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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**LEIGH SHEMARIA et al.,**

**Plaintiffs and Appellants,**

**v.**

**COUNTY OF MARIN,**

**Defendant and Respondent.**

**A131873**

**(Marin County  
Super. Ct. No. CV082718)**

The trial court denied a motion for class certification filed by plaintiffs, who seek to represent a class of persons with mobility disabilities who allegedly have been denied equal access to the pedestrian right of way, Civic Center, parks, and libraries in Marin County as a result of access barriers. Because the trial court improperly denied the motion based on the merits of plaintiffs' claims, we reverse.

**BACKGROUND**

In June 2008, plaintiffs Craig Yates, Ellen Lieber, and Russ and Vicky Bohlke filed a complaint against defendant County of Marin (County) and several County officials in their official capacities. In November 2010, the trial court granted plaintiffs leave to file an amended complaint (FAC) that, among other things, removed plaintiffs

Craig Yates, Russ Bohlke and Vicky Bohlke, and added plaintiff Leigh Shemaria, who is the mother and guardian ad litem of R.S., a minor with a mobility disability.<sup>1</sup>

The FAC alleges claims under the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), Civil Code section 54 et seq., and Government Code section 11135 et seq. Plaintiffs allege County has violated its duty to provide equal access to its programs and activities to persons with mobility disabilities. The types of alleged disability access barriers challenged by plaintiffs include sidewalks that lack curb ramps, hazardous and inaccessible paths of travel to County facilities, inaccessible restrooms, inaccessible service counters, inadequate signage, inaccessible doors, and insufficient accessible parking. Plaintiffs allege that these conditions result from County's failure "to adopt and implement effective policies to ensure that its public facilities and programs are readily accessible to and usable by persons with mobility disabilities." Among other things, plaintiffs allege County has violated its duty "to develop and implement an adequate self-evaluation and transition plan" as required by Government Code section 11135 and its implementing regulations.

The FAC seeks declaratory relief and an injunction requiring County to develop and implement plans to ensure that its facilities are made readily accessible to persons with mobility disabilities and that all future construction and alterations are in compliance with the applicable disability access standards. The FAC does not seek damages.

In August 2010, pursuant to section 382 of the Code of Civil Procedure, plaintiffs sought certification of a class of "All persons with mobility disabilities who are allegedly being denied full and equal access under . . . Government Code Section 11135 *et seq.*, . . . Civil Code Section 51 *et seq.*, and . . . Civil Code Section 54 *et seq.* due to disability access barriers to the programs, services, activities and facilities owned, operated and/or maintained by the County of Marin." The plaintiffs' evidence of systemic access barriers

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<sup>1</sup> In January 2011, Ms. Lieber passed away; Ms. Shemaria continues as a plaintiff and proposed class representative.

included County's own 2008 "ADA<sup>[2]</sup> Self Evaluation and Transition Plan," which identified numerous barriers to program access; declarations from or on behalf of 13 persons with mobility disabilities; and a declaration from an expert on disability access issues, who surveyed six County facilities and identified significant access barriers at each.

Prior to a December 1, 2010 hearing on plaintiff's motion for class certification, the trial court issued a tentative ruling granting the motion. In its tentative ruling, the court found that "Plaintiffs have met their burden of demonstrating the prerequisites for class certification, including the existence of an ascertainable class and a well defined community of interest among class members." In addition, the tentative order stated the court found "common questions of law or fact predominate, particularly under plaintiffs' amended allegations focusing on the County's failure to adopt and implement *plans and policies* to ensure that its public facilities and programs are readily accessible to and useable by persons with mobility disabilities."

Nonetheless, in February 2011, following a continued hearing on the motion, the trial court denied the motion for class certification. Although the court's order states that plaintiffs did not meet "their burden of demonstrating that common questions of law or fact predominate," the order does not discuss any of the common questions arising from plaintiffs' claims or identify any individual questions that preclude class certification. Instead, the order denies class certification on the basis of the merits of plaintiffs' claims. The order concludes that plaintiffs' allegations that County has failed "to adopt and implement unspecified 'policies' to ensure that its public facilities and programs are readily accessible to and usable by persons with mobility disabilities" are "too conclusory and are not supported by substantial evidence." The order continues, "[p]laintiffs provide no evidence of a policy to deny programmatic access and nothing that would support their claim that programs, when viewed in their entirety, are not accessible." Finally, the

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<sup>2</sup> ADA stands for the Americans with Disability Act of 1990 (42 U.S.C. § 12101 et seq.).

order concludes there is no private right of action to enforce state regulations requiring County to develop and implement an adequate self-evaluation and transition plan.

This appeal followed.

## DISCUSSION

### I. *Basic Legal Principles Relating to Certification of Class Actions*

The California Supreme Court recently summarized the legal principles pertinent to class action certification in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*):

“Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever ‘the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .’ [Citations.] Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] ‘In turn, the “community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” ’ [Citation.]

“. . . The ‘ultimate question’ the element of predominance presents is whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.] The answer hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. ‘As a general rule if the

defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [Citations.] Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record. . . .' [Citation.]" (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022, fn. omitted.)

## II. *The Trial Court Improperly Denied the Motion Based on the Merits*

On appeal, plaintiffs contend the trial court's order denying their motion for class certification should be reversed because the court improperly denied the motion based on its conclusion that plaintiffs' claims would fail on the merits. We agree.

### A. *The Limits on Consideration of the Merits at the Class Certification Stage*

In *Brinker*, the Supreme Court thoroughly explained the limits on the consideration of the merits at the class action certification stage: "While . . . trial courts must resolve any legal or factual issues that are *necessary* to a determination whether class certification is proper," the trial court need not "as a threshold matter always resolve any party disputes over the elements of a claim. In many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct." (*Brinker, supra*, 53 Cal.4th at p. 1023.) "The certification question is "essentially a procedural one that does not ask whether an action is legally or factually

meritorious.”’ [Citations.] A class certification motion is not a license for a free-floating inquiry into the validity of the complaint’s allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation].” (*Ibid.*)

*Brinker* did recognize that, in some cases, “ ‘issues affecting the merits of a case may be enmeshed with class action requirements . . . .’ [Citations.]” (*Brinker, supra*, 53 Cal.4th at p. 1023.) “In particular, whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits. [Citations.] To assess predominance, a court ‘must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.’ [Citation.] It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence. [Citation.] In turn, whether an element may be established collectively or only individually, plaintiff by plaintiff, can turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits.” (*Id.* at p. 1024.)

Nevertheless, “[s]uch inquiries are closely circumscribed. . . . [A]ny ‘peek’ a court takes into the merits at the certification stage must ‘be limited to those aspects of the merits that affect the decisions essential’ to class certification. [Citation.]” (*Brinker, supra*, 53 Cal.4th at p. 1024.) In sum, “[p]resented with a class certification motion, a trial court must examine the plaintiff’s theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. [Citations.]” (*Id.* at p. 1025.)

B. *There Was No Justification for Reaching the Merits Issues Addressed by the Trial Court*

In the present case, the trial court's order denying the motion for class certification does not assert that resolution of any merits issues was necessary to an analysis of the class certification criteria. The order states that plaintiffs failed to meet their burden of demonstrating that common questions of law or fact predominate, but none of the analysis in the order is tied to that finding or other criteria relevant to the decision whether to certify a class. Neither does the order identify any individual questions that preclude class certification. Instead, all of the analysis is on the merits, without any articulated nexus to the class certification criteria. Among other things, the order concludes plaintiffs did not present sufficient evidence that County has a policy of denying access, plaintiffs did not present sufficient evidence that County's programs are inaccessible, and there is no private right of action to enforce the transition plan regulation adopted pursuant to section 11135 of the Government Code. These are, among others, common legal and factual issues on the merits, not considerations demonstrating that individual rather than common issues predominate.

The trial court's order does not explain why it was necessary to reach those merits issues, and County proffers no such explanation on appeal. For example, County does not explain how resolution of any of those issues helped the trial court "determine whether the elements necessary to establish liability are susceptible of common proof" or whether "there are ways to manage effectively proof of any elements that may require individualized evidence." (*Brinker, supra*, 53 Cal.4th at p. 1024.) The trial court should have focused on "whether the evidence plaintiffs will offer is 'sufficiently generalized in nature,' " instead of "prejudg[ing] the merits" by inquiring whether plaintiffs had shown they would be able to amass an adequate "quantum of proof" to establish their claims. (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 696 (*Capitol People First*).

As the California Supreme Court pointed out in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429 (*Linder*), "When the substantive theories and claims of a proposed class suit

are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal pleading (demurrer) or motion (judgment on the pleadings, summary judgment, or summary adjudication) that affords proper notice and employs clear standards. Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims. Substantial discovery also may be required if plaintiffs are expected to make meaningful presentations on the merits. All of that is likely to render the certification process more protracted and cumbersome, even if . . . trial courts were prohibited from resolving factual disputes. Such complications hardly seem necessary when procedures already exist for early merit challenges.” (*Id.* at pp. 440-441, fn. omitted.) Furthermore, “[i]t is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff. [Citation.]” (*Brinker, supra*, 53 Cal.4th at p. 1034.) Accordingly, even in cases where plaintiffs do seek individual damages (which they do not here), a class should generally be certified “ ‘if the defendant’s liability can be determined by facts common to all members of the class.’ ” (See *id.* at p. 1022.) Nothing in the trial court’s order reflects any conclusion that plaintiffs’ causes of action are not based on common law and facts.

County argues the trial court concluded that plaintiffs had failed to meet their burden of showing “with substantial evidence, that common questions of law or fact predominate over questions affecting individual members. [Citation.]” (*Capitol People First, supra*, 155 Cal.App.4th at p. 689.) However, as the order fails to identify any individual questions at issue in the case, the order cannot be upheld on that ground. By contrast, in *Capitol People First*, a suit brought by persons with developmental disabilities seeking to enforce their right to live in the least restrictive environment commensurate with their needs (*id.* at p. 681), the trial court had reasoned that the

plaintiffs claims would require the trier of fact to focus on “how the policies and practices affect each class member through the development, content and implementation of individual” program plans (*id.* at p. 692).<sup>3</sup>

We conclude the trial court’s order denying plaintiff’s motion for class certification rests on improper criteria and must be reversed. (*Brinker, supra*, 53 Cal.4th at p. 1050 [“A grant or denial of class certification that rests in part on an erroneous legal assumption is error; without regard to whether such a certification might on other grounds be proper, it cannot stand. [Citation.]”]; *Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1204.)

### III. *It is Appropriate to Remand for Reconsideration*

Although we conclude the trial court’s order must be reversed, that does not mean “that class treatment necessarily is proper. Although the trial court may conclude that certification is appropriate after eliminating the improper criteria and erroneous assumptions from consideration, upon a fresh look it may discern valid reasons for denying [plaintiffs’] certification motion.” (*Linder, supra*, 23 Cal.4th at pp. 448-449.) Accordingly, it is appropriate to remand the matter to the trial court, with directions that it conduct further proceedings consistent with this opinion. (*Id.*, at p. 449.)

In particular, County contends on appeal that common issues do not predominate because the determination of whether a facility is inaccessible depends on an individualized assessment of the characteristics of the disabled individual desiring access to the facility’s programs. To wit, County argues that “the statutory scheme under California and federal law for ensuring that a qualified individual with a disability has ‘meaningful access’ to a County program requires an individualized assessment to determine whether [an] individual, with or without reasonable modifications, ‘meets the

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<sup>3</sup> Nevertheless, the Court of Appeal reversed denial of the plaintiffs’ motion for class certification, concluding that the plaintiffs could employ “statistics, sampling, [evidence of] policies [and] administrative practices, anecdotal evidence, deposition testimony and the like to prove classwide behavior on the part of [the] defendants. [Citations.]” (*Capitol People First, supra*, 155 Cal.App.4th at p. 695.)

essential eligibility requirements for the receipt of services or the participation in programs or activities.’ ” (Fn. omitted.) County also contends class certification is inappropriate because different facilities may be subject to different standards based upon their dates of construction or alteration. On the other hand, plaintiffs contend that “public entities have an affirmative proactive duty to identify and remove disability access barriers that limit or deny access to public programs and activities.” They argue that variations in the types of mobility disabilities experienced by the individual class members do not defeat commonality; that, even if different standards apply to different facilities, whether any given facility is in compliance is an issue common to the class; and that plaintiffs’ “claims fall squarely within the type of systematic disability civil rights challenges to policies and practices of general application that are routinely certified as class actions.” (See *Gray v. Golden Gate Nat. Recreational Area* (N.D.Cal. 2011) 279 F.R.D. 501, 508-520 [discussing class certification criteria and relevant case authority in action seeking injunctive relief regarding barriers to access by disabled persons at Golden Gate National Recreation Area park sites]; see also *McMillon v. Hawaii* (D.Hawai’i 2009) 261 F.R.D. 536, 544-546 [access barriers in public housing]; *Californians for Disability Rights, Inc. v. California Dept. of Transportation* (N.D.Cal. 2008) 249 F.R.D. 334, 344-346 [access barriers in California Department of Transportation facilities]; *Cherry v. City College of San Francisco* (N.D.Cal. 2005) 2005 WL 6769124 [pp. \*5-\*6] [access barriers at college campuses]; *Lopez v. San Francisco Unified School Dist.* (N.D.Cal. 2003) 2003 WL 26114018 [pp. \*2-\*4] [access barriers in school district facilities].)

The trial court’s order denying plaintiffs’ motion for class certification does not address County’s contention that proof of plaintiffs’ claims will require consideration of the circumstances of individual class members, and it does not conclude that the possibility different standards may apply to different facilities means that accessibility to programs at those facilities is not a common question. Therefore, we cannot rely upon those bases to affirm the order. (*Bufile, supra*, 162 Cal.App.4th at p. 1205 [“in our review of an order denying class certification, we consider only the reasons cited by the trial

court for the denial, and ignore other reasons that might support denial”]; see also *id.* at p. 1206 [“the trial court did not cite or discuss any of this evidence in its ruling, and we are constrained by the reasons set forth by the court for denying certification”]; accord, *Jaimez v. Daihls USA, Inc.* (2010) 181 Cal.App.4th 1286, 1297-1298.) We express no opinion on those questions, which are appropriate merits issues to consider on a motion for class certification, because they relate to “whether the elements necessary to establish liability are susceptible of common proof.” (*Brinker, supra*, 53 Cal.4th at p. 1024.) After the trial court addresses those issues, it should exercise its discretion on the certification question in light of its conclusions on those issues and any other appropriate considerations.<sup>4</sup>

#### DISPOSITION

The trial court’s order denying plaintiffs’ motion for class certification is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are awarded to plaintiffs.

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.

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<sup>4</sup> In passing, County also argues plaintiffs do not satisfy the requirements of typicality of claims, adequacy of the class representative, numerosity, and the superiority of class treatment. Because the trial court did not rely on those grounds in denying the motion for class certification, we do not consider those grounds in this appeal.