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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 JAIME DEMELLO, et al.,

7 Plaintiffs,

8 v.

9 UNITED STATES OF AMERICA,  
10 et al.,

11 Defendants.

CASE NO. C16-5741 BHS

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS

12 This matter comes before the Court on Defendant United States of America's  
13 ("Government") motion to dismiss. Dkt. 17. The Court has considered the pleadings  
14 filed in support of and in opposition to the motion and the remainder of the file and  
15 hereby grants the motion for the reasons stated herein.

16 **I. PROCEDURAL HISTORY**

17 On August 26, 2016, Plaintiffs Jaime Demello, the Estate of Alexander Demello,  
18 Michael Demello, and minor children A.D. and O.D. (collectively "Demellos"), filed a  
19 complaint against the Government, Adonis Brown ("Brown"), and several unnamed  
20 others. Dkt. 1 ("Compl."). The Demellos assert claims for common law negligence,  
21 premise liability, wrongful death, and negligent infliction of emotional distress ("NIED").  
22 *Id.* at 6. On October 13, 2016, the Government answered. Dkt. 10. On December 13,  
2016, default was entered against Brown. Dkt. 15.

1 On June 1, 2017, the Government filed a motion to dismiss. Dkt. 17. On June 12,  
2 2017, the Demellos responded. Dkt. 24. On June 16, 2017, the Government replied.  
3 Dkt. 25.

## 4 II. FACTUAL BACKGROUND

5 This case involves a shooting on Joint Base Lewis-McChord (“JBLM”) which  
6 resulted in the death of minor civilian, Alexander Demello. The Demellos allege that the  
7 Government’s failure to secure the perimeter separating the base from a civilian  
8 neighborhood, despite safety complaints and knowledge of criminal activity in the area,  
9 breached a duty owed to Alexander Demello and proximately caused his death and the  
10 other injuries alleged.

11 The perimeter at issue is marked by a chain-link fence that stands “at the end of  
12 Woodbrook Drive SW just beyond 150<sup>th</sup> St SW, in Lakewood, WA.” Compl. at ¶ 3.1.  
13 The fence separates a wooded area of undeveloped JBLM property from the adjacent  
14 civilian residential area (“Woodbrook neighborhood”). *Id.* As of October 20, 2015, there  
15 was no signage along the fence to indicate that the property beyond belonged to JBLM.  
16 *Id.* at ¶ 3.3. Just beyond the fence there is a trail through the undeveloped wooded area of  
17 JBLM that Woodbrook neighborhood residents used as a dog-walking trail and park. *Id.*  
18 at ¶ 3.2. There has been a “6-foot by 3-foot hole” in the fence since 2007. *Id.* at ¶¶ 3.1,  
19 3.2. Brown had frequently used the hole in the fence to access the trail on JBLM  
20 property. *Id.* at 3.5. The hole and civilian use of the property beyond it were  
21 documented in “complaints to the Security Specialist of JBLM on May 18, 2011,” which  
22 indicated that the hole was “a safety risk and security issue” and should be repaired

1 “ASAP.” *Id.* at ¶ 3.12. There have also been reports of criminal activity in the area  
2 around the compromised fence. *Id.* at ¶¶ 3.2, 3.11.

3 On October 20, 2015, 14-year-old A.D. and his 13-year-old brother, Alexander  
4 Demello, followed their 17-year-old friend, Brown, onto the undeveloped wooded area of  
5 JBLM property. The Demellos and Brown were residents of the Woodbrook  
6 neighborhood, and “had no knowledge that the wooded property adjacent to their  
7 neighborhood belonged to JBLM or that it was Government Property.” *Id.* at ¶¶ 3.4, 3.5.  
8 While the boys were walking the trail through the undeveloped wooded area of JBLM  
9 property, Brown “found a gun under some brush.” Compl. at ¶ 3.7. In the hands of  
10 Brown, the gun accidentally fired, striking Alexander Demello “in the face just below his  
11 right eye.” *Id.* On October 25, 2015, Alexander Demello died at Mary Bridge Children’s  
12 Hospital in Tacoma, Washington. *Id.* at ¶¶ 3.9, 3.10.

### 13 III. DISCUSSION

#### 14 A. Standard

15 Defendant moves to dismiss for lack of subject matter jurisdiction. Motions to  
16 dismiss brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure may  
17 challenge jurisdiction factually by “disputing the truth of the allegations that, by  
18 themselves, would otherwise invoke federal jurisdiction,” or facially by “asserting that  
19 allegations in the complaint are insufficient on their face to invoke federal jurisdiction.”  
20 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). For facial  
21 challenges, a plaintiff’s allegations are assumed as true and the complaint is construed in  
22 his favor. *Id.* Federal courts are presumed to lack jurisdiction and on a motion to dismiss

1 pursuant to Rule 12(b)(1) the burden of proof is on the plaintiff to establish subject matter  
2 jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F. 2d 1221, 1225 (9th Cir.  
3 1989). To meet this burden in an action against the Government, a plaintiff “must point  
4 to an unequivocal waiver of sovereign immunity.” *Blue v. Windall*, 162 F.3d 541, 544  
5 (9th Cir. 1998) (citing *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983)).

## 6 **B. Discretionary Function Exception**

7 The Demellos bring claims against the Government pursuant to the Federal Tort  
8 Claims Act (“FTCA”). The FTCA is a limited waiver of sovereign immunity that allows  
9 claims to be brought against the Government for “the negligent or wrongful act or  
10 omission of any employee of the government while acting within the scope of his office  
11 or employment.” 28 U.S.C. § 2675(a). Congress has designated numerous exceptions to  
12 the FTCA’s waiver of sovereign immunity by exempting the Government from liability  
13 for certain types of claims. *See* 28 U.S.C. § 2680. These statutory exceptions must be  
14 construed strictly in favor of the Government. *U.S. v. Nordic Village*, 503 U.S. 30, 34  
15 (1992) (citing *McMahon v. U.S.*, 342 U.S. 25, 27 (1951) (“statutes which waive immunity  
16 of the Government from suit are to be construed strictly in favor of the sovereign.”);  
17 *F.D.I.C. v. Craft*, 157 F.3d 697, 707 (9th Cir. 1998) (“the FTCA’s waiver of sovereign  
18 immunity is strictly construed in favor of the sovereign.”). Therefore, a claim that “falls  
19 within an exception of the FTCA . . . must be dismissed for lack of subject matter  
20 jurisdiction.” *Bibeau v. Pac. Nw. Research Found., Inc.*, 339 F.3d 942 (9th Cir. 2003).

21 The “discretionary function” exception prohibits suit against the Government for  
22 “any claim based upon . . . the exercise or performance or the failure to exercise or

1 perform a discretionary duty on the part of a federal agency or an employee of the  
2 Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). It  
3 is the Government’s burden to show that the discretionary function exception applies.  
4 *Whisnant v. U.S.*, 400 F.3d 1177, 1181 (2005) (citing *Bear Medicine v. U.S. ex rel. Sec’y*  
5 *of the Dep’t of the Interior*, 241 F.3d 1208, 1213 (9th Cir. 2001)).

6 “The Supreme Court has established a two-part test for determining the  
7 applicability of the discretionary function exception.” *Bibeau*, 339 F.2d at 945. *See U.S.*  
8 *v. Gaubert*, 499 U.S. 315, 322–23 (1991); *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531,  
9 536 (1988). First, the challenged conduct must “be the product of judgment or choice”  
10 on the part of the acting employee. *Berkovitz*, 486 U.S. at 536. Therefore, “the  
11 discretionary function exception will not apply when a federal statute, regulation, or  
12 policy specifically prescribes a course of action for the employee to follow.” *Id.* at 356.  
13 When an employee acts under such a mandatory directive, their conduct cannot be the  
14 product of judgment or choice because they have “no rightful option but to adhere to the  
15 directive.” *Id.* at 537. Second, that judgment or choice must be “based on public policy  
16 considerations.” *Id.* at 537. “The purpose of the [discretionary function] exception is ‘to  
17 prevent judicial second-guessing of legislative and administrative decisions grounded in  
18 social, economic, and political policy through the medium of an action in tort.’” *ARA*  
19 *Leisure Servs. v. United States*, 831 F.2d 193, 194 (9th Cir. 1987) (quoting *U.S. v. Varig*  
20 *Airlines*, 467 U.S. 797, 814 (1984)). Therefore, applicability of the discretionary function  
21 exception depends “not on the agent’s subjective intent in exercising [his discretion], but  
22

1 on the nature of the actions taken and on whether they are susceptible to policy analysis.”  
2 *Gaubert* 499 U.S. at 325.

3         The Government argues that the discretionary function exception applies to the  
4 Demellos’ claims because they challenge the Government’s alleged “fail[ure] to properly  
5 fence and maintain a perimeter” around JBLM, which is “immune from suit” under the  
6 discretionary function exception. Dkt. 17 at 14–15. The Court agrees that the  
7 discretionary function exception applies to the Government’s decision not to maintain the  
8 fence or secure the area around it because decisions regarding the maintenance of  
9 JBLM’s perimeter security are discretionary and implicate public policy considerations.  
10 The physical security of military installations is governed by Army Regulation 190-16  
11 (“AR 190-16”), which does not prescribe a specific course of action for the Government  
12 to follow in securing its military bases. Instead, AR 190-16 gives base commanders  
13 discretion to determine the level of security their base requires and to “develop, set up,  
14 and maintain policies and procedures to control installation access” accordingly. AR  
15 190-16 ¶¶ 1-1–2-4 (*see* Dkt. 21-1). Further, AR 190-16 itself illustrates that the  
16 Government’s decisions regarding perimeter maintenance and security are susceptible to  
17 policy considerations because it lists specific policy factors for base commanders to  
18 consider when determining how to secure their bases. *See* AR 190-16 ¶ 1-5.

19         The Demellos do not oppose the applicability of the discretionary function to the  
20 Government’s “failure to repair or maintain fencing around its perimeter or to secure the  
21 boundaries of its property with appropriate security devices.” Dkt. 24 at 2. However, the  
22 Demellos do argue that their claims should survive because the perimeter fencing issue is

1 not “the only basis for cognizable claims for negligence against the United States,” and  
2 that, for their action to be dismissed, the discretionary function exception “must  
3 encompass all cognizable claims” they advance. *Id.* at 4–5. The Demellos’ argument in  
4 opposition fails because it fails to dispute that the specified conduct giving rise to their  
5 claims was a result of the Government’s course of action in a discretionary function.

6 The Demellos argue that the discretionary function exception does not apply to  
7 their claims because they are premised on the Government’s negligence under a theory of  
8 premises liability. Dkt. 24 at 8. The Demellos attempt to rebut the applicability of the  
9 discretionary function exception by asserting that premises liability law creates a “non-  
10 discretionary duty to make the area reasonably safe or to warn of known hazards” and  
11 that the Government has “no room to decline” or “opt out” of that duty. *Id.* at 5.

12 However, the Demellos misapply the discretionary function exception. While the  
13 Demellos are correct that the Government’ status as a land owner may create a general  
14 tort duty under Washington law, “it is the nature of the conduct, rather than the status of  
15 the actor that governs whether the discretionary function exception applies.” *Varig*  
16 *Airlines*, 467 U.S. at 813. The Demellos argue that the conduct they challenge is the  
17 Government’s “failure to make a portion of their property known to be hazardous safe,”  
18 Dkt. 24 at 3–6, but this broad statement does not identify any specific nondiscretionary  
19 course of conduct that the Government should have followed. To determine what conduct  
20 the Demellos challenge the Court must look to the allegations in the complaint, and the  
21 complaint alleges only that the Government failed to keep the area at issue safe by  
22 “[allowing] the hole in the fence to remain” and “failing to take precautions” against

1 known criminal activity in the area. Compl. ¶ 3.15. *See Whisnant*, 400 F.3d at 1184–85  
2 (holding a district court “mischaracterized” what conduct a plaintiff challenged when it  
3 did not consider the conduct as alleged in the complaint). To the extent that the Demellos  
4 claim that the Government was obligated to repair the hole or replace the fence, without  
5 further allegations, such a decision falls squarely within the Government’s discretionary  
6 function in determining how to secure the 90,600-acre base’s perimeter. Nonetheless, this  
7 is not to say that the Government’s failure to repair a base’s perimeter fence cannot  
8 become a nondiscretionary duty if the condition of the fence facilitates or contributes to a  
9 dangerous condition to which members of the public are exposed.

10 **C. Failure to Remedy or Warn of a Dangerous Condition**

11 The Demellos also argue that the discretionary function exception does not apply  
12 to their claims that the Government was negligent in failing to prevent or warn of dangers  
13 associated with known criminal activity that had taken place on the trail behind the hole  
14 in the fence. Dkt. 24 at 8. However, while the Demellos’ reply vaguely identifies a  
15 failure to make safe or warn of dangerous conditions as negligent conduct underlying  
16 their claims, the complaint fails to include allegations about a failure to warn of any  
17 particular dangerous condition of which the Government should have known. *See* Dkt.  
18 24 at 3, 6. The complaint does vaguely assert that the trail located behind the fence was  
19 “the scene of criminal activity” and that the Government “breached its duty when it knew  
20 criminal activity was taking place at the location of the hole in the fence and did not take  
21 precautions to prevent injury or death to Alexander Demello.” Dkt. 1 at 4, 6. Broadly  
22 construed, this language could be interpreted to claim that the Government is liable for



1 failing to warn those who entered through the fence that the area was dangerous or failing  
2 to discover and ameliorate the dangerous condition of the abandoned or mislaid firearm  
3 that resulted in Alexander Demello's death. Under these theories, while the fact remains  
4 that the Government has discretion in deciding whether to repair the hole in the fence, the  
5 existence and nature of the hole is highly relevant to Alexander Demello's status as an  
6 invitee, licensee, or trespasser and what duty the Government may have owed to him in  
7 maintaining the trail in a safe condition.

8         Nonetheless, as the complaint is currently pled, Plaintiffs' conclusory allegations  
9 that the Government breached a duty when it "did not take precautions to prevent injury  
10 or death to Alexander Demello" are insufficient to state a viable claim. While the  
11 complaint need not include overly detailed factual allegations, it must provide the  
12 grounds for entitlement to relief and not merely a "formulaic recitation" of the elements  
13 of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff  
14 must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at  
15 570. According to the Demellos' complaint, the "known criminal activity" that should  
16 have placed the Government on notice of the trail's dangerous condition included a single  
17 reported instance of a burglar fleeing through the hole in the fence, which occurred two  
18 years prior to the accidental shooting of Alexander Demello. Dkt. 1 at 5. Such  
19 allegations on their own cannot support a plausible theory that the Government should  
20 have known that contraband, such as a firearm, might be found along the trail and that the  
21 Government is therefore liable for failing to prevent Alexander Demello's injury.

1 Nonetheless, the parties do not address whether the complaint could be cured if the  
2 Demellos were granted leave to amend their complaint in order to include allegations that  
3 would properly support a theory that the Government failed to adequately warn of, or  
4 remedy, a dangerous condition of which they should have known. Dismissal without  
5 leave to amend “is proper only if it is absolutely clear that the deficiencies of the  
6 complaint could not be cured by amendment.” *Broughton v. Cutter Labs.*, 622 F.2d 458,  
7 460 (9th Cir. 1980). For example, the complaint could conceivably be cured if the  
8 Demellos were to allege that the Government knew of frequent or severe criminal activity  
9 taking place on the trail that would create a foreseeable risk of dangerous contraband or  
10 other dangerous condition being discovered on its premises. Accordingly, the Court  
11 grants the Demellos leave to file an amended complaint.

#### 12 IV. ORDER

13 Therefore, it is hereby **ORDERED** that the Government’s motion to dismiss (Dkt.  
14 17) is **GRANTED** and the Demellos’ claims are **DISMISSED with leave to amend**. The  
15 Demellos may file an amended complaint no later than September 8, 2017. Failure to file  
16 a timely amended complaint shall result in dismissal with prejudice without any further  
17 order from the Court.

18 Dated this 9th day of August, 2017.

19 

20 BENJAMIN H. SETTLE  
21 United States District Judge  
22