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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRIS KOHLER,

Plaintiff - Appellant,

v.

CSK AUTO, INC., DBA O'Reilly Auto
Parts #2941,

Defendant - Appellee.

No. 14-55317

D.C. No. 3:12-cv-03022-JM-
WMC

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, Senior District Judge, Presiding

Submitted February 11, 2016**
Pasadena, California

Before: FARRIS, CLIFTON, and BEA, Circuit Judges.

Chris Kohler appeals the district court's order entering summary judgment in favor of CSK Auto, Inc. in Kohler's action under the Americans with Disabilities Act. We vacate and remand for further proceedings.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The related case upon which the district court relied to apply the doctrine of issue preclusion, *Kohler v. Midway Land, LLC*, No. 12-cv-0148 JM (WMc), 2013 WL 10733705 (S.D. Cal., Apr. 5, 2013) (“*Midway*”), was vacated in part by this Court on appeal with respect to whether the slopes of the parking spaces and access aisles in the challenged parking area were ADA-compliant. *See Kohler v. Midway Land, LLC*, 592 F. App’x 622 (9th Cir. 2015). Thus, Kohler is not here precluded from claiming that the slopes were not ADA-compliant. We vacate the district court’s order granting summary judgment in favor of CSK on this ground and remand for further proceedings.

We decline to affirm the district court’s order on the alternative ground that Kohler failed to submit evidence to show that the parking area of the shopping center was within the control of CSK. *See Katz v. Children’s Hospital of Orange County*, 28 F.3d 1520, 1534 (9th Cir. 1994). Nowhere in CSK’s moving papers was this issue raised as a ground for granting CSK summary judgment.

Costs awarded to Kohler.

VACATED and **REMANDED** for further proceedings consistent with this disposition.