



Association of Defense
Counsel of Northern
California and Nevada



August 3, 2017

Presiding Justice Arthur Gilbert
Associate Justice Steven Z. Perren
Associate Justice Martin J. Tangeman
Court of Appeal of the State of California
Second Appellate District, Division Six
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

Re: Request for Publication of *Jacobs v. Coldwell Banker* B277832 (July 25, 2017)

Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California *Rules of Court*, the Association of Southern California Defense Counsel (“ASCDC”) and Association of Defense Counsel of Northern California and Nevada (“ADCNCN”) write jointly to urge the Court to order publication of its opinion in *Jacobs v. Coldwell Banker Residential Brokerage Company*, B277832 (“*Jacobs*”).

The ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California’s civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and a forum for exchanging information and ideas.

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including personal injury matters and the summary judgment procedure. The Association’s Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC and ADCNCN are separate organizations that coordinate from time to time on matters of shared interest, such as this letter in support of publication of the *Jacobs* opinion. Together and separately, they have appeared as *amicus curiae* in numerous cases before both the

California Supreme Court and Courts of Appeal across the state to express the interests and concerns of the civil litigation attorneys who are the members of those organizations.

The *Jacobs* opinion meets the standards for publication in at least three respects.

First, it addresses the trial court's discretion to consider evidence submitted with the reply brief in a motion for summary judgment, which is a "legal issue of continuing public interest" as set forth in rule 8.1105(c)(6). The *Jacobs* opinion provides guidance regarding the contours of the trial court's discretion, explaining that plaintiffs did not clearly identify in their complaint or discovery responses the theory of liability on which they opposed summary judgment. This emphasizes that plaintiffs' claims are limited to those in the complaint, and instructs that plaintiffs should amend their complaint rather than advance an unpled theory to oppose summary judgment.

Second, the opinion provides guidance regarding more appropriate mechanisms for litigants to employ when evidence is submitted with the reply brief, explaining that the onus is on the party opposing summary judgment to ask the trial court for permission to submit responsive evidence, to file a sur-reply, or to move for a continuance to conduct further discovery. All parties would benefit from this discussion, which explains not only when it is appropriate to submit evidence with a reply brief, but also what parties opposing summary judgment should do to preserve their due process objections. (Opinion, pp. 14-15)


Third, the Court's analysis of the "practical necessity" exception to the general rule that one owes no duty regarding an open and obvious danger meets the publication standards set forth in rule 8.1105 (c)(2) and rule 8.1105(c)(3). (Opinion, pp. 10-14) By contrasting the facts of this case with those in existing published decisions applying the "practical necessity" doctrine, the *Jacobs* opinion explains an existing rule of law (8.1105(c)(3)) and applies the rule to a set of facts significantly different from those stated in published opinions (8.1105 (c)(2)). As this Court observed, the facts of this case do not show a practical necessity requiring the plaintiff to expose himself to the danger posed by an empty swimming pool, or an invitation from the defendant that he do so. The circumstances set forth in the opinion would provide valuable guidance on this important legal doctrine.

For these reasons, ASCDC and ADCNCN urge this Court to certify its *Jacobs* opinion for publication.


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Respectfully submitted,

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On Behalf of the Association of
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PROOF OF SERVICE

(Code of Civ. Proc. §1011 and 1013a, subd. (3))

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and not a party to the within action; my business address is 2049 Century Park East, Suite 2900, Los Angeles, CA 90067.

On August 3, 2017, I served the attached document described hereto as a **Request for Publication** on the interested parties in this action as follows:

Party	Attorney
Jacques Jacobs : Plaintiff and Appellant	Brian Hong Grassini, Wrinkle & Johnson 20750 Ventura Blvd Suite 221 Woodland Hills, CA 91364-6235
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Household Finance Corporation of California : Defendant and Respondent	Teresa Marie Beck Lincoln Gustafson & Cercos 550 W "C" St # 1400 San Diego, CA 92101
Safeguard Properties, LLC. : Defendant and Respondent	Karen Liao Manning & Kass Ellrod, Ramirez, Trester 801 S Figueroa St 15th Floor Los Angeles, CA 90017

BY FIRST CLASS MAIL: I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

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

Executed on this 3rd day of August, 2017 at Los Angeles, California.



Michelle E. Moya