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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KIANA BOLLINGER, a minor, by and
12 through her Guardian ad litem,
13 JACQUELINE BOLLINGER,

14 Plaintiff,

15 v.

16 UNITED STATES OF
17 AMERICA, et al.,

18 Defendants.

Case No.: 16cv820-WQH-BLM

ORDER

19 HAYES, Judge:

20 The matter before the Court is the motion for summary judgment filed by Defendant
21 United States of America. (ECF No. 26).

22 **I. BACKGROUND**

23 On April 6, 2016, Plaintiff Kiana Bollinger, initiated this action by filing a
24 Complaint against the United States of America and Atlantic Power Corporation¹ for
25 negligence and premises liability. (ECF No. 1). Plaintiff seeks to hold the United States
26

27 ¹ On December 20, 2017, Defendant Atlantic Power Corporation filed a motion for determination of good
28 faith settlement. (ECF No. 34). The motion was granted by the Court on December 20, 2017. (ECF No.
37).

1 (“Defendant”) liable for damages arising from burn injuries she sustained while on Naval
2 Base San Diego. *Id.*

3 On October 26, 2017, Defendant filed a motion for summary judgment. (ECF No.
4 26). On October 31, 2017, Plaintiff filed a response in opposition. (ECF No. 33). On
5 November 6, 2017, Defendant filed a reply. (ECF No. 35).

6 The Court heard oral argument on the motion for summary judgment on February 8,
7 2018.

8 **II. FACTS**

9 “Naval Base San Diego has two parts, commonly referred to as the ‘wet side’ and
10 the ‘dry side.’” Statement of Undisputed Facts (“SUF”), ECF No. 33-5 at ¶ 1. “The movie
11 theater is located on the wet side of Naval Base San Diego.” *Id.* ¶ 9. “The Navy Exchange
12 is located on the dry side of Naval Base San Diego.” *Id.* ¶ 8. Harbor Drive divides the wet
13 side and dry side of Naval Base San Diego. *Id.* ¶ 4. “There is no way to drive from one
14 side of Naval Base San Diego to the other side without exiting and then entering the base.”
15 *Id.* ¶ 5. A civilian can drive onto the wet side of Naval Base San Diego through three
16 access points including the Main Gate (Gate 6), Gate 2, and Gate 7. *Id.* ¶¶ 10-11.

17 “On July 18, 2015, Plaintiff, her mother (Jacqueline Bollinger), her brother (Ethan
18 Bollinger), and her boyfriend at the time (Matthew Brumbaugh) visited Naval Base San
19 Diego.” *Id.* ¶ 15. Plaintiff’s mother drove them to the Navy Exchange on the dry side of
20 Naval Base San Diego and then to the movie theater on the wet side of Naval Base San
21 Diego. *See id.* ¶ 16-19. “To get from the Navy Exchange to the base movie theater,
22 Jacqueline Bollinger exited the dry side of Naval Base San Diego, drove down 32nd Street,
23 and entered the wet side of Naval Base San Diego through the Main Gate.” *Id.* ¶ 17. “32nd
24 Street is not part of Naval Base San Diego; it is a city street.” *Id.* ¶ 18. “Plaintiff was going
25 to see the movie ‘Inside Out.’” *Id.* ¶ 21. “Plaintiff was injured on the wet side of Naval
26 Base San Diego, near the movie theater.” *Id.* ¶ 22. Plaintiff did not pay an entrance fee to
27 enter the Naval Base San Diego on July 18, 2015. *Id.* ¶ 23. “No one on behalf of the
28

1 United States government invited Plaintiff and her family to Naval Base San Diego on July
2 18, 2015. *Id.* ¶ 24

3 In the deposition of Plaintiff's mother, Jacqueline Bollinger, Bollinger states that she
4 went to Naval Base San Diego on July 18, 2015 with Kiana, Matthew, and Ethan. Bollinger
5 states that she "planned to go to the Exchange and get some school -- school supplies,
6 school clothes." (J. Bollinger Dep., ECF No. 33-3 at 4). Bollinger states that upon entering
7 Naval Base San Diego, they "went to the Exchange" where Bollinger purchased pants and
8 school supplies. *Id.* at 5. Bollinger states that they spent "an hour and a half, close to two
9 hours" at the Navy Exchange and then went to the food court. *Id.* at 6. Bollinger states,

10 We were eating, and while we were eating we were deciding like what are we
11 gonna do after here? Do we -- you know. So then I was like, well, let me see
12 what kind of movies are playing today. So I went on my phone and I went to
13 MWR San Diego Theaters, and I start scrolling through, and I noticed that
14 there was a movie coming up in like a half hour or so. And so I asked them,
15 Do you guys want to go to the movies? And they said yeah. So we went over
16 there -- so then we just left straight there and went to the movies. I wasn't
17 sure if it was going to be like a long wait or not. So we just went straight to
18 the movies.

19 *Id.* at 7. Jacqueline Bollinger states in her deposition,

20 Q. At the time you made the decision to go to the movies, where were you
21 physically at that time?

22 A. Physically when we decided to go to the movies?

23 Q. Yeah. What location?

24 A. We were eating at the food court.

25 Q. Okay. And on your way to the movie theater, I believe you testified that
26 you had to exit one of the gates at the base; is that correct?

27 A. Yes.

28 Q. Okay. And this is on your way to the movie theater?

A. Yes.

Q. Okay. And then you had to re-enter another gate?

A. Yes. It's the same base. You exit one gate and enter another gate.

Id. at 11. Bollinger states that she was able to enter the base theater without having to pay
for admission. *Id.* Bollinger states that she always buys beverages and popcorn upon going

1 to the movies. *Id.* at 11-13.

2 In her deposition, Plaintiff states they went to the Naval Base to get school supplies
3 from the Navy Exchange. (K. Bollinger Dep., ECF No. 33-2 at 6). Plaintiff states, “Well,
4 so we planned to get the school supplies. And while we were shopping, we decided to
5 watch a movie since we were still there. So we ate and then we went to watch a movie.”
6 *Id.* Plaintiff states that they drove to the parking lot of the movie but arrived about thirty
7 minutes early. *Id.* at 7. Plaintiff states that in order to “kill time . . . me and my brother
8 and Brumbaugh were just walking around. And we went to the parking lot across . . . the
9 street [from where they had parked.]” *Id.* at 7-8. Plaintiff states that she had no destination
10 in mind while walking around the parking lot and was “just killing time.” *Id.* at 9. Plaintiff
11 states that she suffered injuries after standing on a steam grate in the parking lot. Steam
12 rising from the grate caused blisters on her foot. *Id.* at 10-11.

13 III. LEGAL STANDARD

14 “A party may move for summary judgment, identifying each claim or defense—or
15 the part of each claim or defense—on which summary judgment is sought. The court shall
16 grant summary judgment if the movant shows that there is no genuine dispute as to any
17 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
18 56(a). A material fact is one that is relevant to an element of a claim or defense and whose
19 existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v.*
20 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The materiality of a fact is determined
21 by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby,*
22 *Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).

23 The moving party has the initial burden of demonstrating that summary judgment is
24 proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The burden then shifts
25 to the opposing party to provide admissible evidence beyond the pleadings to show that
26 summary judgment is not appropriate. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S.
27 at 322, 324. The opposing party’s evidence is to be believed, and all justifiable inferences
28 are to be drawn in its favor. *See Anderson*, 477 U.S. at 255. To avoid summary judgment,

1 the opposing party cannot rest solely on conclusory allegations of fact or law. *See Berg v.*
2 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, the nonmovant must designate
3 which specific facts show that there is a genuine issue for trial. *See Anderson*, 477 U.S. at
4 256.

5 **IV. CALIFORNIA RECREATIONAL USE IMMUNITY**

6 **A. Contentions**

7 Defendant contends that it is entitled to summary judgment as a matter of law on
8 each cause of action because it is immune from liability under California’s recreational use
9 statute and Plaintiff provides no evidence to support any exception to the recreational use
10 statute. Defendant asserts that Plaintiff entered the Base for the purpose of watching a free
11 movie at the base movie theater, which Defendant contends is a recreational purpose within
12 the meaning of the statute. Defendant contends that Plaintiff’s purpose upon entering the
13 dry side of the Base is immaterial because Plaintiff exited and re-entered the Base on the
14 wet side for the purpose of seeing a movie. Defendant contends that regardless of whether
15 Plaintiff entered the land for a recreational purpose, the recreational use statute applies
16 because Plaintiff used Defendant’s land for a recreational purpose. Defendant contends
17 that the purpose of a landowner in allowing public access to land is irrelevant with respect
18 to application of the recreational use statute. Defendant contends that Plaintiff fails to
19 provide evidence to support the application of any exception to recreational use immunity.

20 Plaintiff contends that the recreational use statute does not apply because she entered
21 the Base for the commercial purpose of shopping at the Navy Exchange and that her
22 purpose in initially entering the Base is controlling. Plaintiff contends that it is immaterial
23 that she briefly exited and reentered the Base to reach the theater. Plaintiff further contends
24 that watching a movie is a commercial purpose rather than a recreational purpose. Plaintiff
25 asserts that although the base theater does not charge an admission fee, it derives a profit
26 from concessions and Plaintiff’s family “always buys snacks at the base theater.” (ECF
27 No. 33 at 16). Plaintiff contends that the recreational use statute “clearly contemplate[s]
28 the exclusion of” indoor activities. *Id.* at 12. Plaintiff contends that Defendant has

1 provided no authority to support the assertion that watching a movie is a recreational
2 purpose under the statute.

3 **B. Applicable Law**

4 “The Federal Tort Claims Act . . . authorizes private tort actions against the United
5 States ‘under circumstances where the United States, if a private person, would be liable
6 to the claimant in accordance with the law of the place where the act or omission
7 occurred.’” *United States v. Olson*, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. §
8 1346(b)(1)). “The Federal Torts Claim Act makes the United States liable for negligence
9 in the same manner and to the same extent as a private individual would be in similar
10 circumstances.” *Simpson v. United States*, 652 F.2d 831, 833 (9th Cir. 1981), *abrogated*
11 *by Ravell v. United States*, 22 F.3d 960, 961 (9th Cir. 1994). California Civil Code section
12 846, the recreational use statute, applies to the United States in the same way it applies to
13 private persons. *Id.*

14 California’s recreational use statute “protects landowners and other interest-holders
15 (landowners) from liability for negligence to those who enter or use their land for
16 recreational purposes.” *Mattice By & Through Mattice v. United States, Dep’t of Interior*,
17 969 F.2d 818, 820–21 (9th Cir. 1992). Pursuant to California Civil Code section 846,

18 An owner of any estate or any other interest in real property, whether
19 possessory or nonpossessory, owes no duty of care to keep the premises safe
20 for entry or use by others for any recreational purpose or to give any warning
21 of hazardous conditions, uses of, structures, or activities on those premises to
persons entering for a recreational purpose, except as provided in this section.

22 A “recreational purpose” as used in this section, includes activities such as
23 fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting,
24 riding, including animal riding, snowmobiling, and all other types of vehicular
25 riding, rock collecting, sightseeing, picnicking, nature study, nature
26 contacting, recreational gardening, gleaning, hang gliding, private
noncommercial aviation activities, winter sports, and viewing or enjoying
historical, archaeological, scenic, natural, or scientific sites.

27 This section does not limit the liability which otherwise exists (a) for willful
28 or malicious failure to guard or warn against a dangerous condition, use,

1 structure or activity; or (b) for injury suffered in any case where permission
2 to enter for the above purpose was granted for a consideration . . . ; or (c) to
3 any persons who are expressly invited rather than merely permitted to come
4 upon the premises by the landowner.

5 Cal. Civ. Code § 846. “The purpose of section 846 was to encourage landowners to let
6 members of the general public use their land for recreational purposes.” *Phillips v. United*
7 *States*, 590 F.2d 297, 299 (9th Cir. 1979) (citing *Gard v. United States*, 420 F. Supp. 300
8 (N.D. Cal. 1976)). Section 846 immunizes California landowners of “the duty to ‘keep the
9 premises safe’ for recreational users, and the duty to warn such users of ‘hazardous
10 conditions, uses of, structures, or activities’ on the premises.” *Klein v. United States*, 235
11 P.3d 42, 48–49 (Cal. 2010) (quoting Cal. Civ. Code § 846).

12 “In enacting section 846, the Legislature plainly extended recreational use immunity
13 to a broad class of land owners.” *Ornelas v. Randolph*, 847 P.2d 560, 569 (Cal. 1993).
14 The list of activities constituting a “recreational purpose” included in section 846 is not
15 exhaustive and courts have interpreted the term broadly. *Id.* at 563. The California
16 Supreme Court has stated,

17 The examples included in section 846 . . . do not appear to share any unifying
18 trait which would serve to restrict the meaning of the phrase “recreational
19 purpose.” They range from risky activities enjoyed by the hardy few (e.g.,
20 spelunking, sport parachuting, hang gliding) to more sedentary pursuits
21 amenable to almost anyone (e.g., rock collecting, sightseeing, picnicking).
22 Some require a large tract of open space (e.g., hunting) while others can be
23 performed in a more limited setting (e.g., recreational gardening, viewing
24 historical, archaeological, scenic, natural and scientific sites). Moreover . . .
25 the statute draws no distinction between natural and artificial conditions
26 Thus it is not limited to activities which take place outdoors, and does not
27 exclude recreational activities involving artificial structures.

28 *Id.* at 563–64.

C. Analysis

The California Supreme Court has determined that the recreational use statute is to
be interpreted broadly and does not exclude indoor activities or recreational activities

1 involving artificial structures. Further, the application of the recreational use statute is not
2 limited to those activities expressly listed in the statute. *Ornelas*, 847 P.2d at 563, 569.
3 Under this precedent, courts have determined that a wide variety of activities constitute a
4 recreational purpose within the meaning of the statute. *See, e.g., id.* at 564 (determining
5 that the recreational use statute was applicable where a child suffered injuries while playing
6 on a piece of property where old farm equipment machinery and irrigation pipes were
7 stored); *Mattice*, 969 F.2d at 821 (“congregat[ing] with friends at a picnic area . . . clearly
8 falls within the scope of the statute”); *Casas v. United States*, 19 F. Supp. 2d 1104, 1105
9 (C.D. Cal. 1998) (entering a Marine Corps Air Station for the purpose of participating in a
10 race was a recreational purpose); *Coryell v. United States*, 855 F. Supp. 1120, 1121 (C.D.
11 Cal. 1994) (applying the recreational use statute where a spectator was injured after falling
12 while attending an Air Show and Open House at the Miramar Naval Air Station);
13 *Pangelinan v. United States, et al.*, No. 15-cv-1730-L-KSC (S.D. Cal. Dec. 2, 2016)
14 (concluding that a boot camp graduation constituted a recreational purpose). The Court
15 concludes that watching a movie may constitute a recreational purpose within the meaning
16 of the recreational use statute.

17 Plaintiff contends that the commercial purpose of the movie theater precludes
18 application of the recreational use statute in this case. It is undisputed that admission to
19 the Base and the base movie theater movie is free. However, Plaintiff asserts that the movie
20 theater is a commercial endeavor because the base movie theater derives a profit from
21 concessions. The California Supreme Court has previously stated

22 [T]he broad language of the statute suggests that the Legislature consciously
23 eschewed any restrictions on the property subject to the statute in order to
24 provide clear guidance to landowners, to encourage access to recreationists,
25 and to fairly balance the interests of both. One who avails oneself of the
26 opportunity to enjoy access to the land of another for one of the recreational
27 activities within the statute may not be heard to complain that the property
28 was inappropriate for the purpose.

1 *Ornelas*, 847 P.2d at 603. Under the language of the statute, recreational use immunity is
2 determined by the purpose of those who enter or use the land, rather than the purpose of
3 the landowner in allowing access to the land. Cal. Civ. Code § 846 (“for entry or use by
4 others for any recreational purpose”); *see also Casas*, 19 F. Supp. 2d at 1107 (“The statute
5 itself refers to recreational activities of those who use the land, not the landowners.
6 Furthermore, the case law consistently addresses the statute as applying to the recreational
7 use, not the landowner’s purpose in allowing access to the property.”) In this case, the
8 recreational use statute is applicable if Plaintiff’s purpose in entering or using the Base was
9 recreational. Any purpose Defendant may have had in granting Plaintiff access to the land
10 is not determinative of the application of the recreational use statute.²

11 It is undisputed that Plaintiff left the Base after shopping at the Navy Exchange on
12 the dry side of the Base. It is undisputed that Plaintiff then re-entered the Base on the wet
13 side of the Base for the purpose of watching a movie at the base movie theater. The Court
14 has concluded that watching a movie constitutes a recreational purpose within the meaning
15 of the recreational use statute. Because Plaintiff entered the Base for the recreational
16 purpose of watching a movie, the recreational use statute is applicable to any injuries
17 sustained by Plaintiff while traveling within the property. *See Mattice*, 969 F.2d at 821
18 (“Section 846 does not require that a plaintiff be engaged in a recreational activity at the
19 time of the accident. The plain language states that a landowner ‘owes no duty of care to
20 keep the premises safe *for entry* or use by others for any recreational purpose’. . . . Thus,
21 the statute applies to injuries sustained while plaintiff travels within the property as long
22 as the plaintiff’s purpose in entering the property was recreational.”).

23 Defendant contends that the purpose of Plaintiff’s first entry onto the Base to shop
24 at the Navy Exchange is controlling and precludes application of the recreational use
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27 ² The recreational use statute does provide an exception to recreational use immunity when permission to
28 enter land for a recreational purpose is granted for a consideration. The Court addresses exceptions to
recreational use immunity *infra*.

1 statute. However, the recreational use statute provides, “An owner of any estate or any
2 other interest in real property . . . owes no duty of care to keep the premises safe for entry
3 *or use* by others for any recreational purpose.” Cal. Civil Code. § 846 (emphasis added).
4 At the time she sustained her injuries, Plaintiff was on the wet side of the Base for the
5 purpose of watching a movie on the base movie theater and was “killing time” in a parking
6 lot prior to the movie. (K. Bollinger Dep., ECF No. 33-2 at 9). Even if the first entry onto
7 the Base was controlling and Plaintiff had not entered the Base for a recreational purpose,
8 the undisputed facts establish that Plaintiff was *using* the premises for the purpose of
9 watching a movie at the time of her injury. Under the undisputed facts of this case, the
10 recreational use statute is applicable and Defendant cannot be held liable for Plaintiff’s
11 injuries, absent any applicable exception to the recreational use statute.

12 The statute provides for several exceptions to section 486 immunity.

13 Under section 846, an owner of any estate . . . owes no duty of care to keep
14 the premises safe for entry or use by others for recreational purposes or to give
15 recreational users warning of hazards on the property, unless: (1) the
16 landowner willfully or maliciously fails to guard or warn against a dangerous
17 condition, use, structure or activity; (2) permission to enter for a recreational
purpose is granted for a consideration; or (3) the landowner expressly invites
rather than merely permits the user to come upon the premises.

18 *Ornelas*, 847 P.2d at 562. Plaintiff does not contend or provide any evidence sufficient to
19 create a disputed issue of material fact regarding the exception for willful or malicious
20 behavior or the express invitation exception. It is undisputed that no one on behalf of the
21 United States government invited Plaintiff and her family to Naval Base San Diego on July
22 18, 2015. (SUF, ECF No. 33-5 at ¶ 24).

23 Plaintiff does not expressly contend that the consideration exception applies;
24 however, Plaintiff contends that watching a free movie on Naval Base San Diego is a
25 commercial endeavor because the establishment derives a profit from the sale of
26 concessions.

27 To trigger the consideration exception of section 846, payment must be made
28 in exchange for “*permission to enter*” the property or “received from others

1 for the same purpose.” . . . Consistent with this text, the few published
2 California cases interpreting the consideration exception have noted that for
3 the exception to apply, consideration must generally be paid “in the form of
4 an entrance fee.”

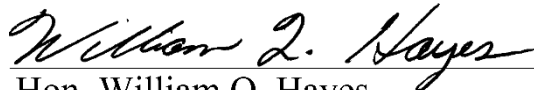
5 *Miller v. Weitzen*, 35 Cal. Rptr. 3d 73, 78 (Ct. App. 2005) (internal citations omitted). It is
6 undisputed that Plaintiff did not pay to enter the Naval Base on July 18, 2015 and that
7 admission to the base movie theater is free. (SUF, ECF No. 33-5 at ¶¶ 23, 25; J. Bollinger
8 Dep., ECF No. 33-3 at 11; K. Bollinger Dep., ECF No. 26-3 at 45). Further, individuals
9 are not required to make a purchase of concessions in order to attend a movie at the base
10 movie theater. (J. Bollinger Dep., ECF No. 33-3 at 12). Plaintiff has raised no disputed
11 issue of material fact with respect to the application of the exceptions to section 846
12 immunity.

13 The Court concludes that under the undisputed facts of this case, Defendant is
14 entitled to immunity from Plaintiff’s suit for damages arising from injuries she sustained
15 while on Naval Base San Diego.

16 **V. CONCLUSION**

17 IT IS HEREBY ORDERED that the motion for summary judgment filed by
18 Defendant United States of America is GRANTED. (ECF No. 26).

19 Dated: February 23, 2018

20 
21 Hon. William Q. Hayes
22 United States District Court
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