Filed 7/31/03; pub. & mod. order 8/29/03 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| MODERN DEVELOPMENT COMPANY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>NAVIGATORS INSURANCE COMPANY,<br><br>Defendant and Respondent. | B157874<br><br>(Los Angeles County<br>Super. Ct. No. BC 227138) |

Appeal from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Dennison, Bennett & Press and James H. Goudge for Plaintiff and Appellant.

Burnham Brown, Clark J. Burnham and Alison F. Greene for Defendant and Respondent.

INTRODUCTION

Navigator's Insurance Company (Navigators) appeals from the grant of summary judgment for respondent, Modern Development Company (Modern) in a lawsuit arising from an insurance coverage dispute. Modern contends that Navigators had a duty to defend in a lawsuit brought by a disabled man for physical and emotional damages resulting from Modern's alleged failure to comply with the Americans with Disabilities

Act and other similar California statues. The trial court agreed with Navigators' contention there was no "occurrence" that triggered coverage under the insurance policy. We affirm.

## FACTUAL AND PROCEDURAL HISTORY

Modern is a California Limited Partnership that owns and operates the Paramount Swap Meet. The Swap Meet is an open-air marketplace operated at the site of a former drive-in movie theater. Navigators issued Modern a commercial general liability policy No. 98G110630 for the period of February 1, 1998 through February 1, 1999 (the Policy.) The Swap Meet is a named insured covered under the Policy. The Policy insured Modern for up to $1 million for amounts that it was legally obligated to pay.

On or about December 7, 1998, Mr. Juan Moreno filed a complaint[1] against Modern in the United States District Court of California for violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, and related California statutes. The complaint set forth the following causes of action: 1) violation of the ADA; 2) injunctive relief for denial of full and equal access to a person with physical disabilities in a public facility; no accessible public facilities in a public Swap Meet (Health & Safety Code § 19955 et seq.; Civil Code § 55; 3) violation of California Disabled Persons Act (Civ. Code §§ 54[2] et. seq, denial of equal access to persons with physical disabilities

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[1] *Juan Moreno v. Modern Development Company, a Limited Partnership*, Case No. 98-9841 MMM.

[2] Civil Code § 54: Provides that physically disabled persons shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, hotels, lodging placed, places of public accommodation and amusement or resort, and other places to which the general public is invited, subject only to the conditions or limitations established by law, or state and federal regulations, and applicable alike to other persons.

Civil Code § 54.3; Provides that any person or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in sections 54 and 54.1 is liable for each such offense for the actual damages and in an amount up to

(Civ. Code §§ 54 et. seq.); 4) violations of Unruh Civil Rights Act (Civ. Code § 51 et. seq.); and, 5) violations of Business & Professions Code sections 17200 et. seq. Moreno's complaint contained the following factual allegations:

(1) The [Swap Meet] facility has undergone "construction work" and "Modernifications" which subject the Swap Meet to the handicapped access requirements set forth by the Americans with Disabilities Act Access Guidelines and the California Health and Safety Code.

(2) The [Swap Meet] failed to remove architectural barriers and to otherwise comply with the accessibility requirements set forth by the Americans with Disabilities Access Guidelines ("ADAAG") and the California Health and Safety Code.

(3) Modern Development had reason to know of the accessibility requirements references above and "intentionally" failed to "rectify the situation."

(4) In August 1998, when Mr. Moreno visited the [Swap Meet], the public restroom facilities were configured in such a way that they were inaccessible to Mr. Moreno in his wheelchair.

(5) As a result of the inaccessible facilities, Mr. Moreno was humiliated, embarrassed and frustrated, *suffering serious emotional and physical injuries*. (Emphasis added.)

On or about February 17, 1999, Modern tendered the defense of the *Moreno* action to Navigators. On or about March 26, 1999, Navigators declined to defend or indemnify Modern on the grounds that the complaint did not allege any "bodily injury" or "property damage" caused by an "occurrence." Modern subsequently settled the *Moreno* action for $9,750. Modern claims that it incurred a minimum of $7,600 in attorney's fees defending the action.

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a maximum of three times the amount of actual damages but in no case less than $1,000 and such attorneys' fees that may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in section 54 and 54.1 for services necessary to enforce those rights.

On March 27, 2000, Modern filed a complaint for damages in the Los Angeles Superior Court alleging breach of contract, breach of the covenant of good faith and fair dealing, injunctive relief and restitution pursuant to California Business & Professions Code section 17200, et. seq. The complaint sought compensatory damages, prejudgment interest, attorney fees and punitive damages. On or about June 29, 2000, Navigator filed an answer to the complaint.

The parties filed cross motions for summary judgment and/or summary adjudication. The motions addressed the legal issue of whether Navigator had a duty to defend Modern in the *Moreno* lawsuit. The motions were heard in the trial court on January 10, 2002. The trial court granted Navigator's motion for summary judgment Making its ruling, the court found:

> "As for the defendant's motion for summary judgment, the Court finds that it has merit and grants the motion in favor of the defendant. The Court finds that there is no potential for coverage. Further, that the underlying Moreno action was not a covered claim. The Court finds that there was no "occurrence" as that term is defined in the CGL policy and as interpreted by the applicable case law.
>
> "Finding a no occurrence, there is no duty to defend and thus there is no triable issue of fact. Finding no breach of contract, there can be no breach of the covenant of good faith and fair dealing and no cause for injunctive relief and restitution."

The court also found that the underlying *Moreno* lawsuit failed to allege any actual physical injury.[3] The court declined to rule on Modern's motion for summary judgment, stating that the motion was moot.

Judgment for Navigator was entered on March 15, 2002. Notice of entry of judgment was filed on April 2, 2002. A timely notice of appeal was filed the same date.

## CONTENTIONS ON APPEAL

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[3] This lack of physical injury is not argued in this appeal. The *Moreno* complaint clearly alleged physical injury.

The sole issue raised by this appeal is whether Navigators had a duty to defend Modern Development in the *Moreno* action. The trial court found there was no occurrence within the definition of "occurrence" set forth in the CGL Policy. Consequently, there was no potential for coverage and therefore no duty to defend.

Modern's contention is that Navigators had a duty because: 1) the *Moreno* action properly alleged "bodily injury;" and, 2) the *Moreno* complaint properly alleged bodily injury due to an "occurrence."

STANDARD OF REVIEW

Summary judgments are reviewed de novo. (*Parsons v. Crown Disposal Co*. (1997) 15 Cal.4th 456, 464, fn.4; *Scheinding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 69; *Vann v. Travelers Companies* (1995) 39 Cal.App.4th 1610, 1614; *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1837.) In doing so, we examine the facts presented to the trial court and independently determine their effect as a matter of law. (*Donchin*, supra, at p. 1837.) We must affirm the judgment if it is correct under any theory of law applicable to the case. (*Lucas v. Pollock* (1992) 7 Cal.App.4th 668, 673.) "Although the trial court may grant summary judgment on one basis, this court may affirm the judgment under another, . . . it reviews the ruling, not the rationale." (*Salazar v. Southern Cal. Gas Co*. (1997) 54 Cal.App.4th 1370, 1376.)

In reviewing insurance policies, we are also guided by the rule that: "Interpretation of an insurance policy is primarily a judicial function. When the trial court's interpretation did not depend upon conflicting extrinsic evidence, the reviewing court makes its own independent determination of the policy's meaning. [Citations.]" (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co*. (1996) 45 Cal.App.4th 1, 35-36.) Insurance policies are contracts subject to ordinary rules of contract interpretation. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) Our goal is to give effect to the mutual intention of the parties when they entered into the contract. (*Safeco Ins. Co. v. Robert S*. (2001) 26 Cal.4th 758, 763.) Whenever possible, we

determine the parties' intent solely from the terms of the policy, giving those terms their ordinary and popular meanings, unless the parties use terms in a technical or special sense. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822,)

When assessing the validity of a claim that an insurer owes a duty to defend we review the allegations of the underlying action and extrinsic evidence, recognizing that the third party plaintiff cannot be the arbiter of coverage. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 296 (*Montrose*), citing *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 276 (*Gray*).)

Additionally, in determining whether allegations in a particular complaint give rise to coverage under a CGL policy, courts must consider both the occurrence language in the policy, and the endorsements or exclusions affecting coverage, if any, included in the policy terms. (*Collin v. American Empire Ins. Co*. (1994) 21 Cal.App.4th 787 at p. 803.)

DISCUSSION

*Navigators Commercial General Liability Policy*

Customarily, third party liability policies provide in some manner that the insurer is liable only for accidental events. The Policy issued by Navigators contained the following provisions:

"1. Insuring Agreement "

> "(a) We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend any 'suit' seeking those damages
>
> "[¶] . . . [¶]
>
> "(b) This insurance applies to 'bodily injury' and 'property damage' only

if:

"(1)The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and, (2) The 'bodily injury' or 'property damage' occurs during the policy period."

Within the Policy itself, bodily injury is defined as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time. The Policy defines "occurrence" to mean "an accident,"[4] including continuous or repeated exposure to substantially the same general harmful conditions." ~(AA 162)~

The policy also contains the following language relating to exclusions:

> "This insurance does not apply to:
> **(a) Expected Or Intended Injury**
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured." (Emphasis in original.)

*Navigators Refusal to Defend*

After Modern tendered the defense of the Moreno action, Navigators advised Modern in a letter dated March 26, 1999, as follows:

> We have now had the opportunity to review the allegations in the complaint, as well as conduct a thorough investigation into the facts of this matter. For the reasons discussed below, Navigators Insurance Company must respectfully decline your request of defense and indemnification on behalf of Modern Development in this litigation.
>
> In the complaint, the plaintiff alleges his civil rights were violated when he was denied access to the public restroom because he was physically handicapped at the Paramount Swap Meet…. As a result of his civil rights being violated, he alleges emotional distress, embarrassment, humiliation, anger, headaches,

[4] "Accident": Unless the term "accident" is otherwise defined in the policy, it is given a commonsense interpretation: i.e., an "unintentional, unexpected, chance occurrence." (*St. Paul Fire & Marine Ins. Co. v. Sup. Ct. (County of Yuba)* (1984) 161 Cal.App.3d 1199; See also, *Collin v. American Empire Ins. Co., supra,* 21 Cal.App.4th at pp. 804-805, *Chatton v. National Union Fire Ins. Co*. (1992) 10 Cal.App.4th 846, 860.)

stomachaches and anxiety. There is no medical evidence plaintiff was treated for the above stated injuries.

Respondent Navigators now argues, "Modern simply failed to meet its threshold burden of proving that there was a potential for coverage afforded under the Navigators policy." Navigators maintains the GCL policy:

> "does not purport to cover statutory violations, such as the failure to maintain a premises in compliance with the ADA and similar accessibility statutes. Even if the Moreno allegations of discomfort, humiliation and 'physical injuries' from being unable to access the restroom could somehow be construed as allegations of actual "bodily injury," the allegations do not constitute an accidental, unforeseen 'occurrence' sufficient to trigger Navigators' duty to defend."

Discussing the definition of "occurrence" in the Policy[5] Navigators argues "claims should be covered by a commercial general liability policy where the consequences of an act were not intended, even though the act giving rise to liability was intentional." "Even construing these allegations in a manner most favorable to Modern Development, Moreno's alleged injuries were caused by the architectural configuration of the Paramount Swap Meet and Modern Development's alleged failure to remove architectural barriers . . . . [¶] The Swap Meet's layout and architectural configuration were necessarily the result of day-to-day managerial decisions, actions or omissions to act." Further: "Modern Development, whether or not in violation of the ADA and other related statutes, <u>intended the architectural layout of the Paramount Swap Meet to be the way it was when Mr. Moreno visited the Swap Meet</u>. As a matter of law, the architectural layout of a building is not an accident." (Emphasis in original.)

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[5] Occurrence is defined in the policy as "continuous or repeated exposure to substantially the same general harmful conditions."

## GENERAL INSURANCE PRINCIPLES

*The Duty to Defend*

An insurer must defend any complaint that "*potentially* seeks damages within the coverage of the policy . . . ." (*Gray v. Zurich Ins. Co*. (1966) 65 Cal.2d 263.) The duty is limited to those actions of the nature and kind covered by the policy. (*Ibid.*) The burden to establish the existence or absence of a duty to defend is: "To prevail, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within the policy coverage; the insurer must prove it 'cannot.'" (*Montrose, supra,* 6 Cal.4th at p. 300.)

*Montrose* also holds that an insurer has a duty to defend an insured if it becomes aware of, or if the third-party lawsuit pleads, facts giving rise to the potential for coverage under the policy. (*Montrose, supra,* 6 Cal.4th at p. 296) The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint in the suit with the terms of the policy, and it turns on those facts known by the insurer at the inception of the suit. Facts extrinsic to the complaint may also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy.

The policyholder bears the initial burden of proving the potential for coverage (*Cutler-Orosi Unified School Dist. v. Tulare County School, etc. Authority* (1994) 31 Cal.App.4th 617.) Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor. (*Reagen's Vacuum Truck Service, Inc. v. Beaver ins. Co.* (1994) 31 Cal.App.4th 375; *Haskel, inc. v. Superior Court* (1957) 33 Cal.App.4th 963.) Similarly, when the accidental nature of an event is a condition of coverage, the burden is on the insured to bring the claim within the scope of coverage. That burden is not met merely by showing that the event happened in an unexplained and presumably accidental, manner.

*Gray* holds the duty to defend is limited to those actions of the nature and kind covered by the policy. For example, a liability policy's coverage for "property damage" or "bodily injury" does not obligate the insurer to defend claims of "emotional and physical distress" flowing from economic losses suffered in a failed business relationship where the gravamen of the underlying claims was uncovered economic loss. (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1.) Similarly, it has often been held that a liability insurer has no duty to defend where the policy covers "accidents" and the underlying action clearly and unequivocally alleges only intentional acts resulting in predictable injury.[6] This concept has found frequent reference in the employment area. Many employment cases state that an insurer has no duty to defend a wrongful termination action alleging negligent conduct by the employer because wrongful termination is by its very nature an intentional act excluded from coverage. (See, *Commercial Union Ins. Co. v. Superior Court* (1987) 196 Cal.App.3d 1205, 1208, *Loyola Marymount University v. Hartford Accident & Indemnity Co*. (1990) 219 Cal.App.3d 1217, 1224-1225, 271.) A mistake of fact in an employment termination does not transform the intentional act of terminating an employee into an accident thereby triggering an insurer's duty to defend. "An employment termination, even if due to mistake, cannot be unintentional." (*Lipson v. Jordache Enterprises, Inc.* (1992) 9 Cal.App.4th 151, 159.)

*No Duty = No Bad Faith*

There is no duty to defend where there is no potential coverage under the policy. "The absence of coverage under the [insurance] policy conclusively negates [the insured's] cause of action for bad faith breach of contract as no duty to indemnify or

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[6] Insurance Code section 533: "Willful act of insured; negligence: [¶] An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured' agents or others.

defend existed here." (*Horsemen's Benevolent & Protective Assn. v. Insurance Co. of North America* (1990) 222 Cal.App.3d 816, 822.) "[A] bad faith claim cannot be maintained unless policy benefits are due . . . ." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153; *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, 992.)

## ANALYSIS

When we apply these general rules to the present case and compare the allegations of the Moreno complaint with the terms of Navigators CGL policy, we conclude that Navigators did not owe a duty to defend the *Moreno* lawsuit. (*Gray*, *supra*, 65 Cal.2d at p. 276.) Moreno's allegations did not constitute an accidental, unforeseen 'occurrence' sufficient to trigger Navigators' duty to defend under Modern's commercial general policy.

Respondent cites to employment several cases finding there was no "occurrence" under the terms of various liability policies. The cases were usually wrongful termination cases. We did not find the analysis in these cases to be very helpful in the present discussion because the act of an insured taking positive, affirmative steps to deliberate regarding and then terminate an individual's employment seems very different than the passive activity of the insured in this case of not complying with a body of statutes dealing with discrimination against the disabled.

Our research uncovered no published opinions having factual scenarios similar to the instant appeal. There is however one federal case and several unpublished opinions that bear great factual similarity.[7] (*MacAnnan v. General Insurance Co. of America* (1997 WL 67694 (9th Cir. (Cal.))); *Morris C.M. Yip v. The Dentists Insurance Company*

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[7] In California an unpublished opinion may not be cited or relied upon. (Cal. Rules of Court, rule 977(a); *People v. Webster* (1991) 54 Cal.3d 411, fn. 4.) However, like any other writing on a point of law, an unpublished opinion can be considered for the value and persuasiveness of its analysis or reasoning. (See *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, fn. 9.)

(2000 B139850 (Cal.App.2 Dist.)); *Original Joe's, Inc. v. Golden Eagle Insurance Company* (2002 WL 192737 (Cal.App.1 Dist.)) In nearly each instance, the Courts found there was no duty to defend, although the rationales have varied.[8]

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[8] In *MacAnnan v. General Insurance Co. of America, supra,* a wheelchair bound man filed a lawsuit because he could not enter a restaurant without assistance. The Ninth Circuit Court of Appeals affirmed a grant of summary judgment for the insurance company, holding that the alleged harm (psychic trauma) did not result from an "accident." They found that the insured "intended to configure the steps to the restaurant and intended to provide assisted access for wheelchair patrons as he did. [¶] [C]overage here did not depend on whether the insured's acts were willful or negligent, but only on whether the insured's architectural choices constituted an 'occurrence' within the terms of the policies." (*MacAnnan* at pp. 1-2.)

A more recent California Court of Appeal case is *Morris C.M. Yip v. The Dentists Insurance Company* (2000 B139850 (Cal.App.2 Dist.)). *Yip* involved an appeal from a dismissal following the sustaining of a demurrer in favor of an insurance company. In *Yip*, a disabled man was unable to access a dental office in his wheelchair and sued the dentist. The plaintiff's allegations were similar to the charges to Moreno's complaint; claiming humiliation, embarrassment, and frustration, as well as emotional, bodily and physical injury. The company issuing the premises liability policy for the dental office declined to provide a defense. The Court of Appeal in *Yip* held:

> "The entire body of the complaint concerns statutory violations based on inaccessible facilities that are not covered under the TDIC policy. Nothing in the factual allegations of the complaint suggests that an accident occurred which caused Felix bodily injury. Because the factual allegations of the Felix complaint did not describe an event that was potentially covered under the policy, the insurance company was not required to provide a defense." (*Yip* at p. 7.)

A case with strikingly similar facts is *Original Joe's, Inc. v. Golden Eagle Insurance Company* (2002 WL 192737 (Cal.App.1 Dist.)) This was the only case located which found for the insured, but it is not helpful to Modern. In *Original Joe's*, a wheelchair bound man was unable to access the restroom facilities and filed a complaint alleging non-compliance with California's disability requirements. His complaint did not allege any "bodily injury" but rather "damages resulting from physical discomfort and pain, mental and emotional shock, emotional distress, embarrassment and humiliation." (*Original Joe's* at p. 1.) The insurance company denied coverage on three grounds: First, the allegations alleged intentional conduct that did not constitute an accident;

second, there was no "occurrence" under the policy; and, lastly, the alleged statutory violations did not constitute "bodily injury" under the policy.

The Court of Appeal concluded that the respondent insurance company failed to meet its burden to demonstrate there was no possibility of coverage based on admissible evidence negating coverage.

> "Here, Louie's allegations of physical discomfort and pain adequately suggest a physical injury or its manifestations. Thus, respondent had a duty to defend appellant on the complaint if the injury was caused by an occurrence. (*Original Joe's* at p. 2.) "Here, there was a possibility that Louie's alleged injuries were caused by an occurrence under the policy. Though the facts were not developed below, it is possible that the allegedly inaccessible condition of the restroom was excused or that there was an additional '"happening"' that together with appellant's maintenance of the restroom resulted in an accident." (*Original Joe's* at p. 4.)

We understand this language in *Original Joe's* to mean that the circumstances surrounding the infliction of the plaintiff's injuries was not sufficiently well-identified to allow the conclusion there was no coverage as a matter of law. We do not believe *Original Joe's* rationale to extend to a requirement that the insurance company defend the case if the only "occurrence" was the inaccessibility of the bathroom.

The most recent case located was *Hebert v. Travelers Indemnity Company of Illinois* ( 2003 WL 1122796 (Cal.App. 1st Dist.)). In *Hebert*, summary judgment was granted for an insurance company after they declined to defend a lawsuit by a man claiming just that he had been denied service at a coffee house in violation of state and federal laws outlawing discrimination against disabled persons. He claimed emotional distress, humiliation and physical injury. The First District Court of Appeal affirmed the summary judgment holding:

> "Even assuming that plaintiffs had no intention to discriminate against Murphy and no intention to cause him bodily injury, the conduct giving rise to his complaint cannot be regarded as an 'accident.' There is no dispute that plaintiff's intended to exclude Murphy from their coffee house. Even assuming plaintiffs acted fully within their legal rights in doing so, there also can be no dispute that the plaintiff's intention act *by its nature* was intended to and did detrimentally affect Murphy, in that it prevented him from entering a place where he desired to spend time. Cases construing standard form general liability policies indistinguishable from those issued to plaintiffs have uniformly held that intentional acts *by their nature* having a detrimental effect on another person cannot be considered 'accidents' even if the harm turns out to be different from that expected." (*Hebert* at p. 5, emphasis in original.)

In this appeal, the allegations in Moreno's complaint relate to injuries (both emotional and physical) resulting from his inability to access the restroom facilities at the Swap Meet. The complaint alleged that the Swap Meet failed to comply with various anti-discrimination laws relating to the disabled and that because of the resulting lack of access he was injured. These events are not covered events under Navigators commercial general liability policy because they do not constitute "accidents" or "occurrences" as such terms are defined in the Policy. As argued by Navigators, Moreno's alleged injuries were caused by the architectural configuration of the Paramount Swap Meet and Modern Development's alleged failure to remove architectural barrier, not by an accident. The Swap Meet intended for the bathrooms to be configured as they were. The result is that the incident involving Mr. Moreno is not a covered event.

## DISPOSITION

The judgment of the trial court granting summary judgment for Navigators is affirmed. Navigators to receive costs on appeal.

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.

Filed 8/29/03

***CERTIFIED FOR PUBLICATION***

*NO CHANGE IN JUDGMENT*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| MODERN DEVELOPMENT COMPANY,<br>Plaintiff and Appellant,<br><br>v.<br><br>NAVIGATORS INSURANCE COMPANY,<br>Defendant and Respondent. | B157874<br><br>(Super. Ct. No. BC227138)<br><br>***ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PUBLICATION*** |

THE COURT:

It is ordered that the opinion filed herein on July 31, 2003, be modified as follows:

1) Footnote 8 is deleted in its entirety.

2) By striking from Page Two:

"Navigator's Insurance Company (Navigators) appeals from the grant of
summary judgment for respondent, Modern Development Company (Modern) in a lawsuit arising from an insurance coverage dispute."

By adding to Page Two:

"Modern Development Company (Modern) appeals from the grant of summary judgment for respondent, Navigator's Insurance Company (Navigators), in a lawsuit arising from an insurance coverage dispute."

Further, the above entitled opinion was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

This modification effects no change in the judgment.

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COOPER, P. J. RUBIN, J. BOLAND, J.