inspection reports are prepared, the easiest, safest and most complete way for sellers and brokers to assure full compliance with their disclosure duties is to provide all existing inspection reports to the prospective buyer.

2. Transfer Disclosure Statements.

a. Civil Code section 1102, et seq.

Before title is transferred, sellers and brokers must deliver to buyers statutory Transfer Disclosure Statements that include multiple statutorily-prescribed disclosures, including knowledge of any major defects. (Civ. Code, § 1102.6.) Sellers and brokers can make "substituted disclosures"

based upon the reports of home inspectors or other third party professionals. (Civ. Code, § 1102.4, subd. (b); see Civ. Code, § 1102.6 ["Substituted Disclosures" section of Transfer Disclosure Statement]; Miller & Starr, Cal. Real Estate, *supra*, § 1:123, at p. 426 ["If information required by the disclosure statement is provided by . . . a third-party professional, the seller and his or her agent are relieved of further obligations of the statutory disclosure as to that item of information."])

The legislation encourages the use of professional inspectors by shielding sellers and brokers from liability for any "error, inaccuracy, or omission" in a Transfer Disclosure Statement if they lacked personal knowledge of the defect and they based their disclosures upon the report of "a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise." (Civ. Code, § 1102.4, subds. (a), (c).)

b. The inspectors' briefs misconstrue Civil Code section 1102.4.

The inspectors assert that section 1102.4(a)'s liability protection applies only where the expert was hired by the seller or its broker, as opposed to the buyer or its broker. (See Crystal and D-way's Respondents' Brief ["C-DwRB"], pp. 19-20.) They are wrong. Nowhere does that statute suggest that the seller or its broker must pay for the report or physically retain the inspector for the protection to apply.

To the contrary, the statute requires only that the report be delivered to the buyer "pursuant to a request therefor," i.e., that it not be gratuitous.

(Civ. Code, § 1102.4, subd. (c).) Similarly, the "Substituted Disclosure" section on the statutory Transfer Disclosure Statement expressly refers to "[i]nspection reports completed pursuant to the contract of sale or receipt for deposit" or "[a]dditional inspection reports." (See Civ. Code, § 1102.6.) It imposes no limitations based upon who paid for the inspector. Since buyers pay for the overwhelming majority of home inspections, one must assume the Legislature would have expressly limited section 1102.4 to inspections paid for by the seller had it intended that restriction.[4]

The sole basis for the inspectors' contention is that section 1102.4 refers to disclosures required "pursuant to this article," which they characterize as solely encompassing the "seller's disclosures." (C-DwRB, p. 20.) Even were that a correct description of the Transfer Disclosure Statement "article," it would not establish that the seller must retain and pay for the expert for the protection to apply. But the description also is incorrect because the Transfer Disclosure Statement "article" also encompasses *brokers'* disclosures. The Transfer Disclosure Statement contains a place for seller's and buyer's brokers to disclose material items "based on a reasonably competent and diligent visual inspection of the

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[4] Limiting the statute's application to experts retained by the seller or its broker would be contrary to public policy and ignore the economic realities of modern-day real estate sales. Since a buyer generally has a greater interest in a thorough, competent inspection than a seller (whose primary interest is selling the home), public policy is furthered best by having the buyer select the home inspector, rather than the buyer having to rely on one chosen by the seller. Moreover, any focus on who actually pays the inspector ignores the fact that the inspection cost ends up part of the home cost irrespective of the payment method. Whether the buyer pays the inspector directly, the cost is an escrow expense, or the seller pays the inspector directly (in which case the cost is subsumed in the home price), all parties to the transaction ultimately use the inspection report and the buyer ultimately pays for it.

accessible areas of the property" (Civ. Code, § 1102.6 [agent disclosure provisions]); and section 1102.4(a) limits the brokers' liability for non-disclosure, in addition to the seller.[5]

Although this issue is ultimately unnecessary to resolving the central question on appeal, it is one of tremendous importance to brokers throughout California. The inspectors' attempt to limit the protections prescribed in section 1102.4 must not be countenanced.

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[5] Section 1102.4 provides that "[n]either the transferor *nor any listing or selling agent* shall be liable . . . ." (*Id.*, subd. (a), emphasis added.) Under real estate parlance and statutory law, a "listing agent" is a seller's broker, while a "selling agent" encompasses a buyer's broker. (See, e.g., Civ. Code, § 1102.14 [defining, by cross-references to section 1086, "listing agent" as a person who obtains a listing to sell property and "selling agent" as an agent "who acts in cooperation with a listing agent and who sells, or finds and obtains a buyer for, the property"]; Civ. Code, § 2079.13, subd. (n) [defining "selling agent" as "a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer of purchase to the seller"]; Civ. Code, § 2079.16 [statutory real estate agency relationship disclosure form stating that a "selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only"].)

II.

ESTABLISHED LAW AND CONSIDERATIONS OF PUBLIC POLICY COMPEL THE CONCLUSION THAT A BROKER SUED BY A HOME BUYER FOR ALLEGEDLY FAILING TO DISCLOSE MATERIAL DEFECTS MAY SEEK INDEMNIFICATION FROM THE BUYER'S HOME INSPECTOR FOR FAILING TO DISCLOSE THOSE SAME DEFECTS.

A. Home Inspectors And Brokers Who Negligently Fail To Disclose A Home's Material Defects To A Home Buyer Are Joint Tortfeasors Under California Indemnity Law.

1. The home inspectors and brokers are "concurrent tortfeasors" under *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578.

Under California law, "where the negligent acts of two tortfeasors are both a proximate cause of injury, each tortfeasor is jointly and severally liable as a concurrent tortfeasor." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1548, citing *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 586-588.) Accordingly, home inspectors and brokers who both cause a buyer to unknowingly purchase a

home with material defects by negligently failing to disclose those defects are "concurrent tortfeasors" under California law.[6]

Twenty years ago, in *American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d 578 ["*AMA*"], the Supreme Court explained that "joint and several liability" reaches well beyond tortfeasors "who act[] in concert" or contexts where one person is liable for another's actions, such as vicarious liability; it also applies where wholly unrelated parties who acted independently were "concurrent tortfeasors" in that they each were a proximate cause of the same injury:

> "[T]he concurrent tortfeasor context . . . simply embodies the general common law principle . . . that a tortfeasor is liable for any injury of which his negligence is *a* proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a

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[6] Our analysis focuses on the allegations that the broker defendants negligently failed to uncover and disclose the material defects, since most claims against brokers truly boil down to negligence at most. Proof that the brokers *intentionally* concealed the information (as opposed to recklessly or negligently failing to disclose it) would alter the indemnity analysis as follows: If the home inspectors also intentionally concealed the information, the brokers would be entitled to indemnity against them. (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 688-690.) But if the home inspectors were only negligent, then the brokers could not obtain indemnity against them. (*Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 6-7; *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 227.)

single injury, each tortfeasor is thus personally liable for the damage sustained . . . ." (*Id.* at p. 587.)

The Supreme Court further held that in "concurrent tortfeasor" contexts, liability for the injury should be "be borne by each individual tortfeasor 'in direct proportion to [his] respective fault'" and, therefore, every concurrent tortfeasor has the right to obtain indemnity against the others "on a comparative fault basis." (*Id.* at p. 598.) This means that a defendant has a right to cross-complain for indemnity against other alleged concurrent tortfeasors, even if they were not named in plaintiff's complaint. (*Id.* at pp. 605-606.)

The broker defendants' cross-complaint for indemnity against the home inspectors falls squarely within *AMA*'s rules for concurrent tortfeasors.[7] The plaintiffs allegedly would not have purchased the damaged home for the price they paid had either the defendant brokers or the cross-defendant home inspectors disclosed the alleged defects to them.

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[7] The inspectors' reliance on *Munoz v. Davis* (1983) 141 Cal.App.3d 420, is misplaced because the parties there were *not* concurrent tortfeasors. In *Munoz*, a driver injured the plaintiff by crashing into his car and the plaintiff's attorney then injured him by failing to file a lawsuit within the statute of limitations. The court recognized that "joint and several liability" was inapplicable because the driver and the attorney independently caused two distinct injuries: "The injury sustained . . . as a result of [the attorney's] negligence–loss of a right of action–is entirely distinct from the injury that was the immediate consequence of [the driver's] negligence–physical injuries–and does not form a normal part of the aftermath of careless driving." (*Id.* at p. 427; see also *Crouse v. Brobeck, Phleger & Harrison, supra,* 67 Cal.App.4th at p. 1547 [distinguishing *Munoz*: "[t]he negligence of the original tortfeasor did not cause or contribute to the subsequent malpractice of the attorney, and . . . there was no nexus between the conduct of the original tortfeasor and the attorney. . . ."].)

Each is therefore a concurrent and joint tortfeasor under *AMA* and its progeny.

2. The inspectors present a distorted and inaccurate analysis of equitable indemnity law.

The inspectors try to sidestep *AMA* with a hodgepodge of red herrings and misstatements inconsistent with well-settled California indemnity law.

First, they claim non-liability for indemnity because they owed the brokers no duty of care and the brokers were not intended beneficiaries of their actions. (Cornerstone's Respondent's Brief ["CRB"], pp. 6, 14; C-DwRB, pp. 5, 9, 23.) But indemnity liability rests on whether the indemnitor and indemnitee each owed and breached duties *to the plaintiff*, not duties to each other. (E.g., *AMA*, *supra*, 20 Cal.3d at p. 607 [plaintiff's parents liable for indemnity to organizational sponsors of motorcycle race, even though each owed a duty of care only to plaintiff, and not each other]; *Yamaha Motor Corp. U.S.A. v. Paseman* (1990) 219 Cal.App.3d 958, 969 ["'There seems no logical reason why the application of [comparative equitable indemnity] should turn on the relationship of the tortfeasors to each other. What is important is the relationship of the tortfeasors to the plaintiff and the interrelated nature of the harm done,'" citation omitted].) A defendant pursuing indemnity may seek apportionment of the loss based upon any liability theory for the loss that the plaintiff could have asserted against the alleged indemnitor directly. (*Gem Developers v. Hallcraft*

Homes of San Diego, Inc. (1989) 213 Cal.App.3d 419, 429; *Yamaha Motor Corp. U.S.A.*, *supra*, 219 Cal.App.3d at p. 968.)

Here, since plaintiffs—the home buyers—hired Cornerstone to inspect the home and thus could have sued it directly, the broker defendants may sue Cornerstone for indemnity as a concurrent tortfeasor.[8] And since—as we show in Section III below—plaintiffs also could have sued Crystal and D-way for intentional and negligent misrepresentation despite the absence of contractual privity, the broker defendants may pursue indemnity claims against them as well.

Second, the inspectors contend they are not joint tortfeasors with the broker defendants because their investigation and disclosure duties to the buyer arise from different sources. (CRB, pp. 1, 3, 6, 8, 12; C-DwRB, pp. 23, 29.) But as *AMA* explains, and the facts there exemplify, parties are liable as concurrent tortfeasors irrespective of the source of their duty of care to the injured party so long as each is a proximate cause of the same injury. (See *AMA*, *supra*, 20 Cal.3d at p. 587; see also cases cited in footnote 3 of the broker defendants' Reply Brief.)

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[8] The same would be true even if the seller or its broker had retained Cornerstone to prepare the inspection report. (*Hardy v. Carmichael* (1962) 207 Cal.App.2d 218, 227 [negligent termite inspector retained by seller through broker owed duty of care to prospective buyers]; *Wice v. Schilling* (1954) 124 Cal.App.2d 735, 745-746 [negligent termite inspector held liable to purchaser despite no privity of contract]; Miller & Starr, Cal. Real Estate, *supra*, § 1:123, at pp. 426-427, fn. 41 ["When the expert is aware that the opinion will be delivered to and relied on by the buyer, the expert will be liable to the buyer for damages suffered if the expert was negligent in rendering the opinion"]; *Davis v. New England Pest Control Co.* (R.I. 1990) 576 A.2d 1240, 1242 ["There is . . . a substantial body of case law that holds that a[n] [inspector] is liable to a plaintiff who purchases property in reliance upon a false or inaccurate [inspection] report provided to the vendor"]; see also pp. 33-36, *infra*.)

Third, the inspectors claim they could not be joint tortfeasors with the brokers because their alleged negligent acts and omissions purportedly occurred at different times, not contemporaneously. (CRB, pp. 5, 10-11.) But the law is clear that joint tortfeasors' acts or omissions only need be a proximate cause of the same injury, whether or not they occur "concurrently":

> "It is well established that tortfeasors need not have acted in unison, or even concurrently, to be considered as joint tortfeasors. Even tortfeasors whose successive acts unite to produce an indivisible injury may be considered joint tortfeasors for purposes of equitable indemnity." (*Time for Living, Inc. v. Guy Hatfield Homes/All American Development Co.* (1991) 230 Cal.App. 3d 30, 40.)

Courts have repeatedly held there to be joint tortfeasor indemnity liability where the causative acts or omissions were independent, occurred at wholly different times, and violated completely distinct independent duties so long as the result was an indivisible injury. (See cases cited in footnote 3 of the broker defendants' Reply Brief; see also *Time for Living, Inc.*, *supra*, 230 Cal.App.3d at p. 40 [home builder allowed to seek indemnity against contractor who graded lots ten years earlier]; *Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th at p. 1548 [attorneys liable where independent acts of negligence contributed to plaintiff's loss of a promissory note].)

Fourth, the inspectors suggest they should be shielded from indemnity suit because the buyers did not sue them. (CRB, p. 5; C-DwRB, pp. 23; RT 22.) California law again dictates otherwise:

> "Our Supreme Court has explained plaintiffs 'no longer have the unilateral right to determine which defendant or defendants should be included in an action' under the comparative equitable indemnity doctrine. [Citations]. As part of the comparative equitable indemnity doctrine, a defendant who is sued has a right to bring in other tortfeasors who are allegedly responsible for plaintiff's action through a cross-complaint or by a separate complaint for equitable indemnification. [Citations.]" (*Gem Developers v. Hallcraft Homes of San Diego, Inc.*, *supra*, 213 Cal.App.3d at p. 428.)

California indemnity law is clear and well-settled: Brokers and home inspectors who each allegedly fail to disclose material defects to a home buyer are joint tortfeasors.

B. California Law And Public Policy Provide No Basis For A Special Indemnity Exemption For Home Inspectors.

Since home inspectors and brokers who fail to disclose a home's defects are joint tortfeasors under prevailing California law, the respondents' case boils down to a request for a special indemnity exemption for home inspectors that no appellate court from any jurisdiction has ever recognized. California law and public policy do not permit such an exemption.

1. No existing case authority permits an indemnity exemption for home inspectors.

Indemnity claims among concurrent tortfeasors may be prohibited by public policy in specific circumstances, but indemnity is the rule, not the exception.[9] The circumstances that would support such a special exemption are not present here.

For example, respondents rely primarily on *Munoz v. Davis*, *supra*, 141 Cal.3d 420 and *Major Clients Agency v. Diemer* (1998) 67 Cal.App.4th 1116. (See CRB, pp. 12-14; C-DwRB, p. 28.) But those cases recognize that special indemnity rules apply to *attorneys*, because of the privileged, fiduciary nature of their relationship with clients:

> "'[T]he ordinary rules of implied equitable indemnity in tort do not apply when the claim for indemnity is made against an attorney, is based on a breach of an attorney's duty to his or her client, and is brought by an adverse party in litigation

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[9] E.g., *Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th at p. 1544 ["Under [*AMA*] a defendant may ordinarily seek equitable indemnity from another party when the negligent acts of both have combined to cause a single injury to the plaintiff"]; *Gem Developers v. Hallcraft Homes of San Diego, Inc.*, *supra*, 213 Cal.App.3d at p. 430 [recognizing "the clear Supreme Court language favoring apportionment of loss among those responsible for the harm on a comparative fault basis [and] its language granting defendants a right to seek equitable indemnity from parties not named by the plaintiffs"]; *Gentry Construction Co. v. Superior Court* (1989) 212 Cal.App.3d 177, 181-182 ["cases which have created exceptions to the rule of comparative indemnity have done so only where, because of the particular factual context, fairness did not require that any part of the loss be shifted from a defendant to a third party, or where such a loss shifting would interfere in a special relationship between the plaintiff and the third party"].

> which is the same as or related to that in which the alleged negligence took place. Perceiving that attorneys would be reluctant to accept cases that might result in indemnity claims, and, more significantly, that if faced with a potential indemnity claim, the attorney's sense of self-preservation might impinge on his or her duty of undivided loyalty to the client, these cases have established an exception to the ordinary rule of equitable indemnity.'" (*Major Clients Agency*, *supra*, 67 Cal.App.4th at p. 1130, citations omitted.)

(Accord *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1541-1542 [applying a "well-recognized [attorney] exception" to ordinary equitable indemnity rules to shield attorney from indemnity claim given "issues of undivided loyalty, self-protective tendencies, and the preservation of the attorney-client privilege"].)

Home inspectors do not have a comparable relationship with any of the parties to a residential real estate transaction. Unlike attorneys, home inspectors are not fiduciaries and they have no privileged, fiduciary relationship with their clients. Unlike attorney-client communications, inspection reports are not privileged and confidential, and inspectors typically provide their reports to all parties in the home sale transaction, including the brokers, knowing everyone will rely on them.[10] And while the

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[10] Significantly, indemnity suits against attorneys by non-clients *are* allowed where the attorneys knew the non-clients were proceeding with a transaction because of the attorney's representations about his advice to his client. (*Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277.) In *Home Budget Loans, Inc.*, a loan broker required (continued...)

threat of indemnity liability to a non-client might induce an attorney to temper the advice he or she might otherwise provide a client, potential indemnity liability would seemingly enhance the performance of home inspectors by inducing them to be more diligent in conducting their inspections.

In fact, the trial court's holding that brokers can never sue home inspectors for indemnity actually elevates the inspectors' relationship with their clients above the relationship between attorneys and their clients—because even the indemnity shield for attorneys is not absolute. (See footnote 10, *supra*; *Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th at p. 1548 [holding successor attorney could sue client's former attorney for indemnification since attorney-client privilege no longer a concern]; *Kroll & Tract v. Paris & Paris*, *supra*, 72 Cal.App.4th at p. 1544, fn. 4 ["we do not suggest that a cross-complaint for indemnity would never be allowed against an attorney involved in the concurrent representation of a joint client"].)

Home inspectors have an arms-length, non-fiduciary, commercial relationship with their clients. That relationship is not the equivalent of an attorney-client relationship by any stretch of the law, logic or imagination.

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[10](...continued)
a borrower to consult with an attorney as a condition for arranging a loan. An attorney subsequently issued a "To Whom it May Concern" letter stating that he had explained the loan documents to the borrower—his client—and the borrower wanted to complete the transaction. The borrower later sued the loan broker claiming she did not understand English and had not understood the transaction. The Court of Appeal held that the broker could seek indemnity against the attorney based on allegations that the attorney knew the purpose of the "To Whom it May Concern" letter but negligently or intentionally failed to review the documents and to properly advise the borrower. (207 Cal.App.3d at p. 1285.)

No existing California case even remotely supports an indemnity exemption for them.

2. A special indemnity exemption for home inspectors would contravene codified public policy.

Not only does no existing law support an indemnity exemption for home inspectors, but such an exemption would contravene prevailing public policy, as expressed in numerous cases and codified in Business and Professions Code section 7195, et seq.

A special indemnity shield for home inspectors would contravene indemnification's fundamental public policy rationale: To motivate parties to be diligent by ensuring they will bear full liability for wrongdoing even if not sued by the direct victim of their negligence. (*Baird v. Jones*, *supra*, 21 Cal.App.4th at p. 692 ["'The basic idea of indemnification is to spread or shift the burden of an obligation so that the responsible person will be motivated to effectuate a cure'"].) The Legislature has already recognized—indeed, codified—the principle that exposing home inspectors to full liability directly increases the competency of home inspections. Business and Professions Code section 7198 bars home inspectors from contractually circumscribing their liability for breaching their duty of care as "contrary to public policy," in order to "assure that consumers of home inspection services can rely upon the competence of home inspectors." (Bus & Prof. Code, § 7198; *id.*, § 7195, Historical and Statutory Notes.) An indemnity shield for home inspectors would be flatly irreconcilable with

the Legislature's codified policy mandate that home inspectors face full liability exposure.

A special indemnity shield for home inspectors also would contravene the fundamental indemnity policy that,

> "'everyone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill. . . .' A tortfeasor may not escape this responsibility simply because another act . . . may also have been a cause of the injury." (*AMA*, *supra*, 20 Cal.3d at p. 586.)

"'[There] is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were . . . unintentionally responsible, to be shouldered onto one alone, . . . while the latter goes scot free.'" (*Id.* at pp. 607-608, quoting Prosser, Law of Torts, § 50., p. 307.)

But under the home inspectors' view of the law they should be allowed to do just that—escape scot free—whenever a buyer sues only brokers for failing to disclose defects. Neither logic nor the law condones such a result. In fact, in situations where only an expert would likely have been able to discern the alleged defects—as with the foundation defects that plaintiffs allege here—a home inspector would seemingly be entirely at fault, or at least significantly more at fault, than the real estate brokers. Public policy requires holding home inspectors liable for their proportionate responsibility.

The trial court never considered any of these important public policy interests. To the contrary, the only "public policy" it discussed was a concern that allowing inspectors to be sued for indemnity could increase their insurance premiums and thus increase the cost of inspection services.

(RT 8.) The home inspectors rely on similar contentions in their respondents' briefs, claiming indemnity could increase inspection costs and that they deserve special treatment because home inspection costs are less than broker commissions.[11] (C-DwRB, pp. 9, 21, 29.)

The Legislature, however, has already spoken on these issues, and it *rejected* the respondents' position when it enacted Business and Profession Code section 7195, et seq. Home inspectors proffered the exact same rationale—that the approach would force them to increase their inspection prices—in unsuccessfully opposing the duty of care imposed by section 7196 and the prohibition against contractual liability disclaimers or damage limitations imposed by section 7198. (RJN, pp. 48, 53.) In enacting the home inspector statutes, the Legislature necessarily concluded that the public's interest in promoting competent home inspections and ensuring full liability for home inspectors overrides any concern that increased liability exposure might increase home inspection costs. The Legislature's policy analysis is controlling. (*California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1486 ["It is not [a court's] function as a judicial body to reweigh the competing interests considered by the Legislature based on [the court's] perception of which consideration may or may not be more important"]; *Goodman v. Cory* (1983) 142 Cal.App.3d 737, 741 ["Courts may not substitute their social and economic beliefs for the judgment of the

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[11] Brokers commissions and inspector fees are apples and oranges. Home inspectors, unlike brokers, are guaranteed payment for their work and can perform several inspections a day. A broker, in contrast, usually works intensely with clients for months, ultimately guiding them through a lengthy, detailed, and sometimes contentious escrow process. Their exhaustive efforts often will yield no commission whatsoever, because clients frequently change their minds about buying or selling and deals frequently fall apart.

Legislature elected by the people to enact appropriate regulatory legislation"].)

The respondents' cost claims also ignore that a home purchase is typically the single largest and most important investment a family will ever make, and inspection costs—even if they increase—will always be a drop in the bucket compared to the total sum a buyer willingly and necessarily spends on a new home. As the Legislature has recognized, the public needs home inspectors to perform competent, thorough inspections for which they can be held fully accountable, not inspections that are cheap for the sake of being cheap.

In any event, allowing the mere risk of increased costs to justify an indemnity exemption would open an indemnity Pandora's Box that would threaten to unravel all indemnity law. Every commercial entity could claim an indemnity exemption based upon increased insurance and other costs.

Moreover, allowing a broker to pursue indemnification where a buyer fails to sue a home inspector directly would not substantially alter a reasonable inspector's economic exposure. Since buyers have a protected right to pursue inspectors for full liability under Business and Professions Code section 7198, reasonable inspectors already will have liability insurance and will charge inspection fees that reflect their liability exposure and insurance costs. Although indemnity liability might theoretically induce more inspectors to seek liability insurance, that would only further promote public policy. As the California Legislature has mandated in the context of real estate broker's investigation and disclosure duties, "it is desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public." (Civ. Code, § 2079.12, subd. (a)(3).)

A special indemnity exemption for home inspectors would contravene sound, codified public policy. Indemnity liability is the rule, not the exception, for the very policy reasons that prompted the Legislature to enact Business and Professions Code section 7195, et seq.

III.

THE SUMMARY JUDGMENTS IN FAVOR OF CRYSTAL HOME INSPECTIONS AND D-WAY FIREPLACE MUST BE REVERSED, EVEN THOUGH THEY PERFORMED THEIR INSPECTIONS IN A PRIOR FAILED ESCROW.

The indemnity question regarding cross-defendants Crystal and D-way is more complex than that regarding Cornerstone, because they were not hired by the plaintiffs or by the seller. Rather, they were retained by a prospective buyer in an unconsummated sale that immediately preceded plaintiffs' escrow; and the seller and its broker delivered the reports to the plaintiffs.

Since no special indemnity exemption exists for home inspectors, and since the broker defendants may seek indemnity based upon any liability theory plaintiffs could have brought against Crystal and D-way, the summary judgment in their favor must be reversed unless undisputed facts establish as a matter of law that plaintiffs could not have asserted a viable claim against them. Crystal and D-way's argument that the plaintiffs, as a matter of law, could not have sued them directly boils down to a contention that the undisputed absence of contractual privity precludes any such claim because it purportedly means they owed the plaintiffs no duty of care. (C-

DwRB, pp. 6-9, 13-19, 24-26.) That contention fails for two distinct reasons.

First, Crystal and D-way predicate their privity argument on a misreading of *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 ["*Bily*"] and the Restatement of Torts' principles it adopted. Properly construed, those principles establish that plaintiffs *could* sue Crystal and D-way for intentional and negligent misrepresentation despite the absence of privity. Construing the facts against the inspectors as summary judgment review requires, Crystal and D-way have not shown they would be entitled to summary judgment on the basis they owed no duty of care had plaintiffs sued them for intentional or negligent misrepresentation. That failure necessarily defeats the summary judgment in their favor on the broker defendants' indemnity claims.[12]

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[12] Crystal and D-way assert summary judgment is proper here because negligence requires breach of a duty and "determination of duty is a question of law for the court." (C-DwRb, p. 5.) That assertion is over-broad. While existence of a *general negligence* duty usually rests on undisputed facts (such as no contractual privity) that a court may resolve by summary judgment, the existence of a duty of care allowing a *misrepresentation claim* under *Bily* often entails disputed facts regarding forseeability, knowledge and reasonable expectations that a trier of fact must resolve on a full record. (E.g., *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1770-1772.) Here, ample grounds exist to resolve these latter issues *for the broker defendants* as a matter of law based upon the conclusion that the circumstances compel a favorable finding. But since the broker defendants did not move for summary adjudication and the inspectors will undoubtedly claim disputed facts regarding what they knew or should have known, we focus our analysis on the sole issue before this Court—whether undisputed facts entitle Crystal and D-way to summary judgment as a matter of law. Irrefutably, they don't. As we show, plaintiffs could have sued Crystal and D-way for intentional and negligent misrepresentation despite the absence of contractual privity.

Second, the California legislature has already considered and rejected the special restriction against being sued that Crystal and D-way seek here. Home inspectors should petition the Legislature to change its mind on this issue, rather than ask the judiciary to end-run the Legislature's policy analysis.

A. Under *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, And The Restatement Principles It Adopted, Crystal And D-way Are Potentially Liable To Plaintiffs For Intentional And Negligent Misrepresentation, Despite The Absence Of Privity. Crystal And D-way Thus Failed To Establish Entitlement To Summary Judgment On The Broker Defendants' Indemnity Claims.

1. The home inspectors are potentially liable to the broker defendants for intentional misrepresentation.

A professional information supplier's potential liability to non-clients for an erroneous report has a greater scope where there has been intentional misrepresentation than where the claim is merely negligent misrepresentation. (*Bily*, *supra*, 3 Cal.4th at p. 415; Rest.2d Torts, § 552, com. h.) In *Bily*, the Supreme Court endorsed a general forseeability standard for intentional misrepresentation, holding the misrepresentation "'must have been made with the intent to defraud plaintiff, or a particular class of persons to which plaintiff belongs, whom defendant intended *or*

reasonably should have foreseen would rely upon the representation.'" (*Id.* at p. 415, emphasis added; see also *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548-1549 [citing cases]; Rest.2d Torts, § 531-534.)

To the extent the broker defendants are claiming Crystal or D-way made intentional misrepresentations, the summary judgment dismissing their indemnity cross-claims unquestionably must be reversed. No rational view of the facts, or of home sales in general, would allow a determination that, as a matter of law, Crystal and D-way should *not* have reasonably foreseen that the buyer in any subsequent escrow would receive and rely upon the content of their inspection reports. Thus, the summary judgments are improper to the extent the indemnity claims allege intentional misrepresentations.

2. The home inspectors are potentially liable to the broker defendants for negligent misrepresentation.

Crystal and D-way also cannot show entitlement to summary judgment on any indemnity claims based upon their alleged *negligence*.

Their contrary claim boils down to assertions that under *Bily* "[negligence] liability is confined to the client" and therefore only the prospective buyer in the first escrow could ever sue them because "[h]e was the only person intended to receive the information by contract." (C-Dw RB, p. 7.) Those assertions, however, wholly confuse and disregard *Bily*'s distinction between an auditor's general negligence liability—which "is confined to the client, i.e., the person who contracts for or engages the audit services" (*Bily*, 3 Cal.4th at p. 406)—and its liability for *negligent*

misrepresentation, which extends *beyond contractual privity* to non-clients who received and relied upon the report (*id.* at pp. 408-413). No one is claiming Crystal and D-way owed a general professional negligence duty to the plaintiffs (that would exist without an inspection report); the point, rather, is that they owed a duty of care under negligent misrepresentation law because of the allegedly negligent inspection reports they disseminated.[13]

With respect to negligent misrepresentation by professional suppliers of information, *Bily* adopted the approach of the Restatement Second of Torts section 552, subdivision (2). (*Bily,* 3 Cal.4th at p. 414.) That standard extends negligence liability for a professional opinion or report *beyond contractual privity* to a class of "intended beneficiaries," which is based upon an objective, rather than true intent, standard. (*Id.* at p. 410.) The professional must have intended to influence the "[non-client] plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of

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[13] Crystal and D-way's reliance on *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, is therefore misplaced, because the plaintiffs there never relied upon any report or representation by the defendants. The plaintiffs there were party-goers injured when an oceanfront balcony collapsed. They sued real estate brokers who had represented the home's seller, alleging the brokers negligently failed to inform the home buyer about the balcony's defects. The plaintiffs, however, had no contact with the brokers in any form and were complete strangers to the real estate transaction, as they had no relationship with the brokers, the seller, the buyer or any prospective purchaser of the property. (*Id.* at p. 72.) Not surprisingly, the court held that the brokers could not be liable to the partygoers. (*Ibid.*) Here, in contrast, plaintiffs were not strangers to the home sale and they directly received the material contents of allegedly negligent inspection reports under circumstances where it was substantially certain all prospective purchasers in escrow would rely on them. That is a different story under *Bily*.

transaction. . . ." (*Id.* at p. 414.) Such an intent to influence a non-client plaintiff is deemed to exist whenever the preparer of the opinion/report "knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction." (*Ibid.*; see also *Arthur Anderson v. Superior Court* (1998) 67 Cal.App.4th 1481, 1501 [noting *Bily* and the Restatement steer "a middle ground between privity and forseeability in cases alleging negligent misrepresentation by an accountant"].)

This standard is fluid and must be applied contextually to effect its overall purpose—to "'eliminate liability to the very large class of persons whom almost any negligently given information may foreseeably reach and influence, and limit the liability, not to a particular plaintiff defined in advance, but to the comparatively small group whom the defendant expects and intends to influence.'" (*Bily*, 3 Cal.4th at p. 394, quoting Dean William Prosser, the Reporter for the Restatement.) The Supreme Court therefore recognized in *Bily* that summary adjudication of an auditor's liability to a third party is proper only where the evidence "does not permit a reasonable inference that the auditor supplied its report with knowledge of the existence of a specific transaction or a well-defined type of transaction which the report was intended to influence, . . . [thereby] plac[ing] [the auditor] on notice of the risks of the audit engagement." (*Bily*, 3 Cal.4th at p. 414.)

Even if *Bily*'s rules for auditors were to govern home inspectors, the summary judgment for Crystal and D-way here violates these principles. Both Crystal and D-way prepared their reports knowing it was solely for a specific, limited type of transaction—the sale of a specific home—and that it was substantially certain a limited, defined class—prospective purchasers

in escrow—would rely upon it. *Bily*'s concern about exposing auditors to indeterminate liability is plainly absent in the home inspector context.[14] In agreeing to perform an inspection, home inspectors know a negligent report will expose them to the cost of repairing the undisclosed defects—a damage threat that, unlike the audit report context, is fairly constant and limited irrespective of the buyer's identity. *Bily*, therefore, would allow plaintiffs to sue Crystal and D-way for negligent misrepresentation.

It is irrelevant that Crystal and D-way had no contractual or other relationship with plaintiffs and did not directly provide them their inspection reports. California cases assessing liability for negligent inspection reports under *Bily* and/or the Restatement of Torts section 552 show negligent misrepresentation claims are viable against inspectors even where (a) the plaintiff did not retain or pay the inspector, (b) the inspector did not provide the professional report directly to the plaintiff or prepare it directly for the plaintiff, and (c) the inspector did not know the plaintiff's identity at the time it prepared the report. (See *M. Miller Co. v. Dames & Moore* (1961) 198 Cal.App.2d 305; *Hardy v. Carmichael*, *supra*, 207 Cal.App.2d 218; see also *Soderberg v. McKinney*, *supra*, 44 Cal.App.4th at p. 1760.) What matters is that the inspector knew it was substantially certain that a limited class of parties (here, prospective purchasers in an escrow) would rely upon the report in connection with a specific

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[14] The Supreme Court in *Bily* also sought to limit the scope of auditor suits because "audits are performed in a client-controlled environment" based upon financial statements over which the client has "direct control over and assumes financial responsibility" and "the client necessarily furnishes the information base for the audit." (3 Cal.4th at p. 399.) That client control creates a heightened risk of "liability out of proportion to fault." (*Ibid.*) None of that is true for home inspectors.

transaction or type of transaction (here, the sale of a specific home) for which it was prepared. (*Ibid.*)

Although pre-*Bily*, *M. Miller Co.* is particularly instructive because the Supreme Court described it in *Bily* as consistent with "Restatement Second of Torts section 552 and the 'intended beneficiary model.'" (*Bily*, 3 Cal.4th at p. 412, fn. 20). In *M. Miller Co.*, the defendant allegedly prepared a negligent soil inspection report pursuant to a contract with a sanitary district, which the plaintiff relied upon in contracting with the district to build a sewer system. The court rejected defendant's claim of no liability as a matter of law given the lack of contractual privity or any other relationship with plaintiff. It held a triable issue existed because the evidence might show the inspection report was intended "to provide information for prospective bidders such as plaintiff." (*M. Miller Co.*, *supra*, 198 Cal.App.3d at pp. 307-308.)

Similarly, in *Hardy v. Carmichael*, *supra*, 207 Cal.App.2d 218, the court found a negligent termite inspector liable under Restatement of Torts section 552 to a home buyer who relied on its inspection report, even though the inspector was hired by the seller, had no privity of contract with the buyer, and did not know the names of any prospective buyers when it prepared its report. (*Id.* at p. 227.) Although the inspector did not know the names of the people who might rely on his report, he "knew the property was 'changing hands' or being sold." (*Ibid.*) The Court of Appeal recognized that under the circumstances "[i]t could be inferred that he knew that his report was for the benefit or information of persons who were concerned with the purchase and sale transaction involving the property . . . [and thus] that the plaintiffs were of a class of persons for whose benefit the report was made." (*Ibid.*)

Although it did not involve an inspector, *Soderberg v. McKinney*, *supra*, 44 Cal.App.4th 1760, is also on point. There, the Court of Appeal reversed a summary adjudication in favor of a defendant real estate appraiser on a negligent misrepresentation claim. The defendant had prepared an appraisal report on a piece of real property pursuant to a contract with a mortgage broker. The plaintiffs were investors who relied on a copy of the report provided by the mortgage broker in deciding to make a loan secured by a trust deed. After the borrower defaulted and plaintiffs learned the property was worth less than the appraisal, plaintiffs sued the appraiser. The Court of Appeal found a triable issue on the negligent misrepresentation claim under *Bily* and the Restatement Second of Torts. (*Id.* at pp. 1770-1771.)

It did so because the evidence construed in plaintiffs' favor indicated that the appraiser knew the mortgage broker would provide the report to "a particular group or class of persons to which plaintiffs belonged—potential investors contacted by [the mortgage broker]" who would rely on his report "in the course of a specific type of transaction he contemplated—investing in a deed of trust secured by the appraised property." (*Id.* at p. 1771.) The Court held there was a triable issue even though the appraiser claimed it did not know "the appraisal would be communicated to or relied upon by anyone other than [the client]" and even though its contract with the mortgage broker expressly limited the appraisal's reproduction to the client's use. (*Ibid.*)

Under these cases, summary judgment is improper on a buyer's claim against a home inspector who negligently prepared an inspection report relating to a home's possible sale if one could infer the inspector knew with substantial certainty that whoever bought the home would rely

upon the report.[15] Thus, a home inspector under contract with the seller or its agent irrefutably may be liable for negligent misrepresentation to the buyer even where multiple escrows occurred. Although here Crystal and D-way were hired by a prospective buyer and not the seller, that does not shield them from liability. The facts, construed against Crystal and D-way as summary judgment review requires, support the necessary inference.

Although Crystal and D-way were paid by the prospective purchaser, it is undisputed that they willingly gave copies of their inspection reports to

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[15] Legions of non-California authorities applying Restatement Second of Torts section 552—the approach *Bily* adopted—have found triable issues and *reversed summary judgments in favor of inspectors* under analogous circumstances. (E.g., *Wolther v. Schaarschmidt* (Colo.Ct.App. 1986) 738 P.2d 25, 28-29 [allowing trial on engineer's liability to home buyer for negligent structural inspection report prepared for lender's appraiser but sent to the real estate broker]; *Bay Garden Manor Condominium Association v. James D. Marks Associates, Inc.* (Fla.Ct.App. 1991) 576 So.2d 744, 746 [allowing trial on whether engineer who prepared negligent inspection report for building owner prior to condominium conversion knew unit owners would rely on its report in deciding to purchase a unit]; *Perschall v. Raney* (1985) 137 Ill.App.3d 978, 984 [484 N.E.2d 1286, 1290] [termite inspector hired by seller could be liable for negligent misrepresentation to home buyer because it "was aware that the premises being inspected were being sold and that the report would be provided to and relied upon by prospective purchasers, such as plaintiffs"]; *Barrie v. V.P. Exterminators, Inc.* (La. 1993) 625 So.2d 1007, 1016-1017 [termite inspector hired by seller could be liable to buyer because it knew inspection report would be transmitted to prospective purchasers]; *Hosford v. McKissack* (Miss. 1991) 589 So.2d 108, 111 [pest control inspector hired by seller "should reasonably have foreseen that [the buyer] would receive and rely on the report"]; *Meininger v. Henris Roofing & Supply of Klamath County, Inc.* (1995) 137 Or.App.451 [905 P.2d 861] [roof inspector hired by seller's agent could be liable for negligent misrepresentation to buyer]; see also *Davis v. New England Pest Control Co.* (R.I. 1990) 576 A.2d 1240, 1242 [noting "a substantial body of case law" holds inspectors liable to home buyers who rely on an inaccurate report provided to the seller].)

the seller, the seller's broker, and the buyer's broker—which is exactly what would have happened had the seller instead paid the inspectors.

And under the circumstances, their delivery of the reports to the seller and its broker was tantamount to providing the reports' material contents and opinions to the prospective purchaser in any subsequent escrow. Since California law requires sellers and brokers to disclose all known adverse material information to a prospective buyer, they face liability for failing to disclose material information contained in any inspection reports they receive. (*Godfrey v. Steinpress*, *supra*, 128 Cal.App.3d at pp. 154, 172-173; *Gilbert v. Corlett*, *supra*, 171 Cal.App.2d at p. 118; Miller & Starr, Cal. Real Estate, *supra*, at § 1:123, p. 427.) The easiest and safest way to assure full compliance with their disclosure duties and to minimize the threat of litigation is to provide all existing current inspection reports to any prospective buyer, just as the seller and broker defendants did here. It is also customary for sellers and brokers to rely upon all existing inspection reports and to provide them to any prospective buyer in escrow by submitting them with, and referencing their content in, their statutorily-prescribed Transfer Disclosure Statements; sellers and brokers do so in order to rely on the Code's "substituted disclosure" provisions and to assert the Code's liability shield for sellers and brokers who rely upon professional reports in making their disclosures. (Civ. Code, §§ 1102.4, 1102.6.)

This broad inter-reliance on, and dissemination of, the content of inspection reports can come as no surprise to any reasonable home inspector. In fact, inspectors actively solicit broad reliance on their reports by home sale participants because they need references, particularly broker

references, to obtain clients. Indeed, Crystal and D-way actively solicited the broker defendants here. (CT 5198.)

Although Crystal and D-way claim—just like the defendant in *Soderberg* and virtually every other analogous case—that they didn't intend for anyone else to rely on their reports, that bald assertion cannot support summary judgment. Since the circumstances indicate that it was substantially certain the buyer in a subsequent escrow would rely upon the material contents of their inspection reports—either through direct receipt of the reports or through brokers' disclosures based upon them—for summary judgment purposes plaintiffs fall within the universe of potential persons to whom Crystal and D-way might be liable for negligent misrepresentation.[16] Indeed, the fact that customary real estate practices and California disclosure law essentially ensured the buyer would receive and rely upon the material contents of the inspection reports arguably compels attribution of the requisite knowledge to Crystal and D-way *as a matter of law*. (Cf. *Arthur Anderson v. Superior Court*, *supra*, 67 Cal.App.4th at pp. 1506-1507 [court rejected auditor's claim it didn't actually know non-client plaintiff would receive and rely upon audit report,

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[16] *Soderberg* confirms that the references in Crystal's inspection report that it is "confidential" and "prepared exclusively" for the client (AA 5270) does not permit summary judgment for Crystal (*Soderberg*, *supra*, 44 Cal.App.4th at p. 1770). The undisputed fact is that Crystal willingly provided the report to everyone involved in the escrow, and those actions trump the contract language for summary judgment purposes. Also, in the event a trier of fact found Crystal liable for negligent misrepresentation, the contract provisions could not exculpate Crystal. (Bus. & Prof. Code, § 7198; Civ. Code, § 1668; *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101-103 [exculpatory provision invalid as against public policy]; *Akin v. Business Title Corp.* (1968) 264 Cal.App.2d 153, 159 [same].)

charging auditor as a matter of law with knowledge that a particular statute required plaintiff's receipt of the report].)

Either way, Crystal and D-way have failed to show entitlement to summary judgment on a negligent misrepresentation claim by plaintiffs; and therefore the summary judgment in their favor on the broker defendants' indemnity claims must be reversed.

B. The California Legislature Has Already Rejected The Special Restrictions Against Being Sued That Crystal And D-way Seek Here.

In enacting its statutes governing home inspectors—Business & Professions Code section 7195, et seq.—the California legislature squarely rejected the identical request for special protection against being sued that Crystal Homes and D-way presently pursue. The judgment in their favor therefore undermines the Legislature's intent and must be reversed for this additional distinct reason.

Initial versions of the Senate bill enacting the home inspector statutes contained—at the request of home inspector organizations—the following limitation against suing home inspectors:

> "An action arising from a home inspection may be maintained only by the party ordering the report, the party paying the home inspector for the report, a party named in the report as a beneficiary of the report, or an intended beneficiary of the report." (RJN, pp. 29, 33, 37, 41.)

The inspectors insisted upon this restriction because of the exact scenario confronting Crystal Homes and D-way here:

> "Under the bill, this duty would be owed only to parties ordering or paying for the report, and to named or intended beneficiaries of the report. [¶] This duty limitation was inserted into the bill at the request of the home inspector organizations which support the bill. The limitation is designed to address the following situation: prospective buyer #1 hires a home inspector, and the report is delivered to both prospective buyer #1 and the seller. Prospective buyer #1 backs out of the deal, and the seller gives a copy of report to prospective buyer #2. The home inspectors do not want to be held liable to prospective buyer #2, because they don't want people to rely on reports without paying for them." (RJN, pp. 93, 117, 137.)

The California Legislature, however, *rejected* the proposed duty-limitation, deleting it entirely from the bill enacted into law. (RJN, p. 24; see also RJN, pp. 5, 15, 20.) Senate Judiciary Committee reports explain why.[17] After discussing *Bily*'s special rules for auditors, those reports explain:

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[17] Statements of legislative committees may be used to discern legislative intent. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659.) "'[I]t is reasonable to infer that those who actually voted on the proposed measure read and considered the [legislative committee] materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it.'" (*City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 692.)

"These justifications for a specially limited duty do not appear to apply to home inspection reports: it is not likely that there will be more than a few prospective purchasers who would rely on a report which was not intended for their benefit. Likewise, a negligently prepared home inspection report does not have consequences like affecting multi-million dollar investment decisions. In addition, prospective home buyers are not analogous to sophisticated investors who can be assumed to be able to protect themselves. [¶] *In limiting intentional fraud actions to plaintiffs who were intended beneficiaries of the contract, this bill would be unprecedented. In limiting negligence actions to intended beneficiaries, this bill would be applying a rule which was created for a special situation involving potential crushing liability to a situation in which such concerns do not seem to be applicable*." (RJN, pp. 95, 119, 138-139, emphasis added.)

The Legislature's rejection of the lawsuit restriction manifests its intent that suits against home inspectors not be restricted in the manner that Crystal and D-Way seek here. (*Madrid v. Justice Court* (1975) 52 Cal.App.3d 819, 825 [legislature's rejection of provision requiring civil suit for welfare fraud to be brought before criminal action was "a clear indication from the legislature that it did not wish to impose such a halter on the prosecution of welfare frauds"]; *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555 ["the rejection of a specific provision

contained in an act as originally introduced is 'most persuasive' [evidence]" of legislative intent].)

Since the trial court here did not have the legislative history before it, it never realized that it was adopting a special restriction that the Legislature had rejected. To avoid undermining and supplanting the Legislature's intent on what is essentially a public policy issue, the judgment must be reversed. (*People v. Zapien* (1993) 4 Cal.4th 929, 954-955 [courts cannot "judge the wisdom of statutes " and are not "empowered to insert what a legislative body has omitted from its enactments"]; *People v. Tufunga* (1999) 21 Cal.4th 935, 950 [whether amending statute to preclude a legal defense "would better reflect public policy is one properly addressed to th[e] [Legislature] rather than to th[e] court"].)

If home inspectors desire special protection from suit, they should petition the Legislature to change its mind. But they should not be allowed to end-run the Legislature's policy determination by asking this Court to create a special limitation against suit—one riddled with public policy ramifications—that the Legislature expressly rejected.

CONCLUSION

The right to hold wrongdoers liable according to their proportionate fault is a cornerstone of California jurisprudence. Permitting home inspectors to escape liability merely because they were not named in the plaintiff's complaint would not just contravene settled California indemnity law, it would uproot it from its very foundation by allowing virtually any commercial entity to claim the same liability shield. And an indemnity exemption for home inspectors wouldn't just disregard settled indemnity law. It also would violate the Legislature's clear policy mandates on home inspector liability, voiced in both measures it enacted and ones it rejected.

California law and public policy compel the judgment's reversal.

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