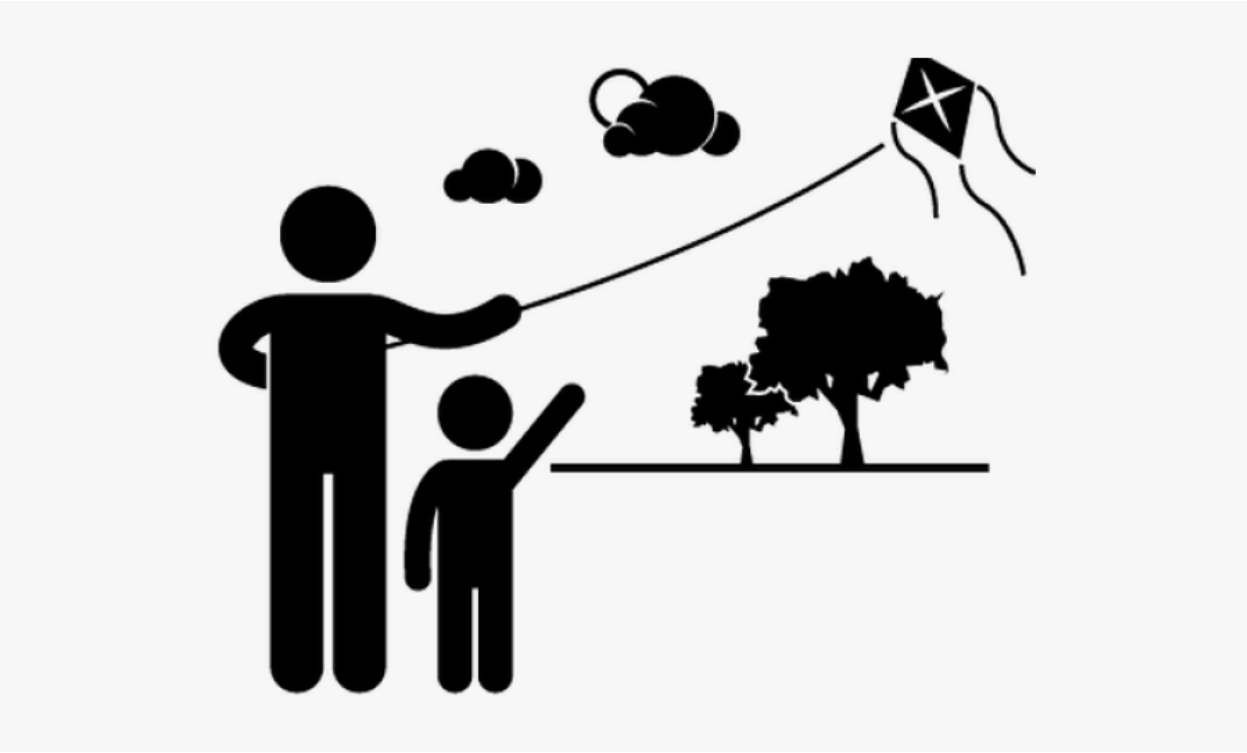
“RECREATIONAL IMMUNITY”
[Civil Code section 846]



JAMES GRAFTON RANDALL, ESQ.
LAWATYOURFINGERTIPS, INC.

RECREATIONAL IMMUNITY

1. OVERVIEW

It is always good practice to thoroughly review the allegations of the Complaint before beginning to file an Answer. Not only is it necessary to review the allegations to see whether a demurrer or motion to strike should be filed [for punitive damages and other matters], but what affirmative defenses you need to assert in the Answer.

Of course, it is further necessary to analyze the allegations of the Complaint to form a Discovery plan and to determine what future motions may be needed.

One of the issues a defense attorney must analyze a Complaint for is whether or not Plaintiff is asserting allegations that may raise the issue of whether Defendant has a defense, such as "Recreational Immunity" pursuant to Civil Code section 846 or whether Plaintiff's action is one that is barred by the Doctrine of Primary Assumption of Risk [due to the activity Plaintiff was engaged in or the occupation Plaintiff was engaged in when injured].

If the plaintiff is alleging he or she was injured while on the defendant's property, then the Complaint must be analyzed to ascertain how Plaintiff was injured, what activity was Plaintiff engaged in at the time of the injury, whether plaintiff had the express invitation of the Defendnat to enter the property or whether paid a fee to enter the property – and whether or not the Complaint is barred by the provision of Civil Code section 846. Further, as Civil Code section 846 provides, there is a wide range of activities covered by Section 846, and the list provided is "not exhaustive".

Depending on the allegations asserted, the deficiencies of the Complaint may be addressed in a Demurrer or a motion for summary judgment [or, after the Answer has been filed, in a motion for judgment on the pleadings].

NOTE: In Judicial Council Form Complaints there is a box that many plaintiffs check off in trying to plead a cause of action for "Premises Liability". In the Judicial Council form, Prem. L-3, Count Two is "Willful Failure to Warn [Civil Code section 846]. In most cases this claim is not pertinent to the action at all. If not relevant, in the "meet and confer" request plaintiff to stipulate in writing [with an order] to strike the references to "Willful Failure to Warn"]. Even if it is, merely checking off the box is not sufficient. Plaintiff must plead the essential facts to state a cause of action. The form complaint is no more immune to demurrer than any other complaint that fails to meet essential pleading requirements to state a cause of action. *People ex rel. Dept. of Transportation v. Superior Court*, 5 Cal.App.4th 1480, 1486 (1992).

If Plaintiff intends to check off the box or pleads that Defendant's conduct was "willful and malicious", then it is necessary to review the allegation to ascertain whether they are sufficient

and whether they plead sufficient facts. For purposes of the "willful or malicious" exception under section 846, "[a] plaintiff must allege specific facts establishing the three essential elements-knowledge of the peril, knowledge of the probability of injury, and conscious failure to act to avoid the peril-necessary to raise the defendant's alleged negligence to the level of willful misconduct." (*Charpentier v. Von Geldern* (1987) 191 Cal.App3d 101, 114, accord, *Bartlett v. Jackson* (1936) 13 Cal.App.2d 435, 437.

2. PURPOSE OF CIVIL CODE SECTION 846

As stated succinctly by the Court of Appeal in *Johnson v. Unocal,* (1993) 21 Cal.App.4th 310, at page 315 of its opinion, "The purpose of [Civil Code] section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits." Thus, the enactment of Civil Code section 846, the "recreational use immunity," carried out the Legislature's strong desire to immunize landowners from injury to persons using their property for recreational purposes. While the Legislature enacted three exceptions to this policy of immunization of land owners, those exceptions, including the "consideration exception" argued by Plaintiffs in this case, are to be narrowly construed so that the Legislature's policy of encouraging private landowners to open their property for recreational use will not be undermined. (*Johnson v. Unocal,* (1993) 21 Cal.App.4th 310, 315.)

3. CLAIMS FOR NEGLIGENCE AND PREMISES LIABILITY ARE BARRED BY RECREATIONAL IMMUNITY

Negligence and premises liability – come within the reach of Section 846 (assuming the elements of recreational immunity are satisfied). This is because recreational immunity bars all forms of premises liability and related claims stemming from alleged "property-based duties." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80.)

It is well understood that premises liability is a species of negligence, and both are covered by Section 846 when, like here, the defendant's ownership, maintenance, etc. of the property forms the basis of alleged liability. (See, e.g., *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 11 [noting that "[n]egligence claims based on premises liability" fall within the ambit of Section 846].)

4. A LEASEHOLD INTEREST IS SUFFICIENT TO TRIGGER IMMUNITY

There are "two elements as a precondition to immunity: (1) the defendant must be the owner of an 'estate or any other interest in real property, whether possessory or nonpossessory'; and (2) the plaintiff's injury must result from the 'entry or use [of the "premises"] for any recreational purpose.' " (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100, 17 Cal.Rptr.2d 594, 847 P.2d 560.) A leasehold interest is sufficient to trigger immunity under Civil Code section 846. (*Ornelas v. Randolph, supra,* 4 Cal.4th at pp. 1102–1103, 17 Cal.Rptr.2d 594, 847 P.2d 560 [exceptionally broad definition of types of interest in real property which will trigger immunity]; *Callahan v. Martin* (1935) 3 Cal.2d 110, 118, 43 P.2d 788 [leasehold an estate in real property].) *Gordon v. Havasu Palms, Inc*., 112 Cal.Rptr.2d 816, 824, 93 Cal.App.4th 244, 255 (Cal.App. 4 Dist.,2001).

5. C.C.P. SECTION 846 PROVIDES EXTREMELY BROAD PROTECTION TO LANDOWNERS DUE TO THE PUBLIC POLICY OF ENCOURAGING THOSE LIKE HIM TO CONTINUE OPENING THEIR LAND FOR FREE

As long recognized, "[t]he purpose of section 846 is to encourage property owners 'to allow the general public to recreate free of charge on privately owned property.'" (*Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707; *Hubbard v. Brown* (1990) 50 Cal.3d 189, 193 [Section 846 's goal "was to constrain the growing tendency of private landowners to bar public access to their land for recreational uses out of fear of incurring tort liability"].) The protection afforded to landowners under Section 846 "is extremely broad." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105.)

Consistent with the public policy protections afforded by Section 846, and its "extremely broad" reach, the Supreme Court has struck down court-imposed limitations on the immunity that threaten to "thwart the laudable goal of inducing owners to make their properties available for recreation." (See *id.* at p. 1107 [overruling decisions that had interpreted the statute to require the property be "suitable" for recreational purposes].)

Just two elements are required to establish a prima facie defense based on recreational immunity:

"(1) the defendant must be the owner of an 'estate or any other interest in real property, whether possessory or nonpossessory;' and

(2) the plaintiff's injury must result from the "entry or use [of the 'premises'] for any recreational purpose." (*Id.* at p. 1100 [citing Section 846; brackets by Supreme Court].)

For example, in *Collins v. Tippett*, 203 Cal.Rptr. 366, 367, 156 Cal.App.3d 1017, 1019 (Cal.App. 4 Dist.,1984), the court held that construction of the statute allowing a landowner to retain immunity even if he permits public use only of the beach area is more likely to achieve the Legislature's goal of keeping as much private land as possible open for public recreational use.

In this case, Tippett owned one parcel of beachfront property in Solana Beach, California. Her home is built on a cliff overlooking the ocean and her property line extends down the cliff-face to the mean high tide line of the beach. Collins was sunbathing in the nude at the base of Tippett's cliff when a piece of gunite (a concrete-like substance sprayed on cliffs to prevent erosion) broke off the cliff and fell onto Collins, injuring him. Collins sued, alleging Tippett's negligent maintenance of the cliff caused his injuries. Tippett affirmatively defended, contending Civil Code section 846 immunized her from a negligence suit. The court found Tippett owned the beach (subject to a public easement created by implied dedication) and the cliff, Collins was recreating on Tippett's property, and therefore Tippett was immune from suit under the statute.

6. "RECREATIONAL IMMUNITY" APPLIES TO INJURIES OFF OF THE DEFENDANT'S LAND:

See: *Wang v. Nibbelink*, 208 Cal.Rptr.3d 461, 464–65, 4 Cal.App.5th 1, 5–6 (Cal.App. 3 Dist., 2016): To encourage landowners to allow public use of the land for recreational purposes, Civil Code section 846 shields landowners from liability "for any injury to person or property caused by any act of the person to whom permission has been granted," subject to statutory exceptions. (Civ. Code, § 846, par 3, subpart(c); unless otherwise set forth, statutory section references are to the Civil Code.) In this case of first impression, we hold section 846, paragraph 3, subpart (c) shields landowners from liability where such recreational users of the land cause injury to persons outside the premises who are uninvolved in the recreational use of the land, even where the plaintiffs also allege that the landowners' neglect of their own property-based duties contributed to the injury.

In *Wang v. Nibbelink*, a horse ran away from a meadow owned by defendants Gregory Nibbelink, Bevlee Nibbelink, Gary D. Nibbelink, Linda A. Nibbelink, Robert G. Goulding, Diane K. Goulding, and Nibbelink Revocable Family Trust (meadow landowners) onto adjacent property known as Strawberry Lodge (Lodge). The horse trampled plaintiff Yan Wang as she and her husband, plaintiff Tyler Raihala, got out of their car to dine at the Lodge. This appeal involves plaintiffs' negligence claims against the meadow landowners who invoke section 846.
The horse was part of the Wagon Train—an annual historical event simulating Old West travel by stage coach across the Sierras in Northern California. The meadow landowners were not involved in the event but allowed the event organizers and participants to use the meadow for overnight camping and horse containment. Plaintiffs had nothing to do with the Wagon Train, not even as spectators.

In *Wang v. Nibbelink*, 208 Cal.Rptr.3d 461, 473–74, 4 Cal.App.5th 1, 17 (Cal.App. 3 Dist., 2016), the court held: "Here, the question is whether section 846 applies to off-premises injury to persons not participating in recreational use of the land—matters not addressed in *Klein*.

Since the first paragraph of section 846 absolves a landowner of duty towards recreational users only (*Klein, supra*, 50 Cal.4th at p. 78, 112 Cal.Rptr.3d 722, 235 P.3d 42), it does not relieve the meadow landowners in this case from a duty, if any, owed to these plaintiffs, who were neither participants nor spectators in the Wagon Train event. (See *Ornelas, supra*, 4 Cal.4th at p. 1102, 17 Cal.Rptr.2d 594, 847 P.2d 560 [section 846 applies to both participants and spectators, even though the statute did not expressly address spectators, because both participants and spectators take advantage **474 of the recreational opportunities, and neither may be heard to complain when injury results therefrom], criticized on other grounds in *Klein, supra*, 50 Cal.4th at p. 85, 112 Cal.Rptr.3d 722, 235 P.3d 42.)

Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as Ms. Wang and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph."

7. A WIDE RANGE OF ACTIVITIES, UNDER CIVIL CODE SECTION 846

As Section 846 provides: "….A "recreational purpose," as used in this section, includes activities such as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, private noncommercial aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites…".

In *Ornelas* the California Supreme Court held:

> In these circumstances, whether plaintiff entered the property to play on the equipment, or merely accompanied the other children at play, is immaterial. In either case, his presence was occasioned by the recreational use of the property, and his injury was the product thereof. We discern no meaningful distinction, for purposes of section 846, between the passive *19 spectator and the active participant. Both take advantage of the recreational opportunities offered by the property; neither, therefore, may be heard to complain when injury results therefrom. (*Ornelas, supra*, 4 Cal.4th at p. 1102.)

The Supreme Court repeats – at least four times in this paragraph – that one need not be actively engaged in a recreational activity for immunity to apply; if recreation of any kind brought the plaintiff onto the property, that is sufficient.

The non-exhaustive list of recreational activities in Section 846 includes purely passive acts such as "sightseeing," "picnicking," "viewing scenic sites," and similar activities materially indistinguishable from observing an animal roping event. (Civ. Code, § 846, subd. (b); see also *Ravell v. U.S.* (9th Cir. 1994) 22 F.3d 960, 962 [noting "the encompassing nature of the word 'recreation' and the broad list of ***passive*** *22 and active activities mentioned in section 846," and refusing to disturb the district court's finding that entering property merely to observe an air show constitutes "recreation" under the statute] (citing *Ornelas, supra;* emphasis added)[7]; see also *Wang, supra*, 4 Cal.App.5th at p. 29 ["the statutory list is not exhaustive and the term recreational activity is to be broadly construed"] (citing *Klein, supra*, 50 Cal.4th at p. 85).)

Section 846 puts active and passive recreation on equal footing, without mandating that the injury be caused by the activity, itself, for passive recreation (as opposed to some other danger on the property that otherwise would form the basis of a premises liability claim). Accordingly, Carter's argument here amounts to an effort to read into Section 846 an unlisted limitation, namely, that purely passive types of recreation come with the additional requirement that the injury be caused by the activity. The statute does not state any such limitation, and the Supreme Court in *Ornelas* made clear that courts should not read into section 846 unlisted requirements. *(Ornelas, supra*, 4 Cal.4th at p. 1107.)

The recreational use immunity statute bars an action by the plaintiff who entered the defendant's property to retrieve a kite that had been blown onto the property. *Jackson v. Pacific Gas & Elec. Co*., 114 Cal.Rptr.2d 831, 834, 94 Cal.App.4th 1110, 1114 (Cal.App. 1 Dist.,2001).

8. EXCEPTIONS TO IMMUNITY FOR RECREATIONAL IMMUNITY

Section 846 provides that recreational immunity will not apply when the evidence establishes one of three statutory exceptions: (1) the landlord willfully or malicious failed to warn or guard against a dangerous condition; (2) the injury occurred "where permission to enter" for a recreational purpose was granted for consideration; or (3) the plaintiff was expressly invited onto the land. (Civ. Code, § 846, subds. (d)(1)-(3); e.g., *Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 938 [confirming these are "exceptions" that "abrogate[]" immunity that would otherwise be provided under Section 846].)

A. WILLFUL FAILURE TO WARN

The rules regarding the "willful or malicious failure to warn" exception were well summarized in *Manuel, supra.* Among other things, the court explained that the terms "'willful,' as well as 'wonton"' refer to when "the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm *28 would follow." (*Manuel, supra*, 173 Cal.App.4th at p. 939 [citations and quotation marks omitted].)

The court added, "willfulness generally is marked by three characteristics: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) conscious failure to act to avoid the peril." (*Id.* at p. 940 [citing *Calvillo–Silva v. Home Grocery* (1998) 19 Cal.4th 714, 728-30 (disapproved of on other grounds by *Aguilar, supra*, 25 Cal.4th 826)].

Importantly, "willful" misconduct "involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences." (*Calvillo-Silva, supra*, 19 Cal.4th at p. 729; see also *Charpentier, supra*, 191 Cal.App.3d at p. 113 ["Willful or wanton. misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results"] (citations and quotations omitted).)

One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].) Judicial Council Of California Civil Jury Instruction 1010.

For purposes of the "willful or malicious" exception under section 846, "[a] plaintiff must allege specific facts establishing the three essential elements-knowledge of the peril, knowledge of the probability of injury, and conscious failure to act to avoid the peril-necessary to raise the

defendant's alleged negligence to the level of willful misconduct." (*Charpentier v. Von Geldern* (1987) 191 Cal.App3d 101, 114 (*Charpentier);* accord, *Bartlett v. Jackson* (1936) 13 Cal.App.2d 435, 437 [to claim willful misconduct, "it is necessary to specify the particular acts upon which the willful misconduct of a person is charged"].)

B. CONSIDERATION

It is well established that "'consideration' in the context of section 846 must be for 'permission to enter' (§ 846, par. 4), i.e., payment of an entry fee to use the land or other benefit that gives the landowner an immediate and reasonably direct advantage." (*Wang, supra*, 4 Cal.App.5th at p. 31). At a minimum, consideration received must consist of a present, actual "benefit bestowed or a detriment suffered." (*A.J. Industries, Inc. v. Ver Halen* (1977) 75 Cal.App.3d 751, 761, 142 Cal.Rptr. 383.)

See: Johnson v. Unocal Corp., 26 Cal.Rptr.2d 148, 152, 21 Cal.App.4th 310, 316 (Cal.App. 2 Dist.,1993) [Johnson learned that his employer, Abex Corporation (Abex), executed an agreement with Unocal which, inter alia, contains a hold harmless clause. Because the hold harmless clause in the agreement did not constitute consideration, the exception to immunity in section 846 does not apply here. We therefore affirm the summary judgment granted Unocal.]

To trigger the consideration exception of section 846, payment must be made in exchange for "*permission to enter* " the property or "received from others for the same purpose." (*Ibid.,* italics added.) Consistent with this text, the few published California cases interpreting the consideration exception have noted that for the exception to apply, consideration must generally be paid "in the form of an entrance fee." (*Johnson, supra,* 21 Cal.App.4th at pp. 316–317, 26 Cal.Rptr.2d 148 [**"**as regards section 846, we are aware of no cases in which consideration did not involve the actual payment of an entrance fee by plaintiff to defendant.] *Miller v. Weitzen*, (2005)133 Cal.App.4th 732, 739 [fee for trail maintenance not consideration].

On the other hand, see: *Graves v. United States Coast Guard* (9th Cir.1982) 692 F.2d 71, 73 [money paid by plaintiff to friend to pay campground operator abrogated landowner's section 846 immunity]; *Thompson v. United States* (9th Cir.1979) 592 F.2d 1104, 1108 ["rental charge" paid to the federal government by sporting association which in turn charged entry fee to plaintiff triggered section 846 consideration exception].) In both of these cases, the consideration paid was in the nature of an entrance fee to use the land. (See *Thompson,* at p. 1108 ["With a rental charge having been made for the use of the land, it is clear that permission to enter the government land was 'granted for a consideration' "]; *Graves,* at p. 73 ["the use of the cabana and access to the river [the site of the injury] were implied benefits received as a consequence of the payment of consideration to the campground operator"].)

The consideration need not be received by the entity/person claiming the CC 846 immunity. In *Pacific Gas & Electric Co. v. Superior Court*, 216 Cal.Rptr.3d 426, 430–31, 10 Cal.App.5th 563, 566 (Cal.App. 1 Dist., 2017) the court held that the "consideration exception" does not require

actual payment to the entity/person seeking immunity under Section 846. Camper brought suit against electric company for negligence, alleging company was responsible for maintaining its electrical lines and adjacent areas in a safe condition, but failed to warn camper of dangerous condition presented by trees adjacent to electrical lines and negligently inspected and maintained trees in proximity to electrical lines adjacent to campsite at which camper was injured when tree fell on his tent. The consideration exception to recreational use immunity does apply to PG&E even though Zachary's fee for recreational access to the campground was not paid to it, and therefore affirm the trial court's denial of PG&E's motion for summary judgment asserting section 846 immunity. Payment of consideration abrogates the immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff's injuries.

C. INVITATION

It is established in California that immunity is abrogated by an [express] invitation for any purpose. (*Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 588, 216 Cal. Rptr.3d 426.)

"Express invitation" in section 846 refers to a direct, personal request by the landowner to persons whom the landowner personally selects to come onto the property. *Wang v. Nibbelink*, 208 Cal.Rptr.3d 461, 485, 4 Cal.App.5th 1, 32 (Cal.App. 3 Dist., 2016).

However, as the court points out in *Hoffmann v. Young*, 271 Cal.Rptr.3d 33, 37, 56 Cal.App.5th 1021, 1026 (Cal.App. 2 Dist., 2020), however, the express invitation by the landowner need not be specifically by the landowner him or herself – it can be by an agent, such as a child residing on the same premises. "If a person is living with his parents, must he ask his parents for permission to bring a friend onto his parents' property? Or do his parents, by allowing him to live on the property, impliedly permit him to invite friends to the property? We use a modicum of common sense in selecting the latter alternative. Absent very unusual circumstances, such as an express order not to bring a friend to the property, it is reasonable to say that, so long as they are living together, a child may invite a guest onto the parents' property."

Just to make sure that it's holding was clear, the Court in *Hoffman* repeated its holding:

> "We therefore repeat our holding: Where the landowner and the landowner's child are living together on the landowner's property with the landowner's consent, the child's express invitation of a person to come onto the property operates as an express invitation by the landowner within the meaning of section 846, subdivision (d)(3), unless the landowner has prohibited the child from extending the invitation. *Hoffmann v. Young*, 271 Cal.Rptr.3d 33, 39, 56 Cal.App.5th 1021, 1028 (Cal.App. 2 Dist., 2020).

Advertisements, brochures, promotional materials or other invitations to the general public are not express invitations to anyone in particular. *Spence v. U.S.*, 629 F.Supp.2d 1068, 1088 (E.D.Cal.,2009).

Calhoon v. Lewis

Appellant contends that, pursuant to *Calhoon*, *supra*, 81 Cal.App.4th 108, 96 Cal.Rptr.2d 394, the plaintiff was invited by his friend, Wade, to come over to Wade's parents' residence where Wade lived. (The opinion does not indicate the age of plaintiff or Wade.) While waiting for Wade at the residence, plaintiff injured himself riding a skateboard on the driveway. He sued Wade's parents. The parent's defended, inter alia, on the theory that they were immune from tort liability under the immunity defense as codified in section 846. "The trial court found [plaintiff's] claims were barred by the immunity set forth in section 846." (*Calhoon*, *supra*, 81 Cal.App.4th at p. 113, 96 Cal.Rptr.2d 394.) The Court of Appeal disagreed. It said that Wade's invitation of plaintiff was sufficient to negate recreational use immunity. The Court of Appeal concluded that Wade's invitation "would seem to easily bring this case into [the] ... 'expressly invited' exception." (*Ibid*.) We find *Calhoon's* reasoning persuasive. *Hoffmann v. Young*, 271 Cal.Rptr.3d 33, 36–37, 56 Cal.App.5th 1021, 1025 (Cal.App. 2 Dist., 2020).

1. PURPOSE OF INVITATION:

One does not have to be invited onto the property for the purpose of specifically engaging in a recreational activity.

While CACI No. 1010, provides in part that the express invitation exception to the immunity defense applies only if the invitation was for a "recreational purpose", this language is erroneous and should be deleted from the instruction. Nowhere in the statute (§ 846, subd. (d)(3)) is there such a requirement. (*Calhoon*, *supra*, 81 Cal.App.4th at p. 114, 96 Cal.Rptr.2d 394; *Pacific Gas & Electric Co. v. Superior Court*, *supra*, 10 Cal.App.5th at p. 588, 216 Cal.Rptr .3d 426; *Jackson v. Pacific Gas & Electric Co.* (2001) 94 Cal.App.4th 1110, 1116, 114 Cal.Rptr.2d 831.) *Hoffmann v. Young*, 271 Cal.Rptr.3d 33, 39, 56 Cal.App.5th 1021, 1028 (Cal.App. 2 Dist., 2020).

As the court held in *Pacific Gas & Electric Co. v. Superior Court*, 216 Cal.Rptr.3d 426, 448–49, 10 Cal.App.5th 563, 588 (Cal.App. 1 Dist., 2017):

> The express invitation exception applies even when the plaintiff has no recreational purpose in visiting a premises; immunity is abrogated by an invitation for any purpose. (See *Calhoon v. Lewis*, *supra*, 81 Cal.App.4th at p. 114, 96 Cal.Rptr.2d 394.) Thus, eliminating only the invitor's immunity when an invited guest gets injured while participating incidentally in an activity considered to be recreational (see, e.g., *id*. at p. 110, 96 Cal.Rptr.2d 394 [skateboarding while waiting for a friend]), and not the immunity of others such as license or easement holders, would not necessarily

dissuade that landowner from permitting *any* recreational access by the public. As a practical matter, there is little risk a property owner would close its property to recreational users generally if forced to bear liability for injuries caused by an easement or license holder to an invited guest who might or might not even have a recreational purpose in visiting. As we have explained, **449 though, the calculus conceivably would be quite different regarding paying visitors making use of property on a (presumably) more regular and higher-volume basis, and specifically for a recreational purpose.

9. SECTION 846 IMMUNITY DOES NOT APPLY TO PUBLIC ENTITIES

Indeed, Civil Code "[s]ection 846 *does not apply to public entities.*" (*Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 568, fn. 3, 216 Cal.Rptr.3d 426, italics added; see *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 704, 190 Cal.Rptr. 494, 660 P.2d 1168.) *Loeb v. County of San Diego*, 255 Cal.Rptr.3d 860, 871, 43 Cal.App.5th 421, 436 (Cal.App. 4 Dist., 2019).

10. THE IMMUNITY OF 846 DOES NOT APPLY TO AGENTS OF LANDOWNERS

The purpose of section 846 would be neither served nor promoted by extending the immunity afforded by section 846 to agents of a landowner principal. The purpose of section 846 is to encourage property owners to allow the general public to recreate on their private property without charge (*Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707, 190 Cal.Rptr. 494, 660 P.2d 1168), instead of withdrawing the land from recreational access, by immunizing the landowner from tort liability to which the landowner would otherwise be at risk for allowing recreational use of his property. (See, e.g., *Potts v. Halsted Financial Corp.* (1983) 142 Cal.App.3d 727, 730, 191 Cal.Rptr. 160.) *Jenson v. Kenneth I. Mullen Inc.,* 259 Cal.Rptr. 552, 555, 211 Cal.App.3d 653, 659 (Cal.App. 2 Dist.,1989) [business invitees did not have "interest in real property" needed to invoke provisions of recreational use immunity statute].

11. SECTION 846 DOES NOT RELIEVE LANDOWNERS OF DUTY TO AVOID NEGLIGENCE IN DRIVING

Recreational use immunity statute does not relieve landowners of duty to avoid negligence in driving. *Klein v. United States of America*, 50 Cal.4th 68 (Cal.,2010) [The recreational use immunity statute does not relieve landowners of the duty to avoid acts of negligence in driving a motor vehicle committed by the landowner or by the landowner's employee while acting within the course of the employment. Plaintiff Alan Richard Klein was riding a bicycle for recreation on a two-lane paved road in Angeles National Forest in Southern California when he was struck head-on by an automobile driven by a part-time volunteer working for the United States Fish and Wildlife Service. Having been seriously injured in the collision, plaintiff sued the United States government (the owner of the national forest land) and its volunteer worker. Plaintiff stated he was on the property to do bird watching. The California Supreme Court held that the recreational immunity provided for in Civil Code section 846 would not bar this action.

Although section 846 is broad in many respects, it is not all-encompassing, and it does not release landowners or their employees from their basic duty to use due care while engaged in potentially hazardous activities such as driving a motor vehicle. *Klein v. United States of America,* 235 P.3d 42, 50, 112 Cal.Rptr.3d 722, 732, 50 Cal.4th 68, 81 (Cal.,2010).

12. FAILURE TO PROVIDE "RECREATIONAL IMMUNITY" AS AN AFFIRMATIVE DEFENSE IN THE ANSWER:

While not preferable, it is proper to argue "recreational immunity" in a motion for summary judgment without providing it as an affirmative defense in the Answer.

Generally, a defendant must assert an affirmative defense such as a statutory immunity in the answer to the complaint or the affirmative defense is forfeited. (*Cruey v. Gannett Co*. (1998) 64 Cal.App.4th 356, 367, 76 Cal.Rptr.2d 670 (*Cruey*); Schwing, 1 Cal. Affirmative Defenses (2d ed. 2016) § 1.11.) But an exception may exist where the complaint alleges facts indicating applicability of the defense or where the affirmative defense is raised and met on the merits during a summary judgment proceeding. (*Cruey,* at p. 367, 76 Cal.Rptr.2d 670; accord, *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 193–194, fn. 11, 104 Cal.Rptr.3d 508.) The landowners argue they were not required to plead section 846 because the statute, though commonly referred to as an immunity provision, actually negates the duty of care that is an essential element of the plaintiff's cause of action. (*Klein v. United States of America* (2010) 50 Cal.4th 68, 78, 112 Cal.Rptr.3d 722, 235 P.3d 42 (*Klein*) [using the term "immunity" for convenience].) Additionally, the complaint, which alleged the Wagon Train is a "recreational" event for which the landowners owed a duty of care, put into issue the absence of duty for recreational use created by section 846. *Wang v. Nibbelink*, 208 Cal.Rptr.3d 461, 468, 4 Cal.App.5th 1, 10 (Cal.App. 3 Dist., 2016) [Court did not err in allowing Defendant to seek amendment to Answer to add this defense].

In Ferres v. City of New Rochelle (1986) 502 NE.2d 972, 68 N.Y.S.2d 1446, plaintiff while riding a bicycle in a park owned by the City. The City argued that, pursuant to New York's General Obligations Law section 9-103 negligence was not the applicable standard of care when a person is injured while engaged in one of the statutorily enumerated activities, i.e., bicycle riding. Rather, for liability to attach, claimant must prove "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity" as set forth in New York's General Obligations Law section 9-103(2)(a). The plaintiff argued that the City waived the standard of care set forth in section 9-103 by failing to plead it as an affirmative defense or to raise it by dismissal or summary judgment prior to trial. The Court of Appeals rejected plaintiffs argument, holding that New York's recreational use statute was not an affirmative defense that must be separately pleaded, but embraces a standard of care defining a landowner's duty to those using the landlord's property for recreational purposes. If the statute is applicable, its sole effect is to establish the substantive law defining the extent of the duty owed to plaintiff, *and the facts, which arguably bring the case within the statute, are what plaintiff, himself asserts-that he was injured at the entrance of the park while engaged in one of the included activities, bicycling."* The court found that "[w]hile it would have been better practice to raise the legal issue earlierby way of motion, defendant's failure to do so did not, contrary to plaintiff's contention, result in a waiver. (*Ferres v. City of New Rochelle,* (1986) 68 N.Y.d 446,450; 510 N.Y.S.2d 57,502 N.E.2d 972.) Applying this analysis, the court found that the plaintiff's allegations in the complaint

established that he was engaged in one of the enumerated activities governed by New York's recreational use statute. Therefore, the allegations brought the case squarely within statute. Significantly, the court found that it was not inequitable to refuse to treat the statute as an affirmative defense because the facts which arguably bring a case within the statute are particularly within the knowledge of the injured party at the time of the accident. Thus, plaintiff could not claim surprise or lack of notice regarding the applicability of the statute.

13. DISCOVERY AS TO "RECREATIONAL IMMUNITY" DEFENSE

A. REQUESTS FOR ADMISSIONS

1. ADMIT that your requested relief is barred by Civil Code section 846.
2. ADMIT that you were on the Defendant's property when you were injured.
3. ADMIT that you did not receive an invitation from Defendant _____ to enter Defendant's property.
4. ADMIT that you were engaged in a recreational activity within the meaning of Civil Code section 846 while on the Defendant's property.
5. ADMIT that you did not pay any consideration to enter the Defendant's property.
6. ADMIT you did not pay any money as an entrance fee to enter Defendant's property.
7. ADMIT that you did not received any invitation from any agent of Defendant to enter Defendant's property.
8. ADMIT that you did not receive permission from any family member of Defendant to enter Defendant's property.
9. ADMIT that you have no specific facts to establish that Defendant had actual knowledge of the defect or hazard that you claim caused your injuries.
10. ADMIT that you have no specific facts to establish that Defendant had actual knowledge of the probability of injury by such defect or hazard.
11. ADMIT that you have no specific facts to establish that Defendant acted in conscious failure to act to avoid the peril you contend caused your injuries.

[ACCOMPANY THESE REQUESTS FOR ADMISSIONS WITH FORM INTERROGATORIES AND CHECK OFF 17.1]

B. SPECIAL INTERROGATORIES

1. Describe in complete detail the nature of the peril, hazard or defect you contend caused your injuries while you were on Defendant's property.
2. How long after you entered Defendant's property in matter of time did the incident causing your injuries occur.
3. Describe in detail the nature of the activity you were engaged in at the time you were injured.
4. Describe in detail the nature of all activities you were engaged in from the moment you entered the Defendant's property until you were injured.
5. State the name, address and telephone number of all persons accompanying you while you were on Defendant's property.
6. State each and every fact in support of your contention that your recovery of damages is not barred by the Recreational Immunity defense provided for in Civil Code section 846.
7. If you contend that you were expressly invited to enter the land of the Defendant by the Defendant state in detail the specific language used by Defendant extending such alleged invitation.

8. If you contend that paid consideration for permission to enter the Defendant's property, describe in detail the nature of such consideration.
9. If you contend that you paid consideration to enter the Defendant's property, state the name, address and telephone number of the person(s) to whom you paid such consideration.

14. MOTION FOR SUMMARY JUDGMENT – RECREATIONAL IMMUNITY DEFENSE

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on_____, at __.m. in Dept. ___ of the above-entitled Court, defendant _____will and does hereby move this Court for an order granting summary judgment and/or summary adjudication in his favor and against plaintiff, _____pursuant to *Code of Civil Procedure* section 437c(a)(1), Section 437c(f).

This Motion is brought on the ground that plaintiffs' action has no merit because defendant has a complete affirmative defense to plaintiffs negligence cause of action under Civil Code section 846, also known as recreation immunity. (*Code of Civil Procedure* § 437c(o) 2).)

This Motion is further brought on the ground that plaintiff cannot establish the essential element of duty in her negligence-based on cause of action for premises liability.

In the alternative, Defendnat requests this Court grant Summary Adjudication in favor of Defendant on the following issues:

1. That Plaintiff's entire action is barred by the affirmative defense of Recreational Immunity pursuant to Civil Code section 846.

2. That Plaintiff has not and cannot establish the essential element of duty.

3. That Plaintiff's action is barred by the Doctrine of primary assumption of risk.

This Motion is based on Defendant's attached Memorandum of Points And Authorities; the Separate Statement of Undisputed Material Facts; the attached Declaration with accompanying exhibits filed concurrently herewith; the operative Complaint; answer; all records, pleadings, and files in this action; and upon such further evidence or legal arguments as may be presented with defendant's Reply or at the hearing of this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff filed this action for negligence-based premises liability arising out of a fall from a zip line hung over a swimming pool in the back yard of a residence owned by Defendant _____. Plaintiffs Complaint alleges that she was on the Defendant's premises, residential property, where she "fell from the pool upper deck and zip line and onto the hard cement ground."

Plaintiff alleges Defendant was the owner of Residence, and that defendant "negligently designed, constructed, repaired, maintained" zip line, which was a "dangerous condition [that] in the exercise of ordinary and reasonable care would have been known...to defendants in adequate time for a reasonably prudent person to warn of, repair, and make safe."

Defendant filed an answer, averring all applicable affirmative defenses, including recreation immunity under Civil Code section 846 as its eleventh affirmative defense.
In this case, plaintiff alleges that the dangerous condition is the zip line. It is undisputed that Defendant leased the Residence to tenant _____. The Lease did not identify that a zip line was installed in the back yard of the Residence. Instead, the zip line was installed at the Residence after possession of the property was turned over to the tenants. Defendant never gave permission for or consent to the installation of a zip line in the back yard, and had no knowledge that a zip line was ever installed in the back yard.

Despite the unfortunate incident, Defendant is immune from liability pursuant to Civil Code section 846, which provides that a property owner does not owe any duty of care to persons entering the property for a recreational purpose. Further, Plaintiff's action is barred by the Doctrine of Primary Assumption of Risk. Alternatively, plaintiff cannot establish that defendant had a duty of care to third parties. Duty is an essential element of plaintiff's negligence-based cause of action for premises liability. The absence of a duty, therefore, acts as a complete bar to plaintiff's claims. Based on the foregoing, Defendant respectfully request that this Court grant summary judgment in his favor on plaintiffs entire complaint.

II. THE CALIFORNIA SUPREME COURT HAS INDICATED THAT SUMMARY JUDGMENT MOTIONS ARE TO BE MORE LIBERALLY GRANTED IN AMENDING CODE OF CIVIL PROCEDURE SECTION 437c.

In ruling on a motion for summary judgment, "the first step is an analysis of the pleadings, i.e., the complaint and answer, including any affirmative defenses that may be contained therein." (*Lowe v. California League of Prof Baseball* (1997) 56 Cal. App. 4th 112, 122.) "The pleadings

define the issues to be considered on a motion for summary judgment." (Id. citing *Ferrari v. Grand Canyon Dories* (1995) 32 Cal. App. 4th 248, 252.)

"The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172.)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542, 213 Cal.Rptr.3d 764, 389 P.3d 1. It is no longer called a "disfavored" remedy. (*Ibid.*) "Summary judgment is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Ibid.*) *Garcia v. D/AQ Corporation*, 271 Cal.Rptr.3d 861, 864, 57 Cal.App.5th 902, 907 (Cal.App. 2 Dist., 2020).

A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. (CCP § 437c(f)(1)).

III. RECREATION IMMUNITY APPLIES TO PRIVATE RESIDENCES

Plaintiff first argues that recreation immunity does not apply because the Residence "was never intended for use 'by the public' as required for California Civil Code § 846 to apply." (Opposition at 2:7-8 and 4:18-20.)

Plaintiff provides no authority that a property must be open to the public in order for recreation immunity to apply. To the contrary, the California Supreme Court stated: "the Legislature has established two elements as a precondition to immunity: (1) the defendant must be the owner of an 'estate or any other interest in real property, whether possessory or nonpossessory'; and (2) the plaintiffs injury must result from the 'entry or use [of the 'premises'] for any recreational purpose."' *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100. *See, Gordon v. Havasu Palms, Inc.* (App. 4 Dist. 2001) 112 Cal.Rptr.2d 816, 93 Cal.App.4th 244 (two elements as a precondition to recreational immunity); *Shipman v. Boething Treeland Farms, Inc.* (2000) 77 Cal.App.4th 1424 (same). There is no "requirement" that the property be open to the public. In *Jackson v. Pac. Gas & Elec. Co.* (2002) 94 Cal.App.4th 1110, 1113, as modified on denial of reh'g (Jan. 24, 2002), a minor was flying a kite when it became entangled in a power line owned by defendant. The minor went into the neighbor's private residence and attempted to reach the kite with an aluminum pole and was electrocuted. The Jackson Court affirmed summary judgment, *despite* the fact that the injury took place on a private residence that was not open to the public. *Id.* at 837. Plaintiff's argument that the residence is not open to the public is irrelevant.

IV. DEFENDANT HAS NO DUTY KEEP THE PREMISES SAFE TO INDIVIDUALS USING THE PROPERTY FOR RECREATIONAL PURPOSES

A. Recreational Immunity Negates The Element Of Duty In A Negligence Action

"The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; see Civil Code section 1714(a)) The existence of a duty of care is an issue of law for the court. (*Alcaraz v. Vece* (1997) 14Ca.4th 1149, 1162.)

Under California law, "an owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of a hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose...." (Civil Code § 846) (emphasis added.)

"Recreational purpose" is defined in section 846 to include a broad range of activities, including fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites." (Civil Code § 846)

The list of recreational activities in Civil Code § 846 is not exhaustive. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100-1101.) In *Ornelas*, five children were playing on a private landowner's property where farm equipment was stored. (Id. at 1098.) Several children dislodged a metal pipe which fell on plaintiff who was sitting nearby and playing with a hand-held toy. The California Supreme Court found that recreation immunity applied under those facts and, in so doing, addressed the issue of whether plaintiff was engaged in a recreation activity within the meaning of the statute.

Under the principle of ejusdem generis, "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" (Id. at 1101, citing *Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1011-1012.)
From the list provided in section 846, the California Supreme Court concluded that the activities identified "do not appear to share any unifying trait which would serve to restrict the meaning of the phrase 'recreational purpose.' They range from risky activities enjoyed by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary pursuits amenable to almost anyone (e.g., rock collecting, sightseeing, picnicking). Some require a large tract of open space (e.g., hunting) while others can be performed in a more limited setting (e.g., recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites)." (*Ornelas*,

supra, 4 Cal.4th at 1101, finding that children who were on defendant's property and "clambering about on farm equipment" qualifies as recreation activity; *Valladares v. Stone* (1990) 218 Cal.App.3d 362, 369, 267, overruled on other grounds by *Ornelas*, supra, 4 Cal. 4th 1095, finding that climbing a tree is a recreational activity; and *Jackson v. Pacific Gas & Elec. Co*. (2001) 94 Cal.App.4th 1110, 1115, finding that kite-flying is a recreational activity.)

The *Ornelas* Court further rejected plaintiff's argument that, unlike the other kids, plaintiff did not enter the property to play; but rather, plaintiff was merely sitting nearby. The Court reasoned: "We discern no meaningful distinction, for purposes of section 846, between the passive spectator and the active participant. Both take advantage of the recreational opportunities offered by the property; neither, therefore, may be heard to complain when injury results therefrom." (Id. at 1102.)

Civil Code section 846 does not, however, confer immunity for landowners in cases of willful or malicious failure to guard or warn against a dangerous condition or activity on the property (Civil Code § 846; *Manuel v. Pacific Gas & Elec. Co.* (2009) 173 Cal.App.4th 927, 945-948); in cases where payment was made in exchange for permission to enter the property - i.e., paid admission to the premises - other than consideration paid by the State of California (Civil Code § 846; *Miller v. Weitzen* (2005) 133 Cal. App. 4th 732, 739); or in cases where defendant was expressly invited to the property (Civil Code § 846 *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1,31.)

B. Defendants Are Entitled To The Defense of Recreation Immunity

As articulated above, only two elements are required to demonstrate a bar to plaintiff's complaint in this case: (1) the defendant must be the owner of an "estate or any other interest in real property, whether possessory or nonpossessory;" and (2) the plaintiffs injury must result from the "entry or use of the 'premises' for any recreational purpose." (Civil Code § 846.) Defendants can establish both elements and, therefore, owe no duty of care to plaintiff.

As to the first element of recreation immunity, it is undisputed that defendant owns the Residence. Therefore, the first element of the recreation immunity is satisfied.

Defendants can also meet the second element of recreation immunity because Plaintiff was on Defendant's property for recreational purposes. (*Ornelas*, supra, 4 Cal.4th at 1101.)

As instructed by the *Ornelas* Court, the list of activities that qualify under the recreational immunity statute includes activities that occur either on artificial structures or the open outdoors.

In this case, Plaintiff attended a party at the Residence where she continued her consumption of vodka and cranberry cocktails, and attempted to zip line from a wooden cabana to the other side of the pool. Plaintiff's injuries were sustained as a result of her engaging in the recreation activity of zip lining across the pool. Plaintiff took advantage of the "recreational opportunities offered

by the property," and - while this is an unfortunate accident - plaintiffs may not "be heard to complain when injury results therefrom." (*Ornelas*, supra, 4 Cal.4th at 1101.)

Finally, none of the exceptions apply in this case to abrogate the protections afforded to defendant under Civil Code section 846. Defendant did not willfully or maliciously fail to warn or guard against a dangerous activity on the premises because Defendant did not give permission for the installation of the zip line and, in fact, had no knowledge whatsoever that a zip line had been installed in the backyard prior to the alleged incident.

Plaintiff never paid consideration to Defendant, or any individuals, in exchange for use of the property for recreational purposes. And Defendant did not expressly invite Plaintiff to the property for any purposes, including zip-lining across the pool.

Accordingly, Defendant is entitled to the protections under Civil Code section 846.

V. A LANDLORD HAS NO DUTY TO PROTECT THIRD PARTIES FROM UNKNOWN DANGEROUS CONDITIONS

In the alternative to the affirmative defense of recreation immunity under Civil Code section 846, Defendant is still entitled to summary judgment because, absent actual knowledge of a dangerous condition, a landlord, such as Defendant, does not owe third parties a duty of care.

"Public policy precludes landlord liability for a dangerous condition on the premises which came into existence after possession has passed to a tenant." (*Garcia v. Holt* (2015) 242 Cal.App.4th 600, 604-605, citing *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510.) This public policy is based on the legal tenet that when a landlord surrenders possession and control of the premises to a tenant, the landlord has no right to enter without the tenant's permission. (*Uccello*, supra, 44 Cal.App.3d at 511.) Accordingly, it would be unreasonable "to hold a lessor liable if the lessor did not have the power, opportunity, and ability to eliminate the dangerous condition." (*Garcia*, supra, 242 Cal.App.4th at 604.)

In *Garcia*, the landlord leased a residential property to tenant. After the one-year lease expired, the tenancy continued on a month-to-month basis. The tenant hired plaintiff, a landscaper, to maintain the grounds.
At some point after tenant took possession of the premises, he created homemade explosives and stored explosive devices and materials on the premises. The plaintiff-landscaper was injured when he stepped on unstable explosive materials stored by tenant on the premises.

In granting the landlord's summary judgment, the trial court rationalized that "before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, a plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." (Id. at 603). On appeal, the landscaper argued that when the lease became a month-to-month tenancy, the landlord had a right to enter

on a monthly basis and, therefore, a corresponding duty to inspect the premises regardless of actual knowledge of the existence of any dangerous conditions.

The appellate court disagreed, and opined that an obligation to inspect the land arises "only if the landowner had some reason to know there was a need for such action. The month-to-month tenancy may have given the [landlord] the right and the ability to cure a condition by terminating the lease on proper notice, but only if they knew about the condition or had some reason to know inspection was necessary." (*Garcia*, supra, 242 Cal.App.4th at 605.) The *Garcia* Court then cited the following with approval:

> "Where a landlord has relinquished control of property to a tenant, a 'bright line' rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of *the dangerous condition in question,* plus the right and ability to cure the condition. Limiting a landlord's obligation releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested." *(Garcia, supra,* 242 Cal.App.4th at 604-605, citing *Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412.) (internal quotations omitted and emphasis added).

Finding "no reason to depart from the bright line rule," the *Garcia* Court confirmed the trial court's grant of summary judgment in favor of the landlord. *(See also, Chee v. Amanda Goldt Prop. Mgmt.* (2006) 143 Cal.App.4th 1360, 1369-1371, finding landlord has no duty to protect third party from tenant's dog unless landlord has actual knowledge dog is dangerous and ability to control or prevent harm; *Bisetti v. United Refrigeration Corp.* (1985) 174 Cal.App.3d 643, finding landlord is not liable for dangerous conditions of leased property in the absence of a substantial element of control of the premises or actual notice of the hazard.)

In this case, plaintiff alleges that the dangerous condition is the zip line. It is undisputed that Defendant leased the Residence to tenant _____. The Lease did not identify that a zip line was installed in the back yard of the Residence. Instead, the zip line was installed at the Residence after possession of the property was turned over to the tenants. Defendant never gave permission for or consent to the installation of a zip line in the back yard, and had no knowledge that a zip line was ever installed in the back yard.
Thus, Defendant had no actual knowledge of the allegedly dangerous zip line and, therefore, no duty of care to third parties such as plaintiff. Similar to *Garcia*, in this case, there is no reason to depart from the "'bright line' rule [that] has developed to moderate the landlord's duty of care owed to a third party injured on the property." (Id.)

VI. PLAINTIFF'S ACTION AND RECOVERY IS BARRED BY THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK

As an exception to the general duty of care, the doctrine of primary assumption of the risk may be a complete defense to a claim of negligence. *Foltz v. Johnson*, 224 Cal.Rptr.3d 506, 513, 16 Cal.App.5th 647, 655 (Cal.App. 2 Dist., 2017). Whether a defendant owes the plaintiff a duty of care is a question "of law to be decided by the court, not by a jury, and ... generally is 'amenable to resolution by summary judgment.' [Citation.]" *Foltz v. Johnson*, 224 Cal.Rptr.3d 506, 513, 16 Cal.App.5th 647, 655 (Cal.App. 2 Dist., 2017).

"Primary assumption of risk focuses on the legal question of duty. [Citation.] It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. [Citations.]" *Foltz v. Johnson*, 224 Cal.Rptr.3d 506, 514, 16 Cal.App.5th 647, 657 (Cal.App. 2 Dist., 2017). Involving issues of duty, primary assumption of the risk presents legal questions. (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1006 fn. 7 (*Gregory); Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa); Kahn v. East Side Union High School Dist* (2003) 31 Cal.4th 990, 1004 (*Kahn*).)

In a primary assumption of risk case, summary judgment is appropriate if there is no evidence the defendant recklessly injured the plaintiff. (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1066, 68 Cal.Rptr.2d 859, 946 P.2d 817.) *Foltz v. Johnson*, 224 Cal.Rptr.3d 506, 516, 16 Cal.App.5th 647, 659 (Cal.App. 2 Dist., 2017).

An activity falls within the meaning of "sport" if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury. *Record v. Reason*, 86 Cal.Rptr.2d 547, 554, 73 Cal.App.4th 472, 482 (Cal.App. 2 Dist.,1999).

There cannot be any challenge to the fact that a person riding a "zip line" does it for the thrill or enjoyment of rapidly descending on a wire line. Zip-lining meets all the criteria for invocation of the doctrine. Zip-lining is done for enjoyment and thrill, requires physical exertion and skill, is challenging, and poses a risk of injury.

Further, in a "primary assumption of risk" case there is no requirement for the Plaintiff to be in "competitive contest" or organized sporting event. I.e., see: Beninati v. Black Rock City, LLC, 96 Cal.Rptr.3d 105, 110, 175 Cal.App.4th 650, 659 (Cal.App. 1 Dist.,2009) [Participant at "Burning Man" event fell into fire when he tripped and fell into the remnants of the Burning Man effigy while participating in the festival's commemorative ritual]; *Griffin v. The Haunted Hotel, Inc.*, 242 Cal.App.4th 490 (Cal.App. 4 Dist., 2015) [Patron brought action against operator of Halloween haunted house and trail attraction, alleging negligence and assault after he was injured while fleeing from chainsaw-wielding actor. Summary judgment affirmed against plaintiff on doctrine of primary assumption of risk].

See also: McGarry v. Sax (2008) 158 Cal.App.4th 983, 999, 70 Cal.Rptr.3d 519 [Plaintiff injured when skateboard thrown into crowd of spectators at skateboarding event; action barred by primary assumption of risk].

In this instant case there is absolutely no evidence that Defendant installed the zip line. There is no evidence that Defendant even knew the zip line was on the property and was apparently installed after he rented the property to the tenant, _____. There is no evidence that there were any complaints brought to the Defendant's attention regarding the zip line or that anyone on the property was using the zip line.

CONCLUSION

Based on the foregoing, it is respectfully requested that the Court grant summary judgment in favor of Defendant on Plaintiff's entire Complaint, and thereafter enter judgment in favor of the Defendant and against Plaintiff.

In the alternative, Defendant requests this Court grant the Defendant's motion for summary adjudication on the following issues:

1. That Plaintiff's entire action is barred by the affirmative defense of Recreational Immunity pursuant to Civil Code section 846.

2. That Plaintiff has not and cannot establish the essential element of duty.

3. That Plaintiff's action is barred by the Doctrine of primary assumption of risk.

DATED: _____

15. DEMURRER TO COMPLAINT RE: RECREATIONAL IMMUNITY

TO PLAINTIFF AND YOUR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the date and time and in the Department set forth hereinabove, Defendant _____hereby demurs to the Plaintiff's Complaint on the grounds set forth hereinbelow.

This Demurrer will be based upon this Notice, the following Demurrer, the attached declaration, the following Memorandum of Points and Authorities, and upon such matters may be presented at the time of this hearing.

DEMURRER:

1. Defendant demurs to the Plaintiff's First Cause of Action for Negligence on the grounds that it fails to set forth sufficient facts to set forth a cause of action. Code of Civil Procedure section 430.10(e).

2. Defendant demurs to the Plaintiff's First Cause of Action for Negligence in that is it barred by the Recreational Immunity Statute, Civil Code section 846.

3. Defendant demurs to the Plaintiff's Second Cause of Action for Premises Liability on the grounds that it fails to set forth sufficient facts to set forth a cause of action. Code of Civil Procedure section 430.10(e).

4. Defendant demurs to the Plaintiff's Second Cause of Action for Premises Liability in that is it barred by the Recreational Immunity Statute, Civil Code section 846.

DATED:

MEMORANDUM OF POINTS AND AUTHORITIES

1. **STATEMENT OF FACTS AND BASIS OF DEMURRER**:

In this case Plaintiff alleges in her First and Second Causes of Action that she decided to take a "shortcut" and rode her bicycle across the Defendant's property. Plaintiff alleges that she was caused to fall and sustain injuries because of the "unevenness" of the land on Defendant's property.

Defendant contends that Plaintiff does not plead she had an invitation to enter the Defendant's property [which she did not] nor does Plaintiff plead any facts to establish any exceptions to Civil Code section 846.

2. **PLAINTIFF WAS ENGAGED IN A RECREATIONAL ACTIVITY WHEN SHE ENTERED THE DEFENDANT'S PROPERTY AND SHE DOES NOT PROVIDE ANY FACTS TO ESTABLISH THAT SHE WAS EXPRESSLY INVITED ONTO THE PROPERTY BY THE DEFENDANT NOR THAT SHE PAID ANY CONSIDERATION TO ENTER THE DEFENDANT'S PROPERTY. DEFENDANT OWED PLAINTIFF NO DUTY AS A MATTER OF LAW**:

Civil Code section 846 provides that a property owner *"owes no duty of care* to keep the premises safe for entry or use by others *for any recreational purpose* or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section." (Emphases added.)

By its terms, "Section 846 constitutes an exception to the general rule that a private landowner owes a duty of reasonable care to any person who enters his or her property." (*Valladares v. Stone* (1990) 218 CalApp.3d 362,366 (*Valladares),* abrogated on other grounds by *Ornelas v. Randolph* (1993) 4 Cal.4th 1095 (*Ornelas).*)

Section 846 provides a non-exclusive list of "recreational purpose[s] " covered by its immunity from property-based negligence actions, including active sports as well as less intense activities like hiking, sightseeing, or nature study. (Civ. Code, § 846; see also *Ornelas,supra,4* Cal.4th at p. 1101 [stressing that list of activities provided in section 846 is non-exclusive].) California courts have applied the statute to such activities as tree climbing in a vacant lot (*Valladares, supra,* 218 CalApp.3d at p. 369), playing near farming equipment (*Ornelas,* at p. 1101), and retrieving a kite from a power line (*Jackson v. Pacific Gas & Electric Co.* (2001) 94 Cal.App.4th 1110, 1113 (*Jackson)).* Courts have also held that it makes no difference whether the recreational activity occurs outdoors or indoors, or on natural or artificial structures. (*Ornelas,* at p. 1101.)

The recreational-immunity doctrine provides the landowner complete protection from liability because it eliminates the element of duty, a necessary element for recovery by a plaintiff for premises-based negligence. As the California Supreme Court explained recently, "Section 846 does not merely eliminate a damage remedy for certain types of negligent conduct by a landowner." (*Klein v. United States of America* (2010) 50 Cal.th 68, 78 (*Klein).*) Rather, it " 'negate[s] the tort,' because the existence of a duty owed to the injured person is an essential element of the negligence tort." (*Ibid.,* citing *Paz v. State of California* (2000) 22 Cal.4th 550,559.)

By the plain meaning of the language in its first paragraph, Civil Code section 846 absolves California landowners of two separate and distinct duties: the duty to "keep the **49 premises safe" for recreational users, and the duty to warn such users of "hazardous conditions, uses of, structures, or activities" on the premises. (Civ.Code, § 846, 1st par.) *Klein v. United States of America*, 235 P.3d 42, 48–49, 112 Cal.Rptr.3d 722, 730, 50 Cal.4th 68, 78 (Cal.,2010).

///

3. **DUTY IS AN ISSUE OF LAW FOR THE COURT AND MAY BE DETERMINED UPON A DEMURRER. HERE DEFENDANT OED PLAINTIFF NO DUTY AS A MATTER OF LAW**

An issue of law must be tried by the court. Code of Civil Procedure § 591.

A demurrer serves to test the sufficiency of a pleading by raising questions of law. *Buford v. State of California* (1980) 104 Cal.App.3d 811, 818. A demurrer tests the legal sufficiency of the complaint. *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.

A plaintiff seeking recovery of damages of negligence must properly allege facts establishing a duty, defendant's breach of that duty, and that the defendant's breach was a legal cause of the plaintiff's injuries. *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.

Whether a defendant owes a duty of care in a given situation is a question of law for the court. *Wilson v. All Service Ins. Corp*., 153 Cal.Rptr. 121, 123, 91 Cal.App.3d 793, 796 (Cal.App., 1979).

The existence of a duty is a question of law for the court. *Melton v. Boustred*, 107 Cal.Rptr.3d 481, 490, 183 Cal.App.4th 521, 531 (Cal.App. 6 Dist.,2010).

A complaint which lacks allegations of fact to show that a legal duty of care was owed is fatally defective. *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954; *Peter M. v. San Francisco Unified School Dist.* (1976) 60 Cal.App.3d 814, 820. A pleading must allege facts not mere conclusions. *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.

Here Plaintiff's Complaint clearly provides that Defendant owed no duty, as a matter of law, based on the Recreational Immunity provided in Civil Code section 846.

4. **THE RECREATIONAL IMMUNITY PROVIDED BY CIVIL CODE SECTION 86 APPLIES TO DEVELOPED AND UNDEVELOPED PROPERTY ALIKE**:

California law is well established – the immunity of Section 846 applies to both developed and undeveloped property. There is no exception because the property was residential in nature.

The text of section 846 is extremely broad; the immunity applies to the "owner of *any* estate or *any* other interest in real property, whether possessory or nonpossessory...." (Italics added.) The Legislature made no distinction between developed and undeveloped property or between urban and rural land, and imposed no requirement that the site be in a "natural" or unaltered state. As we have previously observed, "section 846 is by no means limited to land in its natural condition—it specifically mentions 'structures'—it obviously encompasses improved streets." (*Delta Farms Reclamation Dist. v. Superior Court, supra,* 33 Cal.3d at pp. 706–707, 190

Cal.Rptr. 494, 660 P.2d 1168; see also *Valladares v. Stone, supra,* 218 Cal.App.3d at p. 370, 267 Cal.Rptr. 57 ["The Legislature did not limit section 846 to rural as opposed to urban land."].) Ornelas v. Randolph, 847 P.2d 560, 566, 17 Cal.Rptr.2d 594, 600, 4 Cal.4th 1095, 1105 (Cal.,1993).

Our conclusion that the Legislature did not intend to confine section 846 immunity to land "suitable" for recreational use is also supported by practical considerations. As the instant case illustrates, the concept of "suitability" is elusive and unpredictable. As a purely judicial construct it has engendered disparate application. *Ornelas v. Randolph*, 847 P.2d 560, 567, 17 Cal.Rptr.2d 594, 601, 4 Cal.4th 1095, 1106 (Cal.,1993).

In enacting section 846, the Legislature plainly extended recreational use immunity to a broad class of land owners. It did not limit the statute to agricultural or rural land, to land in an undeveloped or natural condition, or to land otherwise "suitable" for recreation. We may question the Legislature's wisdom in this regard, but we may not thwart its will. *Ornelas v. Randolph*, 847 P.2d 560, 569, 17 Cal.Rptr.2d 594, 603, 4 Cal.4th 1095, 1109 (Cal.,1993)

Therefore, it makes no difference in applying the "recreational immunity" under Section 846 whether the property upon which Plaintiff sustained her injuries was a wide-open uninhabited property or a residential property.

5. <u>PLAINTIFF PLEADS NO FACTS TO ESTABLISH ANY WILLFUL OR MALICIOUS MISCONDUCT BY DEFENDANT AS AN EXCEPTION TO CIVIL CODE SECTION 846 IMMUNITY</u>:

First of all, Plaintiff does not provide any allegations at all that Defendant's conduct was willful or malicious in an attempt to try to fit within the exception of Section 846.
Further, for the purposes of the "willful or malicious" exception under section 846, "[a] plaintiff must allege specific facts establishing the three essential elements-knowledge of the peril, knowledge of the probability of injury, and conscious failure to act to avoid the peril-necessary to raise the defendant's alleged negligence to the level of willful misconduct." (*Charpentier v. Von Geldern* (1987) 191 Cal.App3d 101, 114 (*Charpentier);* accord, *Bartlett v. Jackson* (1936) 13 Cal.App.2d 435, 437 [to claim willful misconduct, "it is necessary to specify the particular acts upon which the willful misconduct of a person is charged"].)

<u>CONCLUSION</u>:

For the reasons set forth hereinabove, it is requested that this Demurrer be sustained, without leave to amend.

DATED: _____

16. MOTION TO STRIKE

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____, at _____.m., or as soon thereafter as counsel may be heard in department ____ of the above-entitled Court, Defendants ("moving parties") will move will move this Court for an order striking the following language from plaintiff's complaint:

1. From page 4, Prem L-3, Count Two -Failure to Warn, in its entirety.
2. From page 4, Prem L-3, Count Two -Failure to Warn, the words "willfully or maliciously."
3. From page 4, Prem L-4, Count Three - Dangerous Condition of Public Property, in its entirety.

Importantly, plaintiff's Cause of Action for Premises Liability is on a pre-printed form which represents that it is Judicial Council form PLD-PI-001(4), and that it has been approved for optional use by the Judicial Council of California. However, plaintiff has modified this form in important respects. First, in the Judicial Council form, Prem. L-3, Count Two is "Willful Failure to Warn [Civil Code section 846]."

However, in plaintiff's complaint, Count Two is merely "Failure to Warn." However, in plaintiff's complaint this count still requires that the plaintiff be a recreational user, necessarily incorporating *Civil Code* section 846.

Second, in the real Judicial Council form, Prem. L-4, Count Three, is for "Dangerous Condition of Public Property." However, plaintiff's complaint has modified the Judicial Council Form by deleting the word "Public," while still representing that the Cause of Action for Premises Liability is on a judicial Council Form.

Plaintiff is under no obligation to use the judicial council forms. However, plaintiff is not entitled to submit a pleading to the court which states that it is a Judicial Council form, but which has been modified in important respects.

This motion is made pursuant to *Code of Civil Procedure* sections 435 and 436, on grounds that the above-referenced language constitutes improper matters and/or conclusions of law.

This motion is based on this notice, the accompanying memorandum of points and authorities, the files and records in this action, and on such oral and documentary evidence as may be presented at the hearing.

MEET AND CONFER: Defendant attempted to try to meet and confer with Plaintiff's counsel as required, including sending the letter attached as EXHIBIT "A", to the Declaration of _____. Plaintiff's counsel never responded to this letter nor several attempts to leave a message.

DATED: _____

MEMORANDUM OF POINTS AND AUTHORITIES

I. ***INTRODUCTION***

Plaintiff alleges that he slipped and fell on water negligently left on the floor at defendants' premises. Plaintiff further alleges that defendants negligently owned, operated, maintained, entrusted and/or controlled the premises. Plaintiff's complaint therefore sounds in negligence. Unfortunately, plaintiff's cause of action for premises liability includes a count which is appropriate only in entirely different circumstances, and which is not supported by the facts alleged. Count two seeks to recover for defendants' willful failure to warn. This count requires that plaintiff be a recreational user, and is predicated on *Civil Code* section 846. However, this statute only applies in instances where a landowner allows third parties to enter upon his or her land for recreational purposes such as fishing, hunting, camping, and the like. In the instant case, defendants did not make their property available for any recreational purpose, and plaintiff did not enter upon the premises for such a purpose. Consequently, count two of the premises liability cause of action should be stricken from the complaint.

II. ***THE COURT MAY STRIKE ANY IRRELEVANT, FALSE OR IMPROPER MATTER***

This Court may, upon a motion made pursuant to *Code of Civil Procedure* section 435, or at any time in its discretion, and upon terms it deems proper:
"(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.
(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (*Code of Civil Procedure* section 436.)
For the reasons described below, the language set forth in the notice of this motion constitutes irrelevant, false, or improper matter which should be stricken from the complaint.

III. ***CONCLUSIONS OF LAW ARE IMPROPER AND MAY BE STRICKEN FROM A COMPLAINT***

The complaint is replete with conclusions, most of which are actually incorrect statements of law. Plaintiff's complaint alleges by conclusion and without factual support, that defendant willfully failed to warn of a dangerous condition on the premises.

As discussed in detail below, however, plaintiff has pled none of the requisite elements for a violation of *Civil Code* section 846. Thus, the requirement of *Code of Civil Procedure* section 425.10, that a complaint must set forth "facts constituting a cause of action" has not been met. Moving parties request that this Court strike from the complaint the conclusions of law set forth in the notice of this motion. (*Waco-Porter Corp. vs. Superior Court* (1963) 211 Cal.App.2d 559, 567.)

It is wholly improper to plead such conclusions, and the Court should grant defendants' motion to strike.

IV. ***COUNT TWO OF PLAINTIFF'S PREMISES LIABILITY CAUSE OF ACTION FOR FAILURE TO WARN IS IMPROPER AND SHOULD BE STRICKEN***

Count two of plaintiff's cause of action for Premises Liability, Paragraph Prem L-3, requires that plaintiff be a residential user of the property, and is predicated upon a failure to warn under *Civil Code* section 846.

However, plaintiff has failed to satisfy any of the elements of this statute, and count two should be stricken from the complaint.

California Civil Code section 846 states: "Any owner of any estate or any other interest in real property, whether possessory or non-possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

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

In his complaint, plaintiff has alleged that the moving defendants willfully failed to guard or warn against a dangerous condition under, without pleading any of the elements of this statutory cause of action. Most importantly, plaintiff has not pled that he was a recreational user who was either an invited guest or a paying customer. Plaintiff has also not pled that the land was open to the public for a recreational purpose, or that he entered upon the premises for such a purpose, as required by *Civil Code* section 846. Indeed, any such contention would be ludicrous, since the premises in question was an apartment complex.

The purpose underlying section 846 was explained in *Potts vs. Halstead Financial Corp.* (1983) 142 Cal.App.3d 727, 730. The court indicated that the law exempts property owners from liability for negligence to those who come upon their property for recreational purposes without invitation and without paying consideration, citing to *English vs. Marin Municipal Water District* (1977) 66 Cal.App.3d 725. The court in *English* discussed the legislative purpose behind this section, noting the legislative intent to reduce the growing tendency of landowners to withdraw land from recreational access by removing the risk to these landowners of gratuitous tort liability. Here, there are no allegations that plaintiff was engaged in any recreational activity as it is defined in Section 846. Therefore, this portion of plaintiff's complaint should be stricken.

V. ***COUNTS TWO AND THREE OF PLAINTIFF'S PREMISES LIABILITY CAUSE OF ACTION SHOULD BE STRICKEN BECAUSE PLAINTIFF HAS IMPROPERLY ALTERED THE JUDICIAL COUNCIL FORM***

Plaintiff's Cause of Action for Premises Liability is on a pre-printed form which represents that it is Judicial Council form PLD-PI-001(4), and that it has been approved for optional use by the Judicial Council of California. However, plaintiff has modified this form in important respects.

First, in the Judicial Council form, Prem. L-3, Count Two is “Willful Failure to Warn [Civil Code section 846].” However, in plaintiff's complaint Count Two is merely “Failure to Warn.”

Second, in the actual Judicial Council form, Prem. L-4, Count Three, is for “Dangerous Condition of Public Property.” However, plaintiff's complaint has modified the Judicial Council Form by deleting the word “Public,” while still representing that the Cause of Action for Premises Liability is on a judicial Council Form.

Plaintiff is under no obligation to use the judicial council forms. However, plaintiff is not entitled to submit a pleading to the court which states that it is a Judicial Council form, but which has been modified in important respects.

VI. ***THE WORDS "WILFULLY OR MALICIOUSLY" SHOULD BE DELETED FROM PLAINTIFF'S COMPLAINT***

If the Prem. L-3 count is not deleted in its entirety, then the words "willfully or maliciously" should be deleted from the complaint. Broad allegations that a defendant acted maliciously and willfully are not enough; specific facts *must* be alleged. (*Austin v. Regents of University of California* (1979) 89 Cal.App.3d 354 disapproved on other grounds by *Ochoa v. Superior Court* (1985) 39 Cal.3d 159; *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864.)

Words such as "carelessly, negligently, wilfully, wrongfully, and in fraud of the rights of these plaintiffs", going to state the pleader's conclusions may be disregarded. A motion to strike out world be the proper way to seek their elimination. *Smithson v. Sparber*, 11 P.2d 90, 93, 123 Cal.App. 225, 232 (Cal.App. 1 Dist. 1932); *Faulkner v. California Toll Bridge Authority* (1952) 40 Cal. 2d 317, 329 - "Allegations that the acts...[of defendants] were 'arbitrary, capricious, fraudulent, wrongful, unlawful' unlike other adjectival descriptions of such proceedings, constitute mere conclusions of law..." Id. at 329.

A conclusory characterization of defendant's conduct as intentional, wilful and fraudulent is a patently insufficient statement of "oppression, fraud, or malice, express or implied," within the meaning of section 3294. *Brousseau v. Jarrett*, 141 Cal.Rptr. 200, 205, 73 Cal.App.3d 864, 872 (Cal.App. 1977). Allegations that the defendants' conduct ... was intentional, knowing, malicious, fraudulent, false and deceitful. Said acts and omissions were undertaken with a conscious and knowing disregard of the interests and rights of plaintiff and to benefit the defendants ... financially, and were part and parcel of a scheme and plan to defraud plaintiff. Defendants' conduct ... was thus such as to constitute oppression, fraud or malice....." were insufficient as a matter of law to state a claim for exemplary damages. *Smith v. Superior Court*, 13 Cal.Rptr.2d 133, 134–35, 10 Cal.App.4th 1033, 1036 (Cal.App. 4 Dist.,1992).

VII. ***CONCLUSION***

For the foregoing reasons, defendants respectfully request that this Court grant their motion to strike.

DATED: _____

DECLARATION

The following states under penalty of perjury and in accordance with the laws of the State of California:

1. Tht I am an attorney licensed to practice before the Courts of this State;
2. That I make the statements herein with my own personal knowledge;
3. That attached hereto as EXHIBIT "A" is a true and accurate copy of the "meet and confer" letter I forwarded to the plaintiff's counsel, on the date shown. That I received no response to this letter.
4. That I further followed up with a telephone call on _____, leaving a message with a person identified as "_____". That I further emailed on _____ requesting plaintiff's counsel to discuss this matter with me. That I never received any responses from Plaintiff's counsel as to my inquiries.

Declared this ___ day of _____, 202__, at _____, California.

_____
Attorney At Law

17. PUBLIC ENTITIES AND "TRAIL IMMUNITY"

"A public entity is generally liable for an injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury and the public entity had actual or constructive notice of the dangerous condition." (*Montenegro v. City of Bradbury* (2013) 215 Cal.App.4th 924, 929, 155 Cal.Rptr.3d 732 (*Montenegro*).)

However, section 831.4—"the 'trail immunity' statute" (*Lee v. Department of Parks & Recreation* (2019) 38 Cal.App.5th 206, 211, 250 Cal.Rptr.3d 456 (*Lee*))—provides that a public entity "is not liable for an injury caused by a condition of" the following: "(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding ..., water sports, recreational or scenic areas ..."; or "(b) Any trail used for the above purposes." (§ 831.4, subds. (a), (b).) "[S]ubdivisions (a) and (b) [of section 831.4] should be read together such that immunity attaches to trails providing access to recreational activities as well as to trails on which those recreational activities take place." (*Lee*, at p. 211, 250 Cal.Rptr.3d 456; *Burgueno v. Regents of University of California* (2015) 243 Cal.App.4th 1052, 1059, 197 Cal.Rptr.3d 44 (*Burgueno*).)

Trail immunity applies to all manner of defects in the trail's condition. (*Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 1084, 49 Cal.Rptr.3d 631 (*Amberger-Warren*) [" 'It is well-established that the immunity covers negligent maintenance of a trail[.]' "]; *Treweek v. City of Napa* (2000) 85 Cal.App.4th 221, 227, 101 Cal.Rptr.2d 883 (*Treweek*) [" 'It is ... clear that the state is absolutely immune from liability for injuries caused by a physical defect of a trail.' "].)

" 'The plainly stated purpose of immunity for recreational activities on public land is to encourage public entities to open their property for public recreational use, because "the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use." ' " (*Burgueno, supra*, 243 Cal.App.4th at p. 1059, 197 Cal.Rptr.3d 44.)

"Whether a property is considered a 'trail' under section 831.4 turns on 'a number of considerations,' including (1) the accepted definitions of the property, (2) the purpose for which the property is designed and used, and (3) the purpose of the immunity statute." (*Lee, supra*, 38 Cal.App.5th at p. 211, 250 Cal.Rptr.3d 456, quoting *Amberger-Warren, supra*, 143 Cal.App.4th at pp. 1078-1079, 1077, 49 Cal.Rptr.3d 631 [extending trail immunity to "a paved pathway in an urban park setting"].) **868 *432 Although this " 'is ordinarily viewed as an issue of fact [citation], it becomes one of law if only one conclusion is possible.' " (*Montenegro, supra*, 215 Cal.App.4th at p. 929, 155 Cal.Rptr.3d 732.)

See: *Loeb v. County of San Diego*, 43 Cal.App.5th 421, 431–32 (2019) ["[T]he pathway constitutes a trail under accepted definitions because it is a paved pathway through a park, and a 'path' ... is synonymous with a 'trail.' " (*Amberger-Warren, supra*, 143 Cal.App.4th at p. 1079, *id.* at p. 1078, ["immunity applies whether or not the trail is paved"]; *Farnham v. City of Los*

Angeles (1998) 68 Cal.App.4th 1097, 1103, ["[T]he appellate courts have so far unanimously interpreted the current wording of section 831.4, subdivision (b) to apply full immunity to any trail, *paved or unpaved.*"], italics added; *Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 418 ["the nature of the trail's surface is irrelevant to questions of immunity"].)].

18. JURY INSTRUCTIONS

CACO 1010 Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm if [*name of defendant*] proves that [*name of plaintiff*]'s harm resulted from [his/her/*nonbinary pronoun*/*name of person causing injury's*] entry on or use of [*name of defendant*]'s property for a recreational purpose. However, [*name of defendant*] may be still responsible for [name of plaintiff]'s harm if [*name of plaintiff*] proves that

[*Choose one or more of the following three options*:]

[[*name of plaintiff*] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]

[or]

[a charge or fee was paid to [*name of defendant*/the owner] for permission to enter the property for a recreational purpose.]

[or]

[[*name of defendant*] expressly invited [*name of plaintiff*] to enter the property for the recreational purpose.]

If you find that [*name of plaintiff*] has proven one or more of these three exceptions to immunity, then you must still decide whether [*name of defendant*] is liable in light of the other instructions that I will give you. [*New September 2003; Revised October 2008, December 2014, May 2017, November 2017*].

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461].) [Judicial Council Of California Civil Jury Instruction 1010, Judicial Council Of California Civil Jury Instruction 1010]

NOTE: In *Hoffmann v. Young*, 271 Cal.Rptr.3d 33, 39, 56 Cal.App.5th 1021, 1028 (Cal.App. 2 Dist., 2020), the trial court instructed the jury with CACI No. 1010, which provides in part that the express invitation exception to the immunity defense applies only if the invitation was for a "recreational purpose." This language is erroneous and should be deleted from the instruction. Nowhere in the statute (§ 846, subd. (d)(3)) is there such a requirement. (*Calhoon*, *supra*, 81 Cal.App.4th at p. 114, 96 Cal.Rptr.2d 394; *Pacific Gas & Electric Co. v. Superior Court*, *supra*, 10 Cal.App.5th at p. 588, 216 Cal.Rptr.3d 426; *Jackson v. Pacific Gas & Electric Co.* (2001) 94

Cal.App.4th 1110, 1116, 114 Cal.Rptr.2d 831.)

NOTES