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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FIROUZ HEYAT,

Plaintiff and Appellant,

v.

MARRIOTT INTERNATIONAL, INC., et  
al.,

Defendants and Respondents.

G045694

(Super. Ct. No. 30-2010-00358569)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Law Offices of Foroozandeh and Majid Foroozandeh for Plaintiff and Appellant.

Brady, Vorwerck, Ryder & Caspino, Robert B. Ryder and Ravi Sudan for Defendants and Respondents.

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Plaintiff and appellant Firouz Heyat sued defendants and respondents<sup>1</sup> under California's Disabled Persons Act (Civ. Code, § 54 et seq.; Act)<sup>2</sup> for injuries he suffered when he fell on the steps in the swimming pool complex at Defendants' timeshare resort. Heyat alleges the difficulties he experiences in walking render him disabled and Defendants violated the Act by failing to post signs near the pool complex's steps directing him to a nearby ramp that provided access to and from the pool deck. According to Heyat, Defendants' failure to post signs denied him equal access to the pool complex and therefore rendered Defendants liable under the Act for his actual damages, treble damages, and attorney fees.

Defendants moved for summary judgment on the ground Heyat lacked standing to pursue his claim under the Act because (1) he testified in deposition he was not disabled when he fell, and (2) the readily-visible ramp provided Heyat equal access to the pool complex and he simply chose not to use it. The trial court granted Defendants' motion, finding Heyat's deposition testimony established he was not disabled and therefore lacked standing to pursue his claim under the Act. The court did not decide whether Defendants denied Heyat equal access.

We affirm the trial court's decision granting Defendants summary judgment on the ground Heyat lacks standing, but do so because the undisputed evidence and controlling authorities establish Defendants did not deny Heyat equal access to and from the pool complex. Accordingly, we need not address the many issues the parties

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<sup>1</sup> Defendants and respondents are Marriott International, Inc., Marriott Ownership Resorts, Inc., and Newport Coast Villas Master Association. We shall collectively refer to them as Defendants.

<sup>2</sup> "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the 'Disabled Persons Act,' although it has no official title." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674, fn. 8.) All statutory references shall be to the Civil Code unless otherwise stated.

raise regarding whether Heyat's Alzheimer's disease rendered him incompetent to testify at his deposition and whether he was disabled when he fell on the steps.

We also affirm the trial court's decision denying Heyat leave to file an amended complaint adding a negligence per se claim. The trial court did not abuse its discretion in denying the motion because the record supports the court's findings Heyat failed to explain his unreasonable delay in seeking leave to amend, the unreasonable delay prejudiced Defendants, and Heyat's proposed pleading failed to state a negligence per se claim.

## I

### FACTS AND PROCEDURAL HISTORY

Defendants own and operate a timeshare resort in Newport Beach, California. They constructed the resort in the late 1990's and opened it to the public in 2000. Heyat's adult son owns a timeshare at the resort. In October 2009, Heyat and his wife traveled from their home in Maryland to spend a week at the resort with their son and his wife. At the time, Heyat was 83 years old and had reduced mobility due to his age and various health problems.

During his stay, Heyat walked out on the lobby balcony to look for his wife, who was lounging by the resort's pool. After spotting her, Heyat climbed down the stairs from the lobby to the pool complex's gated entrance. He entered the pool complex through the gate and climbed down two separate flights of five steps to the pool deck rather than use the nearby access ramp. Heyat then walked around to the pool's other side to talk with his wife.

After a brief discussion, Heyat headed back to the lobby. He retraced his route to the steps where he entered the pool complex. Along the way Heyat passed the end of the access ramp where it met the pool deck. Using a cane, Heyat slowly began climbing the first flight of five steps. As he reached the second step, he stopped and

slowly began shuffling sideways toward the hand railing. Heyat lost his balance before he reached the hand railing and fell backwards, fracturing his left hip.

In March 2010, Heyat filed this action against Defendants, alleging claims for premises liability and negligence. He later filed a first amended complaint, adding a third cause of action for denial of equal access under the Act. The claim alleges Heyat was denied equal access to the pool and then to the lobby because “there was no handicap access ramp, no signs posted directing a disabled person to the location of a ramp for the disabled and no staff/employee to assist [Heyat]” in going down or up the steps to and from the pool deck. Heyat prayed for actual damages, treble damages, and attorney fees under the Act. The first amended complaint also joined Heyat’s wife as a plaintiff and alleged claims for negligent infliction of emotional distress and loss of consortium on her behalf. After Defendants successfully moved to require Heyat and his wife to post a \$75,000 undertaking under Code of Civil Procedure section 1030, Heyat and his wife voluntarily dismissed all causes of action except Heyat’s denial of equal access claim.<sup>3</sup>

Based on Heyat’s refusal to dismiss his sole remaining claim, Defendants brought a motion for monetary sanctions under Code of Civil Procedure section 128.7. They argued Heyat’s equal access claim was frivolous and lacked factual and legal support because Heyat testified at deposition he was not disabled at the time he fell and it never occurred to him to look for an access ramp rather than use the steps. Heyat’s counsel opposed the motion, arguing Heyat’s Alzheimer’s disease rendered his deposition testimony incompetent and other objective evidence showed Heyat was

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<sup>3</sup> If a defendant establishes a reasonable possibility he or she will obtain a judgment against a nonresident plaintiff, Code of Civil Procedure section 1030 authorizes a trial court to order the plaintiff to post an undertaking as security for any cost award the defendant may obtain against the plaintiff and to dismiss the action if the plaintiff fails to post the undertaking the court orders. Here, Heyat never posted the undertaking the trial court ordered, but the court granted Defendants’ summary judgment motion before it heard their separate motion to dismiss for failure to post the undertaking.

disabled when he fell. The trial court denied the motion, concluding “[t]he facts do not warrant a finding that the plaintiff’s remaining cause of action is without factual and/or legal support, *at least not at this point.*” (Original italics.) The court noted Heyat “appears [to] suffer from a variety of physical and mental problems” that may affect “[t]he value of [his] deposition testimony,” but Heyat’s counsel failed to provide admissible medical evidence on that issue. Consequently, the court explained, “If [Heyat] intends to raise or rely on this issue in the future, the court will require medical documentation of [Heyat’s] condition.”

Defendants also moved for summary judgment on Heyat’s equal access claim, arguing Heyat lacked standing to bring a claim under the Act because (1) the access ramp at the resort’s pool complex provided Heyat with equal access to the pool deck and he simply chose not to use it, and (2) Heyat’s deposition testimony showed he was not disabled when he fell. Defendants also argued Heyat’s claim failed because the resort’s pool complex and access ramp complied with all applicable standards regarding access for disabled persons.

Heyat opposed the motion, arguing eyewitness testimony showed he was disabled at the time he fell and the court should disregard his contrary deposition testimony because of his Alzheimer’s disease. Heyat also argued Defendants denied him equal access because the access ramp was hidden off to the side of the steps and Defendants failed to post signs directing him to the ramp. According to Heyat, Defendants’ failure to post directional signs violated accessibility standards.

The trial court granted Defendants’ summary judgment motion on the ground Heyat lacked standing to pursue his claim for denial of equal access. The court found Defendants met their initial burden by showing Heyat was not disabled when he fell and Heyat failed to present admissible evidence creating a triable issue of fact on whether he was disabled. Based on these findings, the trial court declined to discuss “the other issues” the parties raised.

While Defendants' summary judgment motion was pending, Heyat moved to amend his complaint to add a cause of action for negligence per se based on Defendants' alleged failure to comply with 2001 California Building Code provisions requiring signs identifying all access routes for disabled persons. The trial court denied Heyat's motion to amend because (1) he unreasonably delayed bringing the motion until one week before the hearing on Defendants' summary judgment motion and less than two months before trial; (2) Heyat failed to explain why he did not bring the motion earlier; (3) granting the motion would prejudice Defendants by rendering their summary judgment motion moot and requiring a six-month trial continuance; and (4) Heyat's proposed pleading failed to allege facts stating a negligence per se claim.

The trial court entered judgment in Defendants' favor based on its summary judgment ruling and Heyat timely appealed.

## II

### DISCUSSION

#### A. *Heyat Lacks Standing to Seek Damages Under the Act*

##### 1. Summary Judgment Standard of Review

A defendant moving for summary judgment bears the initial burden to show the plaintiff's action has no merit. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 168-169 (*Teselle*)). The defendant can meet that burden by either showing the plaintiff cannot establish one or more elements of his or her claim or there is a complete defense to the claim. (*Id.* at p. 169; Code Civ. Proc., § 437c, subd. (p)(2).) To meet this burden the defendant must present evidence sufficient to show he or she is entitled to judgment as a matter of law. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 847-848 (*Eriksson*)).

Once the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing triable issues exist on one or more material facts. (*Teselle, supra*, 173 Cal.App.4th at pp. 168-169; Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists “‘if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.] Thus, a party ‘cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145 (*Dollinger*).)

On appeal from a summary judgment, we review the record de novo. (*Eriksson, supra*, 191 Cal.App.4th at p. 848.) “[I]n practical effect, we assume the role of a trial court and apply the same rules and standards that govern a trial court’s determination of a motion for summary judgment.’ [Citation.] ‘Regardless of how the trial court reached its decision, it falls to us to examine the record de novo and independently determine whether that decision is correct.’ [Citation.] . . . The sole question properly before us on review of the summary judgment is whether the judge reached the right *result* . . . whatever path he might have taken to get there, and we decide that question independently of the trial court. [Citation.]” (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694, original italics, fn. omitted; *Dollinger, supra*, 199 Cal.App.4th at p. 1144 [“the reviewing court ‘. . . reviews the trial court’s ruling, not its rationale’”].)

Here, the trial court concluded Heyat lacked standing because he was not disabled when he fell on the steps at the resort’s pool complex. As explained below, we affirm the trial court’s decision Heyat lacks standing on a ground Defendants raised below but the trial court declined to reach. Specifically, we affirm because the

undisputed evidence and controlling authorities establish Defendants did not deny Heyat equal access to or from the pool complex.

Code of Civil Procedure section 437c, subdivision (m)(2), requires an appellate court to provide the parties an opportunity to submit supplemental briefs presenting their views before the court affirms an order granting summary judgment on a ground not relied upon by the trial court.<sup>4</sup> Defendants' brief includes an entire section comprised of several pages that address whether they denied Heyat equal access under the Act. Heyat's reply brief expressly acknowledges the issue, but declined to address it. Accordingly, we conclude Code of Civil Procedure section 437c, subdivision (m)(2), does not apply here because Heyat had a full and fair opportunity to brief the equal access issue in this court, but failed to do so. (See, e.g., *Flores v. Enterprise Rent-A-Car Co.* (2010) 188 Cal.App.4th 1055, 1072, fn. 10 [Code of Civil Procedure section 437c, subdivision (m)(2), did not apply because the appellants had the opportunity to address the ground on which the appellate court affirmed, but the appellants failed to do so]; *Bains v. Moores* (2009) 172 Cal.App.4th 445, 471, fn. 39 (*Bains*); *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147, fn. 7.)

In construing an analogous Government Code provision that requires an appellate court to allow supplemental briefing before deciding an appellate issue the parties did not brief, the Supreme Court observed: "We do not suggest, of course, that the parties have a right under [Government Code] section 68081 to submit supplemental

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<sup>4</sup> Code of Civil Procedure section 437c, subdivision (m)(2), states as follows: "Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party."

briefs or be granted a rehearing each time an appellate court relies upon authority or employs a mode of analysis that was not briefed by the parties. *The parties need only have been given an opportunity to brief the issue decided by the court*, and the fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of [Government Code] section 68081.” (*People v. Alice* (2007) 41 Cal.4th 668, 679, italics added; see also *Bains, supra*, 172 Cal.App.4th at p. 471, fn. 39 [analogizing Code of Civil Procedure section 437c, subdivision (m)(2), to Government Code section 68081].) Similarly, Code of Civil Procedure section 437c, subdivision (m)(2), is not implicated here because Heyat had an opportunity to address the equal access issue but declined to do so.

## 2. Governing Principles Regarding Equal Access Claims Under the Act

The Act is intended to ensure disabled persons “have the same right as the general public to the full and free use” of facilities open to the public. (§ 54, subd. (a); *Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 Cal.App.4th 254, 261 (*Urhausen*)). It declares, “Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, . . . and privileges of all . . . hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited . . . .” (§ 54.1, subd. (a)(1).) For the Act’s purposes, “[f]ull and equal access’ . . . means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those higher standards.” (§ 54.1, subd. (a)(3); *Urhausen*, at p. 261; see also § 54, subd. (c) [“A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this

section”].) “‘Access’ refers not only to entry into a building but, more broadly, to the use of all facilities made available for general public use . . . .” (*Urhausen*, at p. 261.)

“The [Act] provides two distinct private causes of action to individuals with disabilities. First, individuals with disabilities who have been ‘aggrieved or potentially aggrieved by a violation of Section 54 or 54.1’ can file an action ‘to enjoin the violation.’ (§ 55.) . . . Second, individuals with disabilities can file an action seeking ‘actual damages’ against ‘[a]ny person or persons, firm or corporation who denies or interferes with [their] admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1.’ (§ 54.3, subd. (a).)”<sup>5</sup> (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1219 (*Reycraft*).)

Although both private rights of action require a plaintiff to be disabled, standing to pursue an actual damages claim under section 54.3 is not the same as standing to pursue an injunctive relief claim under section 55. (*Reycraft, supra*, 177 Cal.App.4th at p. 1221.) A disabled person has standing to pursue an injunctive relief claim if he or she is merely “‘potentially aggrieved’” by a defendant denying equal access, but that same disabled person has standing to pursue a damages claim only if the defendant actually denied him or her equal access on a particular occasion. (*Id.* at p. 1224

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<sup>5</sup> In authorizing an injunctive relief claim section 55 states, “Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code . . . may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney’s fees.”

In authorizing a damages claim section 54.3, subdivision (a), states, “Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars (\$1,000), and attorney’s fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in Sections 54, 54.1, and 54.2.”

[“standing under section 54.3 of the [Act] is established where a disabled plaintiff can show he or she actually presented himself or herself to a business or public place with the intent of purchasing its products or utilizing its services in the manner in which those products and/or services are typically offered to the public and was actually denied equal access on a particular occasion”]; see also *Urhausen, supra*, 155 Cal.App.4th at pp. 262-263; *Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 183 (*Donald*) [“to maintain an action for *damages* pursuant to section 54 et seq. an individual must take the additional step of establishing that he or she was denied equal access on a particular occasion” (original italics)].)

In *Donald*, the Court of Appeal provided the following example to illustrate the distinction in standing to pursue the two types of private actions under the Act: “For example, let us take a restaurant that is required to have 100 percent of its dining area accessible to the handicapped, but in fact only 90 percent of the dining area meets this standard. If a handicapped individual is readily seated and served in the 90 percent primary dining area which meets all handicap access requirements, then he or she would not have a cause of action for damages for denial or interference with admittance pursuant to Civil Code section 54.3, but an individual or a designated public agency could pursue an action under one of the enforcement provisions to bring about full compliance by the restaurant.” (*Donald, supra*, 218 Cal.App.3d at p. 183.)

3. Heyat Lacks Standing to Recover Damages Under the Act Because Defendants Did Not Deny Him Equal Access

The trial court granted Defendants’ summary judgment motion because it found Heyat lacked standing to pursue his claim under the Act. Specifically, the trial court found Heyat’s deposition testimony established he was not disabled as that term is used in the Act, and Heyat failed to provide any admissible evidence to contradict that testimony or otherwise create a triable issue of material fact on whether he was disabled. Based on that ruling, the trial court declined to reach the other grounds Defendants raised

to support their claim Heyat lacked standing. We affirm the trial court's decision Heyat lacked standing, but we reach that conclusion based on a ground the trial court declined to reach because the undisputed evidence and controlling authority on this issue overwhelmingly supports summary judgment of Heyat's claim.

Heyat based his sole remaining claim on Defendants' failure to grant him equal access to and from the resort's pool complex. He did not seek injunctive relief to require Defendants to correct any alleged violation of the governing accessibility standards. Heyat therefore lacks standing to pursue his claim unless Defendants actually denied him equal access to the pool complex on a particular occasion. (*Reycraft, supra*, 177 Cal.App.4th at p. 1224; *Urhausen, supra*, 155 Cal.App.4th at pp. 262-263; *Donald, supra*, 218 Cal.App.3d at p. 183.) *Urhausen* is directly on point and compels the conclusion Heyat lacks standing to pursue his damages claim regardless of whether a triable issue exists regarding his disability status. Consequently, we need not reach the numerous evidentiary and other issues the parties raise on whether Heyat was disabled, including the admissibility of Heyat's deposition testimony.

In *Urhausen*, the plaintiff, who could not walk without crutches, parked her car at the defendants' drugstore parking lot. The defendants provided two reserved parking spaces for disabled customers directly in front of their store with an aisle, curb cutout, and ramp between the two spots to provide access to the store's entrance. Although the plaintiff had a parking placard that allowed her to use disabled parking spots and the right-hand disabled spot was vacant, the plaintiff parked in a spot immediately adjacent to the empty disabled parking spot. (*Urhausen, supra*, 155 Cal.App.4th at pp. 258-259.)

As the plaintiff exited her car, she stood in the empty disabled parking spot. Using her crutches, she headed directly for the store's entrance, which required her to travel diagonally across the empty disabled parking spot and up the curb to the sidewalk. She did not attempt to use the disabled access aisle, curb cutout, or ramp between the two

disabled parking spots. Just a few inches before she reached the curb, the plaintiff fell in the disabled parking spot and broke her wrist. Later investigation showed the last few inches of the parking spot greatly exceeded the allowable slope for a disabled parking spot. The investigation also showed the access aisle between the two disabled parking spots exceeded the allowable slope. (*Urhausen, supra*, 155 Cal.App.4th at p. 259.)

The plaintiff sued the defendants under the Act to recover damages, alleging the defendants denied her equal access to their store because the space where she fell did not comply with the governing accessibility standards. The trial court granted defendants summary judgment because the adjacent access aisle, curb cutout, and ramp provided the plaintiff with a reasonable access route she could have used. The Court of Appeal affirmed, finding the plaintiff lacked standing to seek damages under the Act because she could not show the defendants denied her equal access. (*Urhausen, supra*, 155 Cal.App.4th at p. 260.)

The appellate court in *Urhausen* rejected the plaintiff's argument she had standing because the parking spot's slope caused her to fall and thereby prevented her from entering the store: "While we recognize that the failure of the parking space to comply with slope requirements was the cause of plaintiff's injury, and therefore a cause of her failure to reach the entrance of the drugstore, we do not believe that this is sufficient to demonstrate that plaintiff was denied equal access to the store. The phrase 'denied equal access' necessarily implies that either the structure of the public facility, or some policy of its operator, precluded equal access. It is undisputed, however, that [the drugstore] provided access to its entrance by way of an aisle, curb cut, and ramp installed for the particular use of the disabled. Because this means of access was at all times available for plaintiff's use, she cannot demonstrate that she was denied equal access to the store without demonstrating that this route, too, was inadequate. By her own acknowledgment, however, she was fully capable of negotiating a typical disabled access ramp. It was plaintiff's injury, and not the physical configuration of the store, that

prevented plaintiff from entering. Accordingly, she was not *denied* equal access to the store; rather, she was *unable* to enter as a result of her fall.” (*Urhausen, supra*, 155 Cal.App.4th at p. 263, original italics, fn. omitted.)

The *Urhausen* court also rejected the plaintiff’s contention she could recover damages because the parking spot’s elevated slope did not comply with the governing accessibility standards and caused the injury that kept her from entering the defendants’ store: “The purpose of section 54.3, however, is not to provide a cause of action for disabled persons who have suffered physical injury but to persons who have been denied the same access to public facilities as persons without a disability. . . . ‘[T]he impediments to the physically handicappeds’ interaction in community life is the inequity which section 54 et seq. . . . seek[s] to prevent.’ [Citation.] [¶] If plaintiff had attempted to use the disabled access aisle, curb cut, and ramp and had fallen because these were not in compliance with statutory requirements, she would presumably have a cause of action under the [Act]. The cause of action would not arise because plaintiff was injured, however, but because her fall suggested that the store did not provide safe access for disabled persons, thereby denying them equal access. In that situation, her injury would not be the basis of the cause of action but would be evidence of a lack of equal access. Here, in contrast, plaintiff did not demonstrate that the means for disabled access provided by [the defendants] was unsafe or otherwise unusable by her. Because plaintiff did not demonstrate that she was denied equal access, section 54.3 provides no remedy for her injury.” (*Urhausen, supra*, 155 Cal.App.4th at pp. 264-265, fns. omitted.)

Here, Defendants met their initial summary judgment burden by showing they did not deny Heyat equal access to the resort’s pool complex. Defendants presented evidence establishing they provided Heyat access to and from the pool complex by way of a ramp Heyat acknowledged he was fully capable of using. Specifically, Defendants presented photographs of the pool complex showing the access ramp and its proximity to the steps where Heyat fell and the path he traveled. Defendants also presented two expert

declarations by a State of California certified accessibility specialist who inspected and evaluated the pool complex and its access routes. The expert described the ramp and the access it provided, and concluded the access routes to the pool complied with applicable accessibility standards.

Because Heyat concedes Defendants provided an access ramp he could have used to enter and exit the resort's pool complex, Heyat must present evidence showing the ramp did not provide him reasonable access if he is to meet his burden of creating a triable issue. (*Urhausen, supra*, 155 Cal.App.4th at p. 263.) Heyat, however, does not make this argument. Instead, he contends the ramp did not comply with the governing accessibility standards because the ramp was too far away from the steps and Defendants failed to post signs directing Heyat to the access ramp. This argument fails to create a triable issue for several reasons, any one of which prevents Heyat from defeating Defendants' motion.

First and foremost, the ramp's alleged noncompliance with the governing accessibility standards does not provide Heyat with standing to pursue a damages claim under the Act. To establish standing to recover damages, Heyat must show the access ramp failed to comply with the governing standards *and* that failure actually denied him equal access on a particular occasion. (*Urhausen, supra*, 155 Cal.App.4th at p. 266.) In *Urhausen*, the plaintiff argued that, even if the access aisle, curb cutout, and ramp provided her with an access route she could safely use, the defendants nonetheless denied her equal access because that route failed to comply with the governing standards regarding the slope of the parking spot and access aisle. The Court of Appeal rejected that argument, explaining the failure to comply with the governing standards provided the plaintiff with standing to pursue an injunctive relief claim to compel the defendants to comply with the standards, but not a damages claim. (*Id.* at 265.) “[E]quat[ing] a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for

statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities." (*Urhausen*, at p. 266.)

Heyat fails to demonstrate the lack of signs directing him to the access ramp prevented him from safely entering and exiting the pool complex when he fell. He concedes he safely used the steps to enter the pool complex. Moreover, he cites no evidence showing he was unaware of the ramp and the access it provided to the pool deck. Indeed, Heyat cannot present evidence showing the absence of signs actually denied *him* access because his counsel insists Heyat's mental infirmities rendered him incompetent to testify about his fall.<sup>6</sup> Heyat offers his son's declaration and his wife's deposition testimony stating they did not see the access ramp, but that testimony sheds no light on whether Heyat saw the ramp or whether he knew it provided access to the pool complex. Heyat must show Defendants *actually* denied *him* access. In other words, it is a subjective standard, not an objective standard. Without Heyat's testimony, he cannot establish the failure to post signs actually denied him equal access and therefore he cannot create a triable issue to defeat Defendants' motion.

Second, Heyat failed to present admissible evidence supporting his contention signs directing him to the ramp were required because the ramp was not readily visible. The photographs both sides presented show the access ramp at the top of the steps leading to the pool is readily visible just to the right of the steps. Heyat nonetheless contends the ramp "is located approximately 40 to 50 feet to the far right, hidden out of sight." Heyat, however, fails to provide any evidence to support his distance estimate or his conclusion the ramp is hidden. The parties' photographs show

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<sup>6</sup> Heyat's testimony, if considered, showed the lack of signs did not actually deny him equal access. During his deposition, Heyat testified he did not consider himself disabled and therefore he did not look for disabled access ramps or signs directing him to those ramps. He also testified he had no problem walking up stairs.

the ramp is not hidden and Defendants' accessibility specialist opines the ramp provided an access route that fully complies with accessibility standards. Similarly, photographs of the ramp's path near the pool show the ramp provided a visible access route and, again, Defendants' accessibility specialist opined the route complied with all governing standards. Heyat provides no admissible evidence to rebut Defendants' evidence or otherwise create a triable issue of fact on whether the ramp was hidden. His conclusions and argument regarding the ramp do not create a triable issue. (See *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 616-617 [evidence, not argument, is required to create a triable issue].)

Third, Heyat failed to show any applicable standard required Defendants to post signs directing him to the access ramp. Heyat argues the 2001 California Building Code required Defendants to provide directional signs, but he fails to establish that code applied. Defendants built the resort in the late 1990's and opened it to the public in 2000, *before* the 2001 Code was adopted. Heyat provides no authority or explanation regarding how the 2001 Code would apply to a facility built before that code was adopted. Moreover, Defendants' accessibility expert opined the California Building Code did not require Defendants to provide directional signs and Heyat provides nothing to rebut that expert opinion.<sup>7</sup>

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<sup>7</sup> In the trial court, Heyat relied on Defendants' expert, who testified directional signs are required whenever a disabled person must choose between two possible paths. Because he had two possible paths to choose from — the stairs or the ramp — Heyat concludes signs were required directing him to the ramp. This argument misconstrues the expert's opinion. The expert explained signs are required when a disabled person is unable to determine which one of several paths provided a proper access route. The expert explained signs were not required when one of the routes clearly does not provide a disabled person with an access route. Here, the steps to the pool plainly did not provide an access route and therefore the expert concluded signs directing a disabled person to the ramp were not required.

4. The Trial Court Had No Obligation to Reconsider Its Earlier Ruling Denying Defendants' Sanctions Motion Before Hearing Defendants' Summary Judgment Motion

Heyat contends the trial court erred in granting Defendants' summary judgment motion without first reconsidering its prior ruling denying Defendants' Code of Civil Procedure section 128.7 sanctions motion. Because the trial court denied the sanctions motion on the ground Heyat did not lack legal or factual support for his equal access claim, Heyat contends the trial court was required to give the parties notice and an opportunity to be heard on whether the court should reconsider its earlier ruling. Heyat is mistaken.

Defendants' sanctions motion and their summary judgment motion are separate motions presenting distinct issues. The sanctions motion presented the question whether Heyat had legal and factual support for his claim (Code Civ. Proc., § 128.7, subds. (b) & (c)), while the summary judgment motion presented the question whether a triable issue of material fact exists on Heyat's claim (Code Civ. Proc., § 437c, subd. (c)). Different standards govern the two motions and Heyat fails to cite any authority to support his contention the trial court cannot grant a summary judgment motion without first reconsidering its denial of an earlier Code of Civil Procedure section 128.7 sanctions motion. Moreover, the parties presented different evidence on the two motions and none of the briefing on the sanctions motion addressed *Urhausen* and whether Defendants actually denied Heyat equal access on a particular occasion.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Heyat Leave to Amend*

While Defendants' summary judgment motion was pending, Heyat moved to amend his complaint to add a negligence per se claim. The trial court denied the motion because it found (1) Heyat failed to explain his unreasonable delay in bringing the motion; (2) granting the motion would unfairly prejudice Defendants; and (3) Heyat's

proposed pleading failed to allege facts stating a negligence per se claim. We find no error in the trial court's ruling.

“Leave to amend a complaint is . . . entrusted to the sound discretion of the trial court. “. . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. *More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court.* Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record.” [Citations.]” (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242, original italics.)

Here, the record supports the trial court's finding Heyat failed to explain his unreasonable delay in bringing the motion to amend. He filed the motion well over a year after commencing this action, and only after Defendants filed their summary judgment motion. Heyat set his motion for hearing just one week before the hearing on Defendants' summary judgment motion and less than two months before trial. California Rules of Court, rule 3.1324(b) provides all motions to amend must be supported by a declaration specifying “[w]hen the facts giving rise to the amended allegations were discovered” and “[t]he reasons why the request for amendment was not made earlier.” Heyat neither filed a declaration to support his motion nor otherwise explained why he failed to seek leave to amend earlier. ““[E]ven if a good amendment is proposed in proper form, unwarranted delay in presenting it may — of itself — be a valid reason for denial.”” (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746; see also *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.)

Granting Heyat's motion to amend in the face of his unexplained delay would have prejudiced Defendants because it would have (1) rendered Defendants' summary judgment motion moot, and (2) required a significant trial continuance to allow Defendants time to bring a demurrer challenging the new pleading, conduct discovery on the new claim, and bring a new summary judgment motion. According to Heyat, the trial

court could have avoided any prejudice to Defendants by delaying its ruling on the motion to amend for one week until after the court ruled on Defendants' summary judgment motion. Heyat, however, cites no evidence in the record showing he made that proposal to the trial court. Moreover, he fails to explain why granting his motion in the face of his unexplained delay would not have prejudiced Defendants by requiring a significant trial continuance. (See *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175 ["appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is "offered after long unexplained delay . . . or where there is a lack of diligence . . ."].)

The record also supports the trial court's finding Heyat's proposed pleading failed to allege facts stating a negligence per se claim. Although a trial court ordinarily will not consider a proposed pleading's validity when ruling on a motion to amend, the court nonetheless has the discretion to deny leave to amend if the proposed pleading fails to state a cause of action. (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230; *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 278, overruled on other grounds in *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 407, fn. 11.)

"[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.' [Citation.]" (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 555.) Specifically, Evidence Code section 669 creates a presumption of negligence where a defendant "(1) . . . violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." Not

every violation of a statute or regulation, however, will give rise to a presumption of negligence; all four elements must be established. (*Urhausen, supra*, 155 Cal.App.4th at p. 267.)

Here, Heyat's proposed pleading alleged Defendants violated the 2001 California Building Code by failing to provide signs directing disabled persons to the access ramp in the pool complex and therefore he was unaware of the ramp. He further alleged Defendants' noncompliance with the Building Code was a substantial factor in causing his fall. The trial court ruled Heyat's proposed pleading failed to allege facts giving rise to a presumption of negligence because it failed to allege the third and fourth elements identified above. We agree and Heyat fails to challenge this aspect of the trial court's ruling or otherwise explain how he did or could allege a claim based on negligence per se.

Instead, Heyat simply contends the trial court abused its discretion in denying his motion because California has a well-established "policy of great liberality in permitting amendments to the complaint at any stage of the proceedings . . . ." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.) Although this statement is true in the abstract, it fails to address the foregoing authorities and does not establish the trial court abused its discretion. We affirm the trial court's decision denying Heyat's motion for leave to amend.

III  
DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.