

# Legal Duty in the USA to Warn of Naturally Occurring Hazards At Recreational Facilities

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## Keywords

act of God, *Breaux*, cases, control, danger, dangerous, duty, flood, golf, golfers, hazard, hazardous, hazards, invitee, invitees, law, legal, liable, liability, lightning, *MacLeod*, *Maussner*, natural, naturally occurring, ocean, *Pacheco*, protect, protection, recreational, reliance, relied, rely, ripcurrent, riptide, safety, *Sall*, shelter, surf, thunderstorm, undertow, warn, warning, water, weather, wind

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## Introduction

Because of my experience in atmospheric physics research in the 1970s and my career change to law in 1998, I wrote an article in 1997 titled, *Lightning Strikes to People and the Legal Duties to Warn and to Protect*, which is posted at <http://www.rbs2.com/lrgwarn.pdf> . In February 2007, a litigator who read my earlier article hired me as a consultant on his case, representing the family of a man killed by lightning on a golf course. That consulting work gave me an opportunity to consider cases on the broad topic of the legal duty of a possessor of land to warn of (and to protect against) naturally occurring hazards. That case is now settled, so I can disclose my legal research.

Since the early 1980s, there have been a series of reported appellate cases involving the duty of a possessor of land to warn of (or to protect against) naturally occurring hazards during recreational activity, such as rip current at a beach or lightning at a golf course.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

## Old Legal Rule

The longstanding rule of law in the USA is that a possessor of land has *no duty* to warn people on his/her land of naturally occurring conditions, such as local lightning, tornado, winds, or flood. Judges often cite this rule with no justification, but the following reasons are sometimes offered:

1. a local thunderstorm is obvious, because everyone can hear the thunder<sup>1</sup>
2. hazardous weather is neither predictable nor foreseeable<sup>2</sup>
3. hazardous weather is an “Act of God” that is beyond the ability of man to control

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<sup>1</sup> *Hames v. State*, 808 S.W.2d 41, 43 (Tenn. 1991) (Quoting trial judge: “Lightning is accompanied by thunder, the ominous sound of the approach of the power in the storm. No warning device could be louder or be more accurate than thunder. Thunder warns all persons that lightning is near. It just does not seem that man can devise any warning device which approaches the efficiency of thunder.”).

<sup>2</sup> I discussed this myth of lack of foreseeability in my essay, *Tort Liability in the USA for Negligent Weather Forecasts*, <http://www.rbs2.com/forecast.pdf> (Mar 2003). Prediction of weather involves extrapolation of current measurements, according to physical laws.

As explained later in this essay, I believe these reasons are archaic (medieval, actually) and do not reflect the knowledge from modern science that gives us the ability to warn of naturally occurring hazards and avoid injuries.

The general statement of the current law in most states in the USA in the year 1965 — forty years ago — is given by the Restatement Second of Torts:

- (1) A common carrier is under a duty to its passengers to take reasonable action
  - (a) to protect them against unreasonable risk of physical harm, and
  - (b) to give them first aid ....
- (2) An innkeeper is under a similar duty to his guests.
- (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
- (4) ....

Restatement Second of Torts § 314A (1965).

Comment *c* to § 314A specifically says an innkeeper has no duty to a guest “who is injured or endangered while he is away from the premises”, in other words, there is no liability for hazards off-premise. Comment *e* to § 314A specifically says “the duty in each case is only one to exercise reasonable care”, which includes unreasonable risks that are either known or should have been known. Notice that the “known or should have known” formulation of the duty includes both (1) actual knowledge of a hazard and (2) negligent failure to be informed of a hazard. In the specific case of lightning strikes to golf courses, a government report shows that, during the years 1991-1994, a total of ten people were killed (and another 68 people were injured) in the USA by lightning at golf courses.<sup>3</sup> During these four years, golf courses were the site of 4% of the total number of people killed by lightning in the USA, and also 4% of the total number of people injured by lightning in the USA.<sup>4</sup> These statistics that make it prudent to provide lightning warning systems at golf courses.

Another section of the Restatements says:

- A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
  - (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
  - (c) fails to exercise reasonable care to protect them against the danger.

Restatement Second of Torts § 343 (1965).

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<sup>3</sup> Ronald L. Holle, Raúl E. López, and Bradley C. Navarro, *U.S. Lightning Deaths, Injuries, and Damages in the 1890s Compared to 1990s*, NOAA Technical Memorandum NSSL-106 (April 2001).

<sup>4</sup> *Ibid.*

The following section says there is generally no duty to warn of “obvious” hazards:

- (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement Second of Torts § 343A (1965).

Comment *b* explains that “ ‘Obvious’ means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.” Comment *f* negates the rule, by declaring that the possessor of land may have a duty to warn/protect if the possessor “has reason to expect that the invitee’s attention may be distracted”. In my opinion, such distractions might be common amongst people enjoying recreational activities.

invitees, licensees, trespassers

These legal rules make distinctions between three classes of people on another person’s land: (1) invitees, (2) licensees, and (3) trespassers. *Invitees* are people who come to the land for a business purpose, e.g., customers at a store or paying guests at a hotel or recreational facility. *Licensees* are people who come to the land for their own personal purpose and who come with the permission of the possessor of the land. *Trespassers* are people who are on the land without the permission of the landowner. A possessor of land has a higher legal duty to invitees than to either licensees or trespassers.<sup>5</sup>

a few cases

In 1968, the Kentucky Supreme Court summarized the law in a case involving accumulations of ice and snow on a walkway:

The generally accepted principle here applicable is thus stated in 38 Am.Jur., Negligence, section 96 (page 754):

“The rule is that an owner or occupant of lands or buildings, who directly or impliedly invites others to enter for some purpose of interest or advantage to him, owes to such persons a duty to use ordinary care to have his premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation, or at least not to lead them into a dangerous trap or to expose them to an unreasonable risk, but to give them adequate and timely notice and warning of latent or concealed perils which are known to him but not to them.”

A further refinement of the principle appears in 65 C.J.S. Negligence § 63(53), page 757:

“The duty to keep premises safe for invitees applies only to defects which are in the nature of hidden dangers, and the invitee assumes all normal or obvious risks attendant on the use of the premises.”

*Standard Oil Co. v. Manis*, 433 S.W.2d 856, 857 (Ky. 1968).

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<sup>5</sup> See, e.g., W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS, §§ 58, 60-61 (5th ed. 1984).

The Kentucky Supreme Court made its own statement of the law:

... the foregoing three cases establish the rule that natural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against.

*Standard Oil Co. v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968).

In 1992, an appellate court in New York State explained:

It is well established that landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see, Nallan v. Helmsley-Spear Inc.*, 50 N.Y.2d 507, 518-519, 429 N.Y.S.2d 606, 407 N.E.2d 451; *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868; *cf., O'Connor v. State of New York*, 70 N.Y.2d 914, 915, 524 N.Y.S.2d 391, 519 N.E.2d 302). Encompassed within this duty is the duty to warn of potential dangerous conditions existing thereon, be they natural or artificial (*see, Basso v. Miller, supra*; Restatement [Second] of Torts § 342). This duty extends, however, only to those conditions that are not readily observable; the landowner owes no duty to warn of conditions that are in plain view, easily discoverable "by those employing the reasonable use of their senses" (*Tarricone v. State of New York*, 175 A.D.2d 308, 309, 571 N.Y.S.2d 845, *lv. denied* 78 N.Y.2d 862, 576 N.Y.S.2d 220, 582 N.E.2d 603), for in such instances the condition is a warning in itself (*see, id.; Schiller v. F.W. Woolworth Co.*, 51 A.D.2d 784, 785, 379 N.Y.S.2d 491, *appeal dismissed* 39 N.Y.2d 901, 386 N.Y.S.2d 398, 352 N.E.2d 585; *Powers v. Montgomery Ward & Co.*, 251 App.Div. 120, 122, 295 N.Y.S. 712, *affd.* 276 N.Y. 600, 12 N.E.2d 595).

*Thornhill v. Toys R Us NYTEX, Inc.*, 583 N.Y.S.2d 644, 645 (N.Y.A.D. 1992).

#### reliance

There is also a duty to warn of hazards, when the victim *relies* on such warning.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement Second of Torts § 323 (1965).

If the recreational facility has scientific instruments to help it detect naturally occurring hazards (e.g., riptide or lightning), then it would be reasonable for people to rely on the superior knowledge of the staff of the recreational facility.

In the cases discussed below (especially *Sall* at page 29 and *Gonzales* at page 34), the judicial opinion mentions that the victims relied on the warning service.

## State Statutes

Some states have enacted statutes that limit the liability of possessors of land for recreational use of their land. Such statutes greatly clarify the legal duty to warn/protect people of naturally occurring hazards on land.

### California

The California statute for immunity of publicly owned land tersely says:

Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

California Government Code § 831.2 (enacted 1963, current Mar 2007).

The legislative history includes the following comment:

It is desirable to permit the members of the public to use public property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the State. But the burden and expense of putting such property in a safe condition and the expense of defending claims of injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received quoted in *Kuykendall v. State of California*, 223 Cal.Rptr. 763, 765-766 (Cal.App. 1986).

### Louisiana

Louisiana has a recreational use immunity statute that says:

**A.** As used in this Section:

- (1) "Land" means urban or rural land, roads, water, watercourses, private ways or buildings, structures, and machinery or equipment when attached to the realty.
- (2) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.
- (3) "Recreational purposes" includes but is not limited to any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized, or nonmotorized vehicle operation for recreation purposes, nature study, water skiing, ice skating, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites.
- (4) "Charge" means the admission price or fee asked in return for permission to use lands.
- (5) "Person" means individuals regardless of age.

**B.** (1) Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:

- (a) Extend any assurance that the premises are safe for any purposes.
- (b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.
- (c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring<sup>6</sup> or man-made.

(2) ....

Louisiana Statute 9:2795 (first enacted 1975, current 2007).

See *Loforte v. Wayne Estay Shrimp Co., Inc.*, 870 So.2d 1171, 1172-73 (La.App. 2004).

Most of the cases interpreting the recreational use immunity statutes impose either two or three conditions on the application of the immunity. For example, the Louisiana Supreme Court, in *Ratcliff v. Town of Mandeville*, 502 So.2d 566 (La. 1987), stated as follows:

This court has described two factors to consider when determining whether the immunity provided by R.S. 9:2791 and 9:2795 is applicable to a given set of facts. First, the property where the injury occurred must be an undeveloped, nonresidential rural or semi-rural land area. Second, the injury itself must be the result of recreation that can be pursued in the "true outdoors."

*Id.* at 567, citing *Keelen v. State of Louisiana, Department of Culture, Recreation and Tourism*, 463 So.2d 1287, 1289 (La. 1985). This test has also been applied by this court in *Lewis v. State Farm Fire & Casualty Co.*, 94- 2639 (La.App. 4th Cir. 4/26/95), 654 So.2d 883. The first part of the test addresses itself to the locality of the accident, while the second part addresses itself to the activity. *Broussard v. Department of Transportation & Development*, 539 So.2d 824 (La.App. 3d Cir. 1989).

*Verdin v. Louisiana Land and Exploration Co.*, 693 So.2d 162, 166 (La.App. 4 Cir.

12 Mar 1997), *writ denied*, 701 So.2d 994 (La. 1997).

Accord, *Naquin v. Louisiana Power & Light Co.*, 768 So.2d 605, 608 (La.App. 2000) ("First, the land upon which the injury occurs must be undeveloped, nonresidential, and rural or semi-rural. Second, the injury itself must be the result of recreation that can be pursued in the "true outdoors." Third, the injury-causing instrumentality must be of the type normally encountered in the "true outdoors" and not of the type usually found in someone's back yard. *Singletary*, 554 So.2d at 847-48.").

## New York

1. Except as provided in subdivision two,
  - a. an owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, .... canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes;

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<sup>6</sup> "Naturally occurring", of course, includes weather, lightning, riptides, etc.



- b. an owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby
  - (1) extend any assurance that the premises are safe for such purpose, or
  - (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or
  - (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.
- c. an owner, lessee or occupant of a farm, as defined in section six hundred seventy-one of the labor law, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep such farm safe for entry or use by a person who enters or remains in or upon such farm without consent or privilege, or to give warning of any hazardous condition or use of or structure or activity on such farm to persons so entering or remaining. This shall not be interpreted, or construed, as a limit on liability for acts of gross negligence in addition to those other acts referred to in subdivision two of this section.

2. This section does not limit the liability which would otherwise exist

- a. for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or
- b. for injury suffered in any case where permission to pursue any of the activities enumerated in this section was granted for a consideration other than the consideration, if any, paid to said landowner by the state or federal government, or permission to train dogs was granted for a consideration other than that provided for in section 11-0925 of the environmental conservation law; or
- c. for injury caused, by acts of persons to whom permission to pursue any of the activities enumerated in this section was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

3. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

New York General Obligations Law § 9-103 (enacted 1963, current Mar 2007).

- *Sega v. State*, 456 N.E.2d 1174, 1175, 469 N.Y.S.2d 51, 52 (N.Y. 1983) (Protection of this statute available to the state, when the state does *not* change an admission fee for entrance to the land.)
- *Sena v. Town of Greenfield*, 696 N.E.2d 996, 999, 673 N.Y.S.2d 984, 987 (N.Y. 1998) (This immunity statute did *not* apply to a supervised town park.)

## Ohio

(A) No owner, lessee, or occupant of premises:

- (1) Owes any duty to a recreational user<sup>7</sup> to keep the premises safe for entry or use;
- (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
- (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

Ohio Statute § 1533.181 (enacted 1963, current Mar 2007).

## Pennsylvania

Like Louisiana and Ohio, Pennsylvania also holds possessors of land immune from tort claims by recreational users of land, when the user did *not* pay the possessor for use of the land. As stated below, section six permits liability when the possessor charges a fee for admission to the land.

The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes<sup>8</sup> by limiting their liability toward persons entering thereon for such purposes.

68 Pennsylvania Statute § 477-1 (enacted 1966, current Mar 2007).

Except as specifically recognized or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

68 Pennsylvania Statute § 477-3 (enacted 1966, current Mar 2007).

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<sup>7</sup> *Recreational user* “means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, swim, operate a snowmobile or all-purpose vehicle, or engage in other recreational pursuits.”  
Ohio Statute § 1533.18(B) (current Mar 2007).

<sup>8</sup> *Recreational purpose* “includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports, cave exploration and viewing or enjoying historical, archaeological, scenic, or scientific sites.” 68 Pennsylvania Statute § 477-2 (enacted 1966, current Mar 2007).

Except as specifically recognized by or provided in section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge<sup>9</sup> any person to use such property for recreational purposes does not thereby:

- (1) Extend any assurance that the premises are safe for any purpose.
- (2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
- (3) Assume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons.

68 Pennsylvania Statute § 477-4 (enacted 1966, current Mar 2007).

Nothing in this act limits in any way any liability which otherwise exists:

- (1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
- (2) For injury suffered in any case where the owner of land charges<sup>10</sup> the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

68 Pennsylvania Statute § 477-6 (enacted 1966, current Mar 2007).

### Texas

- (a) An owner, lessee, or occupant of agricultural land:
  - (1) does not owe a duty of care to a trespasser on the land; and
  - (2) is not liable for any injury to a trespasser on the land, except for wilful or wanton acts or gross negligence by the owner, lessee, or other occupant of agricultural land.
- (b) If an owner, lessee, or occupant of agricultural land gives permission to another or invites another to enter the premises for recreation,<sup>11</sup> the owner, lessee, or occupant, by giving the permission, does not:
  - (1) assure that the premises are safe for that purpose;
  - (2) owe to the person to whom permission is granted or to whom the invitation is extended a greater degree of care than is owed to a trespasser on the premises; or
  - (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted or to whom the invitation is extended.

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<sup>9</sup> *Charge* “means the admission price or fee asked in return for invitation or permission to enter or go upon the land.” 68 Pennsylvania Statute § 477-2 (enacted 1966, current Mar 2007).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Recreation* is defined to include: “hunting; fishing; swimming; boating; camping; picnicking; hiking; pleasure driving, including off-road motorcycling and off-road automobile driving and the use of all-terrain vehicles; nature study, including bird-watching; cave exploration; waterskiing and other water sports; any other activity associated with enjoying nature or the outdoors; bicycling and mountain biking; disc [sic] golf; or on-leash and off-leash walking of dogs.” Texas Civil Practice & Remedies Code § 75.001 (current Mar 2007).

(c) If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:

- (1) assure that the premises are safe for that purpose;
- (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
- (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

(d) Subsections (a), (b), and (c) shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith.

....

Texas Civil Practice & Remedies Code § 75.002 (enacted 1985, version Mar 2007).

A judge in Texas explained this statute:

We are bound, however, to analyze their claims in light of the policies underlying the recreational use statute. The statute exists to encourage landowners to allow the public to enjoy outdoor recreation on their property by limiting their liability for personal injury. *City of Bellmead v. Torres*, 89 S.W.3d 611, 617 (Tex. 2002) (Hankinson, J. dissenting). To accomplish that objective, the Legislature has placed stringent parameters around the duty landowners owe "trespassers." *See* Tex. Civ. Prac. & Rem Code § 75.002. The duty implicit in the *Mirandas* pleading, however, would require the Department to warn all visitors of all perils commonly confronted by human interaction with nature. The scope of that proposed duty — obligating the Department to post warnings about all naturally occurring dangers — would create such an insurmountable practical and economic burden as to frustrate the legislatures intent to encourage landowners to make property available for recreational use.

*Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 237-238 (Tex. 2004) (Jefferson, J., dissenting).

### **Act of God**

I suggest that traditionally including lightning as an act of God may be responsible for the legal rule that possessors of land have no duty to warn of lightning and no duty to protect against lightning.

One Louisiana case defined "Act of God" by quoting a number of authorities cited by the parties in their briefs:

In the case of *Chicago and Erie Railway Company vs. Schaff Bros. Company* (74 Ind.App. 227), 117 N.E. 869, an Act of God was defined as follows:

"An Act of God is the manifestation of a superhuman power which breaks the chain of causation in the realm of human activity."

....

"An Act of God is an unusual, extraordinary, sudden, and unexpected, manifestation of the forces of nature which man cannot resist. The fact that no human agency can resist an Act of God renders misfortune occasioned Solely thereby a loss by

inevitable accident which must be borne by the one upon whom it falls. On the other hand, when an Act of God combines or concurs with the negligence of the defendant to produce an Injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct of omission.”

'See Vol. 38 AMERICAN JURISPRUDENCE, Sec. 7 on Negligence, p. 649.

*Rector v. Hartford Acc. & Indem. Co. of Hartford, Conn.*, 120 So.2d 511, 514-515 (La.App. 1960).

In 1949, the Louisiana Supreme Court defined act of God:

An act of God in the legal sense — that which will excuse the discharge of a duty and relieve a defendant from liability for injury — is a providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care or by the use of those means which the situation renders reasonable to employ.

1 CORPUS JURIS SECUNDUM, verbo Act of God, page 1425, *Holden v. Toye Brothers Auto and Taxicab Company*, 1 La.App. 521 [1925]. “Fortuitous event is that which happens by a cause which we can not resist.” Revised Civil Code Article 3556, paragraph 15.

*Southern Air Transport v. Gulf Airways*, 40 So.2d 787, 791 (La. 1949).

Despite these words about act of God, the court then held:

In the instant case, as shown above, the strong winds could be and were foreseen and, with respect to the accident and injury, could have been resisted by the exercise of reasonable prudence and diligence.

*Ibid.*

In 1987, the Oklahoma Supreme Court explained that only unusually severe, naturally occurring events (e.g., weather) were acts of God. Furthermore, before the act of God can relieve defendant(s) of liability, the act of God must be the *only* cause of the injury.

... an Act of God instruction has been limited by this Court to natural disasters such as storms and floods. In *Gulf Oil Corp. v. Lemmons*, 198 Okl. 596, 181 P.2d 568, 570 (1947) this Court cited with approval *City of Purcell v. Stubblefield*, 41 Okl. 562, 139 P. 290 (1914) for the two requirements necessary to establish an Act of God defense: "(1) that nature's act was the sole cause of the injury, and (2) that the natural cause was of such character as not to be expected and consequently avoided by precautions." Generally, an Act of God is some inevitable accident as could not have been prevented by human care, skill and foresight, but which results exclusively from nature's cause, such as lightning, tempest and flood. We also stated in *Public Service Co. v. Sonagerra*, 208 Okl. 95, 253 P.2d 169, 171 (1953):

"An Act of God is such an unprecedented storm or flood as will excuse from liability, provided it is the approximate cause of the injury *as well as the sole cause of the injury*. However, the defendant is liable if the injury is caused by an Act of God, in connection with which the negligence of the defendant is a concurring cause, and the injury would not have occurred except for such negligence." (Emphasis added).

*Studebaker v. Cohen*, 747 P.2d 274, 276 (Okla. 1987).

Accord, *Lanz v. Pearson*, 475 N.W.2d 601, 603 (Iowa 1991).

The traditional view is that lightning is an act of God, which can not be prevented by man, and man can not precisely predict when or where lightning will strike. Discussion of an act of God puts man in a posture where we must passively accept destruction or injury by lightning.

But science and technology gives us another way! Since the invention of the Franklin Chimes in 1752, man can detect electrified clouds overhead, and get a few minutes of advance warning of the first nearby lightning strike. Since the invention of lightning rods by Benjamin Franklin and the understanding of a Faraday Cage (a structure with conducting metal roof, sides, and floor), man possesses the knowledge to avoid damage or injury by lightning. Put another way, lightning itself may be an act of God, but the negligence of man in failing to use warning technology and in failing to erect lightning protected shelters can be the proximate cause of injury or death.

In 1997, a New Jersey appellate court rejected the act of God defense for lightning on a golf course:

We prefer to look at the act of God defense in light of the more holistic approach to tort analysis discussed by our Supreme Court in *Hopkins*. The act of God defense, in and of itself, does not exculpate defendant. Further analysis requires that we examine "basic fairness under all of the circumstances in light of considerations of public policy."

....

In the past these storms were truly acts of God; they came out of nowhere and unleashed tremendous destructive powers. Modern technology has rendered these storms more predictable. We now know, for example, when conditions are favorable for tornadoes, and we know by satellite imagery and computer modeling when a hurricane will strike land and the probability that it will hit at a particular place. [footnote omitted] These once unforeseeable forces of nature must now be considered, at least to a great extent, foreseeable.

*Maussner* 691 A.2d at 834-835.

It is not true that technology has *recently* made possible warning and protection from lightning — in fact both warning technology and protection technology can be traced back to Benjamin Franklin in the late 1700s.

### **Case Law: Lightning at Recreational Facilities**

Davis (golf)

- *Davis v. Country Club, Inc.*, 381 S.W.2d 308 (Tenn.Ct.App. Apr 24, 1963) (golf course not negligent in maintaining shelter).

A Tennessee intermediate appellate court in 1961 seems to believe that lightning is *not* foreseeable, just because man can not predict which exact spot will be struck at a particular time.

... the danger of the shelter being struck by lightning was so remote as to be beyond the requirement of due care, and, therefore, the injuries and damages of the plaintiffs were not caused in whole or in part by any negligence of the defendants. Bare possibility is not sufficient. 'Events too remote to require reasonable prevision need not be anticipated.' *Brady v. Southern R. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239.

*Davis*, 381 S.W.2d at 311.

## Bier (picnic shelter)

- *Bier v. City of New Philadelphia*, 1983 WL 6560 (Ohio App. 5 Dist. 26 July 1983), *rev'd*, 464 N.E.2d 147 (Ohio 13 June 1984).

On 10 Aug 1980, Plaintiffs paid \$5 to rent a picnic shelter in a park owned and maintained by the city of New Philadelphia in Ohio. A thunderstorm approached and the plaintiffs huddled “under the cover of the metal-roofed shelter or beside the edge of the shelter.”<sup>12</sup> Lightning struck the metal roof, killing one man and wounding several others.

The city moved for summary judgment “because the death and injuries were the result of an act of God and ‘the law of Ohio does not impose liability on a defendant when it is caused by an act of God.’ ”<sup>13</sup> The trial court granted summary judgment to defendants and the intermediate appellate court affirmed in an unpublished opinion.

The Ohio Supreme Court cited a case from the year 1832 that an act of God does not excuse an injury when “proper care and diligence [on a defendant’s part] would have avoided the act.” The court continued:

The plaintiffs attached an affidavit by Marvin M. Frydenlund to their memorandum in opposition to summary judgment. Frydenlund is an expert in the area of lightning protection and is the present managing director of the Lightning Protection Institute in Harvard, Illinois. In his affidavit Frydenlund drew upon his experience and expertise to aver that outdoor shelters which are not protected by a lightning protection system are attractors to lightning strikes. He further noted that, “[t]he reasonably prudent individual \* \* \* would be aware of the need for lightning protection systems to be installed on metal-roofed outdoor buildings that are used by the public to ensure the safety of the public.”

*Bier*, 464 N.E.2d at 149.

The Ohio Supreme Court concluded:

Therefore, in the instant case, the defendants could be found liable if a trier of fact were to find that the negligence of the defendants, in not installing a lightning protection system on the metal-roofed picnic shelter, is a concurrent cause of the plaintiffs' injuries. Such a conclusion does not seem unreasonable, in view of the affidavit of plaintiffs' expert, Frydenlund, submitted in opposition to the motion for summary judgment.

In view of the standard required by Civ.R. 56(C) to sustain a motion for summary judgment, a standard not applied by the lower courts, this court is compelled to reverse the judgment of the court of appeals and remand the cause to the trial court for further determination.

*Bier*, 464 N.E.2d at 149.

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<sup>12</sup> *Bier*, 464 N.E.2d at 148.

<sup>13</sup> *Bier*, 464 N.E.2d at 148.

The case was remanded for trial and Plaintiffs' attorney informed me that the parties settled.<sup>14</sup>

#### Schieler (National Park)

- *Schieler v. U.S.*, 642 F.Supp. 1310 (E.D.Cal. 4 Aug 1986) (discretionary function exception in Federal Tort Claims Act prevents liability of National Park Service).

Plaintiff was standing on a rock in Sequoia National Park on 20 Aug 1975, when he was struck by lightning. He sued the National Park Service for failing to provide any warning, and also failing to provide any protection. The U.S. District Court dismissed the case, because of the discretionary function exception to liability in the Federal Tort Claims Act, 28 U.S.C. § 2680(a). There is no discussion of the frequency of occurrence of lightning, no discussion of lightning warning systems, and no discussion of lightning protection. Most of this 14-page opinion is a verbatim reproduction of Management Policies of the National Park Service in 1975.

#### Hames (golf)

- *Hames v. State*, Not Reported in S.W.2d, 1990 WL 6317(Tenn.Ct.App. 31 Jan 1990) (duty), *rev'd*, 808 S.W.2d 41 (Tenn. Apr 08, 1991) (no duty to have lightning-protected shelter, golf course owned by state).

The trial judge who decided *Hames* believed that technological warning systems were *not* necessary because “no warning device could be louder or be more accurate than thunder.”<sup>15</sup> The trial judge also noted that there were no industry standards for lightning warning/protection at recreational golf courses, and further, “common knowledge tells one that lightning is dangerous.”<sup>16</sup> The intermediate appellate court reversed, noting that park officials had requested lightning-proof shelters at this golf course over the past 10 or 11 years. The intermediate appellate court awarded Hames' widow \$300,000, which was the maximum amount under the state statute for torts against the state. The Tennessee Supreme Court reversed, because lightning was the proximate cause of victim's death. The Tennessee Supreme Court wrote:

With regard to conduct falling below the applicable standard of care, and on a more fundamental level than proximate cause, is the realization that lightning is such a highly unpredictable occurrence of nature, that it is not reasonable to require one to anticipate when and where it will strike. Stated another way, the risk to be guarded against is too remote to impose legal liability. We also think the risks and dangers associated with playing golf in a lightning storm are rather obvious to most adults. It would have taken less than two minutes for the decedent and his companions to reach the relative safety of the clubhouse. It is

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<sup>14</sup> Douglas J. O'Meara, personal communication, 14 Mar 1997.

<sup>15</sup> Quoted in *Hames*, 808 S.W.2d at 43.

<sup>16</sup> *Ibid.*



reasonable to infer that a reasonably prudent adult can recognize the approach of a severe thunderstorm and know that it is time to pack up the clubs and leave before the storm begins to wreak havoc. Indeed, most of the golfers on the course did just that. It is also significant that there is no industry standard to implement warning devices or shelters that are lightning proof; indeed, the proof clearly reveals that most golf courses do not contain either warning devices or lightning proof shelters.

*Hames*, 808 S.W.2d at 45.

The Tennessee Supreme Court ignored the USGA rules that mention lightning, because those rules were only for tournament play, while decedent Hames was playing recreational golf. Clearly, the risks of lightning are the same for professional golfers in tournaments and amateurs who play the same course.

#### Pichardo (baseball)

- *Pichardo v. North Patchogue Medford Youth Athletic Assoc., Inc.*, 569 N.Y.S.2d 186 (N.Y.A.D. 2 Dept. 29 Apr 1991), *appeal denied*, 586 N.E.2d 60, 578 N.Y.S.2d 877 (N.Y. 19 Nov 1991).

A 19 y old boy was playing baseball, when he was struck and killed by lightning. A trial court in New York state granted summary judgment for the defendants (i.e., baseball team, baseball league, umpires, etc.), which was affirmed on appeal. The terse appellate opinion makes two holdings: (1) danger of lightning was obvious and (2) no compulsion for player to continue playing, so decedent assumed the risk of being struck by lightning. The appellate court wrote:

The plaintiff's decedent, who was nearly 19 years old at the time, was playing shortstop for a Connie Mack summer league baseball team when he was struck and killed by lightning on the evening of August 7, 1984. The plaintiff contends, *inter alia*, that the defendants were negligent in "allowing a baseball game to continue when threatening weather became apparent". However, by electing to continue to play baseball in weather conditions which were readily apparent (at some point in the game, thunder was heard and some lightning was seen in the distance), the plaintiff's decedent assumed the risks inherent in continued play (*see, Turcotte v. Fell*, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49, 502 N.E.2d 964; *Gallagher v. Town of N. Hempstead*, 144 A.D.2d 637, 535 N.Y.S.2d 10).

Moreover, the plaintiff has failed to present any evidence that the decedent was ordered to continue to play or that there existed an economic compulsion or other circumstance which impelled the decedent to continue to play. Therefore, there has been no showing of an "inherent compulsion" which would negate a voluntary assumption of the risk (*see, Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 543 N.Y.S.2d 29, 541 N.E.2d 29).

*Pichardo v. North Patchogue Medford Youth Athletic Assoc., Inc.*, 569 N.Y.S.2d 186, 187 (N.Y.A.D. 2 Dept. 1991).

## McAuliffe (swimming at lake)

- *McAuliffe v. Town of New Windsor*, 577 N.Y.S.2d 942 (N.Y.A.D. 3 Dept. 31 Dec 1991).

In another New York state case, a lifeguard at a lake ordered all swimmers out of the water when rain began and thunder was heard. A 16 y old boy walked to a “hill about 50 feet away from the nearest shelter”, and he began to kick a volleyball there, when he was struck by lightning and injured. Father sued town that provided lifeguard. Trial court granted summary judgment to town and appellate court affirmed. The appellate court made two holdings: (1) there was no legal duty to maintain “constant surveillance” of son’s position after he exited the water, and (2) danger of lightning was obvious.

The issue before this court is whether defendant's duty to furnish an adequate degree of general supervision included a direction to McAuliffe not to play on the grassy hill. Put another way, the issue is whether defendant was required to make certain that McAuliffe took proper shelter from the potential hazard of lightning. Generally, a municipality is obliged to furnish an adequate degree of general, but not strict or immediate, supervision to patrons who have been invited to avail themselves of park facilities or recreation areas (*see, Caldwell v. Village of Is. Park*, 304 N.Y. 268, 273, 107 N.E.2d 441). However, a municipality is not required to maintain constant surveillance of the movements of all patrons of its facilities in order to prevent patrons from partaking in risky and dangerous activities that are self-evident (*cf., Curcio v. City of New York*, 275 N.Y. 20, 23-24, 9 N.E.2d 760; *Peterson v. City of New York*, 267 N.Y. 204, 196 N.E. 27; *Nichter v. City of Buffalo*, 74 A.D.2d 996, 427 N.Y.S.2d 101). Under the circumstances disclosed by the record, we are of the opinion that defendant discharged its duty by providing a lifeguard and a beach director who, upon the commencement of rain and thunder, directed all swimmers to get out of the water, leave the beach area and take cover (*see, Curcio v. City of New York, supra; Schuyler v. Board of Educ. of Union Free School Dist. No. 7*, 18 A.D.2d 406, 408, 239 N.Y.S.2d 769, *aff'd*. 15 N.Y.2d 746, 257 N.Y.S.2d 174, 205 N.E.2d 311).

Insofar as liability of defendant is predicated on a failure to specifically warn McAuliffe against the danger of lightning, such danger was admittedly apparent to McAuliffe and there is no duty to warn against a condition that is readily observable by the reasonable use of one's senses (*see, Olsen v. State of New York*, 30 A.D.2d 759, 291 N.Y.S.2d 833, *aff'd*. 25 N.Y.2d 665, 306 N.Y.S.2d 474, 254 N.E.2d 774). McAuliffe and his friends elected to go up the hill and play. While on the hill, one of McAuliffe's friends stated to McAuliffe that he saw lightning. McAuliffe admitted that he observed "heat lightning" in the background and that he was fully aware of the risks and dangers of being outside while lightning was present. Further, he stated that he was aware of the possibility of lightning occurring that day but decided to wait out the light rain with his friends. Contrary to plaintiff's assertions, defendant's duty to provide general supervision did not include an obligation to maintain constant surveillance of his son's movements and activities to make certain that he took proper shelter from the rain, thunder and lightning. McAuliffe's action of going onto the hill and playing while it was raining and lightning was *sui juris* and defendant should not be held responsible therefor.

*McAuliffe v. Town of New Windsor*, 577 N.Y.S.2d 942, 944 (N.Y.A.D. 3 Dept. 1991).

## Dykema (outdoor basketball game)

- *Dykema v. Gus Macker Enterprises, Inc.*, 492 N.W.2d 472 (Mich.App. 8 Sep 1992), *leave to appeal denied*, 498 N.W.2d 740 (Mich. 1993).

Plaintiff was watching an outdoor basketball game, for which he paid no admission fee (fact relevant to show he was not an invitee). A local thunderstorm occurred, and while plaintiff was “running for shelter, [he] was struck by a falling tree limb and paralyzed.” This is *not* a case about lightning, but involves principles relevant to warning of lightning.<sup>17</sup> Plaintiff sued organizers and sponsors of tournament for failure to warn of approaching thunderstorm

In order to assert negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff. The term "duty" has been defined as "essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." The general rule is that there is no duty to aid or protect another. However, there is a limited exception to this rule. A duty may be found if there is a special relationship between the plaintiff and the defendant. Some generally recognized "special relationships" include common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee. The rationale behind imposing a legal duty to act in these special relationships is based on the element of control. *Id.* In a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety. Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself.

[citations omitted from this paragraph]

*Dykema v. Gus Macker Enterprises, Inc.*, 492 N.W.2d 472, 474 (Mich.App. 1992), *appeal denied*, 498 N.W.2d 740 (Mich. 1993).

The appellate court found no duty.

Our review of the record indicates that no special relationship existed between plaintiff and defendant. Contrary to plaintiff's argument, plaintiff and defendant were not engaged in a business invitee-invitor relationship at the time of plaintiff's accident. Plaintiff was not on the land where the basketball tournament was being held in connection "with business dealings" of defendant. In support of this conclusion, we note that plaintiff paid no admission fee to observe the tournament, and no contractual or business relationship was shown to exist between plaintiff and defendant. Nor do we perceive any other type of special relationship from which a duty to warn could arise with regard to inclement weather. There is no indication in the record that plaintiff entrusted himself to the control and protection of defendant. Further, there is no indication that, pursuant to his relationship with defendant, plaintiff lost the ability to protect himself. Plaintiff was free to leave the tournament at anytime, and his movements were not restricted by defendant. He was able to see the changing weather conditions by looking at the sky and was able to seek shelter as the storm

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<sup>17</sup> I have included *Dykema* in the failure to warn of lightning cases, because *Dykema* is quoted with approval in many subsequent lightning strike cases nationwide.

approached. Clearly, plaintiff did not entrust himself to the control and protection of defendant, with a consequent loss of control to protect himself. Because no special relationship existed between plaintiff and defendant, defendant was under no duty to warn plaintiff of the approaching thunderstorm. [citations omitted from this paragraph] *Dykema v. Gus Macker Enterprises, Inc.*, 492 N.W.2d at 474-475.

Furthermore, the appellate court found that the thunderstorm was obvious.

Even if plaintiff had succeeded in establishing that a special relationship existed between himself and defendant, we are unable to find precedent for imposing a duty upon an organizer of an outdoor event such as this basketball tournament to warn a spectator of approaching severe weather. As we previously indicated, such a duty has not been recognized in Michigan, and, apparently, no other jurisdiction has constructed one. In fact, the Tennessee Supreme Court has recently held that a state-owned golf course does not owe, as part of its duty of reasonable care, a duty to warn its patrons of the dangers of lightning. In *Hames v. State*, 808 S.W.2d 41, 45 (Tenn. 1991), the court stated:

We also think the risks and dangers associated with playing golf in a lightning storm are rather obvious to most adults.... It is reasonable to infer that a reasonably prudent adult can recognize the approach of a severe thunderstorm and know that it is time to pack up the clubs and leave before the storm begins to wreak havoc.

We agree with the *Hames* court that the approach of a thunderstorm is readily apparent to reasonably prudent people, and that therefore, it is one's own responsibility to protect himself from the weather. We believe it would be unreasonable to impose a duty on the organizer of an outdoor event to warn a spectator of a condition that the spectator is fully able to observe and react to on his own. As the *Hames* court<sup>18</sup> indicated, "[n]o warning device could be louder or be more accurate than thunder." *Id.* at 43.

*Dykema v. Gus Macker Enterprises, Inc.*, 492 N.W.2d at 475.

#### MacLeod (mountain peak at National Park)

- *MacLeod v. U.S.*, Not Reported in F.Supp., 1994 WL 860798 (C.D.Cal. 30 June 1994) (Plaintiffs were injured by lightning at the summit of Mt. Whitney, in a U.S. National Park. **\$1,700,000 Judgment for plaintiffs**, because prior lightning strikes at the same location put the Park on notice of a dangerous condition.)

In one of a few victories for plaintiffs in cases involving failure to warn or failure to protect from lightning, a judge in a federal district Court in California ordered the U.S. Government to pay \$1.7 million to three hikers injured by lightning and the parents of one hiker killed by lightning. In July 1990, the hikers had climbed Mt. Whitney, "the highest mountain in the lower Continental United States." When they reached the summit, they found a local thunderstorm, so they went into a hut. The hut had been constructed in 1909 and had stone sides and a metal roof, with a 5 foot high metal stovepipe. (Finding of Fact, Nr. 5) About 45 minutes after they reached the

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<sup>18</sup> This is actually a quotation from the Claims Commissioner, who was acting as a trial court.

summit, lightning struck the stovepipe on the hut, and the lightning current passed into the hut, injuring the climbers. (Findings of Fact, Nr. 29-31)

Five years earlier, in 1985, several people were “slightly injured” by lightning while in the hut on Mt. Whitney. (Finding of Fact Nr. 8) Employees of the National Park Service devised a plan on 31 Oct 1986 to provide lightning protection for the hut. (Findings of Fact Nrs. 10-11) However, the Park Service never implemented the protection plan. (Findings of Fact Nrs. 16-17, 24, 26) During each of the years 1987, 1988, and 1989, hikers had been injured by lightning while they were in the hut on Mt. Whitney. (Findings of Fact, Nr. 18, 25)

The key to liability for the government was that the Park Service had written Guidelines that required prompt action to abate hazards. (Finding of Fact Nr. 21) And the National Park Service “knew or should have known that injury was a probable result of the hazard.” (Finding of Fact Nr. 25) Therefore, the Government was guilty of “willful misconduct” (Conclusions of Law, Nrs. 4, 7) and “wanton and reckless disregard to warn or guard recreational users against the life-threatening dangers”. (Conclusion of Law, Nr. 7)

There are three quotations from the trial judge’s opinion that are important:

The defendant knew that it was unsafe for visitors to remain inside the Hut during a thunderstorm inasmuch as there was no lightning protection system in place. None of the plaintiffs or decedent were aware of this information.

*MacLeod v. U.S.*, 1994 WL 860798 at \*5, Finding of Fact, Nr. 27 (C.D.Cal. 1994).

Under the facts of the instant action, defendant may not have had a duty to erect a shelter but, once erected, defendant had a legal duty to maintain the structure on its premises in a safe condition.

*MacLeod v. U.S.*, 1994 WL 860798 at \*12, Conclusions of Law, Nr. 11 (C.D.Cal. 1994).

The trial judge was clearly appalled by the Park Service’s lethargy in failing to install lightning protection on the hut.

In this case, defendant knew of the dangerous condition posed by the Hut, particularly in lightning storms; defendant knew that recreational users utilized the Hut; and defendant knew that the dangerous condition of the Hut could cause serious injury or death to the recreational users. Yet despite such knowledge, defendant failed to erect any warning signs, barricades or notices at or near the Hut or at any trail head to warn recreational users of the dangerous condition which existed. A review of the facts of this action clearly reveals the wanton and reckless disregard of defendant with respect to this well known dangerous risk.

Defendant knew that the Hut posed a threat to human life for at least five years prior to the accident at issue in this complaint. During the summer of 1985, several individuals sustained injuries while in the Hut. In 1987, 1988, and 1989 people were again injured in the Hut when it was struck by lightning. Richard Powell, the Safety Manager of the park, recognized, as early as October 1986, that the hazard posed by the Hut presented a probable risk of injury.

*MacLeod v. U.S.*, 1994 WL 860798 at \*9, Conclusions of Law, Nr. 7 (C.D.Cal. 1994).

## Maussner (golf)

- *Maussner v. Atlantic City Country Club, Inc.*, 691 A.2d 826 (N.J.Super.A.D. 4 Apr 1997).

In *Maussner*, the trial judge granted summary judgment to the defendant, because “an act of God, the lightning” was the proximate cause of injuries. *Maussner*, 691 A.2d at 830, 833. A panel of two appellate judges in New Jersey reversed the dismissal of plaintiff’s complaint. The long appellate opinion cites a law review article by Flynn on liability of golf courses for lightning injuries,<sup>19</sup> plus a preliminary report from plaintiff’s expert witness,<sup>20</sup> as support for a establishing a duty of care, because:

A particular lightning strike is clearly unpredictable. There is no way that present technology can predict whether a bolt of lightning will strike a tree, a bush, a rock, or any of four golfers standing near them. Similarly, the path of a particular tornado or the eye of a hurricane may be difficult to predict. In the past these storms were truly acts of God; they came out of nowhere and unleashed tremendous destructive powers. Modern technology has rendered these storms more predictable. We now know, for example, when conditions are favorable for tornadoes, and we know by satellite imagery and computer modeling when a hurricane will strike land and the probability that it will hit at a particular place. [footnote omitted] These once unforeseeable forces of nature must now be considered, at least to a great extent, foreseeable.

As noted by plaintiff’s expert and by Professor Flynn, there is now technology available that makes lightning’s *presence* more predictable. This being the case, the presence of lightning is less an act of God and more a predictable destructive force. Thus, “the nature of the attendant risk” is that it’s presence is predictable, if not its individual manifestations.

Similarly, “the opportunity and ability to exercise care” in the case of lightning is now greater than it has been in the past. A golf course can warn golfers of what to do in the presence of lightning, can warn golfers of the approach of lightning by using signals, and can create and maintain lightning- proof shelters. A golf course can now also detect the existence of lightning by using some of the new technology that is detailed in Berger’s preliminary expert report and in Professor Flynn’s article.

Lastly, the “public interest in the proposed solution” is clear. The great popularity of golf makes the *reasonable* protection of golfers an important public interest. There are now more people walking around on open plains carrying bags of steel shafts than there have ever been. [footnote omitted]

We find that when a golf course has taken steps to protect golfers from lightning strikes, it owes the golfers a duty of reasonable care to implement its safety precautions properly. We do not go so far as to hold that golf course operators have an absolute duty to protect their patrons from lightning strikes. We refrain from finding this greater duty because it may still be cost-prohibitive to make all golf courses adopt particular safety procedures.

Our holding has the following consequences. All golf courses have a duty to post a sign that details what, if any, safety procedures are being utilized by the golf course to protect its

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<sup>19</sup> *Maussner*, 691 A.2d at 832, discussing article by Flynn, “Lightning: A Double Hit for Golf Course Operators”, 6 Marquette Sports Law Journal 133 (1995).

<sup>20</sup> *Maussner*, 691 A.2d at 829.

patrons from lightning. If a particular golf course uses no safety precautions, its sign must inform golfers that they play at their own risk and that no safety procedures are being utilized to protect golfers from lightning strikes. If, however, a golf course chooses to utilize a particular safety feature, it owes a duty of reasonable care to its patrons to utilize it correctly. This latter standard means, for example, that if a golf course builds shelters, it must build lightning-proof shelters; if a golf course has an evacuation plan, the evacuation plan must be reasonable and must be posted; if a golf course uses a siren or horn system, the golfers must be able to hear it and must know what the signals mean; and if the golf course uses a weather forecasting system, it must use one that is reasonable under the circumstances.

*Maussner*, 691 A.2d at 834-835.

The case then proceeded towards trial, and plaintiff's attorney informed me that the case settled prior to trial.<sup>21</sup> While I like the opinion in *Maussner*, it is not true that technology has *recently* made possible warning and protection from lightning — in fact both warning technology and protection technology can be traced back to Benjamin Franklin. Also, the article by a law professor is *not* a credible source of information about warning technology, he only looked at some advertisements published by a manufacturer of lightning warning systems for golf courses.

#### Blanchard (picnic in park)

- *Blanchard v. State Through Parks and Recreation Com'n*, 702 So.2d 768 (La.App. 8 Oct 1997), *cert. den.*, 709 So.2d 712 (La. 30 Jan 1998).

In 1990, Blanchard's husband was killed by lightning as the family was in a picnic shelter in a state park in Louisiana. She sued, arguing that the state should have either put lightning protection on the shelter or posted warning signs. Prof. Martin Uman, the most prestigious lightning expert in the USA, testified that he calculated that one of the picnic shelters in that park would be struck by lightning about every 25 years on average.<sup>22</sup> The height of the shelter made it more likely to be struck than a similar area of land nearby, so the state had increased the risk of people being hit by lightning by erecting unprotected shelters. The trial judge ruled (no jury) that the state had no duty to install lightning protection and no duty to post warning signs, despite high incidence of lightning in area. The trial judge misunderstood Prof. Uman's testimony to be that the entire park (not one of the picnic shelters) would be struck by lightning once every 25 years. Notwithstanding this huge mistake by the trial judge in understanding the facts of the case, the appellate court affirmed. The reasoning of the appellate court is rather conclusory. I believe the courts did an awful injustice to plaintiffs here. The Louisiana Supreme Court refused to hear plaintiff's appeal.<sup>23</sup>

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<sup>21</sup> Virginia Pallotto, personal communication, 7 March 2007.

<sup>22</sup> *Blanchard*, 702 So.2d at 773.

<sup>23</sup> *Blanchard*, 709 So.2d 712 (La. 1998).

## Grace (golf)

- *Grace v. City of Oklahoma City*, 953 P.2d 69, 1997 OK CIV APP 90 (Okla.Civ.App. 9 Dec 1997) (no duty, golf course owned by city).

In *Grace*, the trial court held the golf course immune because it was owned by Oklahoma City and therefore protected by the Oklahoma Governmental Tort Claims Act. The appellate court tersely affirmed the result, for a different reason:

Lightning is a universally known danger created by the elements. Golf Course has no duty to warn its invitees of the patent danger of lightning or to reconstruct or alter its premises to protect against lightning. [Plaintiffs] did not allege and offered no proof Golf Course created a greater hazard than that brought about by natural causes. Therefore, Golf Course is entitled to judgment as a matter of law.

*Grace*, 953 P.2d at 71, ¶3.

## Jaffe (golf)

- *Jaffe v. City and County of Denver*, 15 P.3d 806, 2000 CJ C.A.R. 3683 (Colo.App. 22 June 2000) (no duty, golf course owned by city).

In *Jaffe*, the trial court held the golf course immune because it was owned by the city of Denver and therefore protected by the Governmental Immunity Act (GIA). The city's golf course had neither a lightning-warning system, a formal medical assistance plan, nor an evacuation plan. The appellate court affirmed, citing only *Hames*.

We acknowledge, as does the City, that improvements can be made for the safety of players, and that other golf courses have installed formal medical assistance systems, automatic lightning and foul weather detection systems, or have at least implemented warning and evacuation plans. While these protections may be highly desirable, we nevertheless conclude that, based on the clear language of the statute, the City's failure to take such steps did not create a "dangerous condition" on the golf course for purposes of the GIA.

Accordingly, the trial court did not err in dismissing plaintiffs' state law tort claims. See *Hames v. State*, 808 S.W.2d 41 (Tenn. 1991)(the absence of lightning proof shelters or devices to warn golfers of thunderstorms on a golf course owned and operated by the state did not constitute a negligently created or maintained dangerous condition).

*Jaffe*, 15 P.3d at 811.



## Chapple (state park)

*Chapple v. Ultrafit USA, Inc.*, Not Reported in N.E.2d, 2002 WL 433351, 2002-Ohio-1292 (Ohio App. 5 Dist. 18 Mar 2002) (State employee who was struck by lightning while working at triathlon held in state park brought negligence action against event's sponsors. No liability.), *appeal not allowed*, 772 N.E.2d 1203 (Ohio 2002).

Chapple was an employee of a Delaware State Park who was working during a triathlon at the park. The starting time of the triathlon had been delayed until 09:30, because of unspecified bad weather at the park. However, lightning continued to strike north of the park. The organizers of the triathlon had “no access to weather information”, other than what was to be supplied by “amateur radio operators ... at the race”. While working outside during the triathlon, Chapple was struck by lightning and injured. Chapple then sued the organizers of the triathlon, arguing that they should have canceled or postponed the event. The trial judge granted defendant’s motion for summary judgment and an appellate court affirmed in an unreported opinion. I think it was bizarre for the organizers to depend on “amateur radio operators” for weather information. The appellate court found significant that Chapple was *not* ordered to be outside by the organizers of the triathlon, instead Chapple personally “chose to work outside”. The appellate court found that the organizers owed no legal duty to Chapple, the organizers did not control the activities of Chapple, and that the organizers were not negligent. The appellate court did not explain the “no negligence” finding, but it could follow from the absence of a duty.

## Seelbinder (beach)

- *Seelbinder v. County of Volusia*, 821 So.2d 1095 (Fla.App. 31 May 2002), *review denied*, 842 So.2d 846 (Fla. 27 Mar 2003).

Seelbinder was a 47 y old woman who was at a Florida beach operated by Volusia County. She saw a thunderstorm to the south, but ignored it. As the dark storm clouds to the south moved toward Seelbinder, it “started to sprinkle rain”, and at approximately 15:11 she began to pack up at a leisurely pace, although she insists that the “sky overhead was still clear”. At 15:29, she was struck by lightning and injured. The lightning that struck her apparently was the first strike from a storm to the west of the beach. She sued the County for failure to warn. Actually, the lifeguards at 15:24 did call a “red light” alert that required all swimmers out of the water, and clear the beach of people. Given that the lifeguards gave her 5 minutes (15:24 to 15:29) of warning, her argument is really that she needed more advance warning. At the close of plaintiff’s case at trial, the County moved for a directed verdict. The trial judge granted the motion and an appellate court affirmed, because the County did not breach any duty to Seelbinder and “the County’s acts or omissions were not the cause of Marlene [Seelbinders]’s injuries.”

We begin by joining the almost universally agreed view that the County, in its capacity as "landowner" or the equivalent, did not have a duty to warn invitees, including beachgoers that

there was a risk of being struck by lightning. *Caldwell v. Let the Good Times Roll Festival*, 717 So.2d 1263 (La.Ct.App. 1998); *Grace v. City of Oklahoma City*, 953 P.2d 69 (Okla.Ct.App. 1997); *Dykema v. Gus Macker Enters.*, 196 Mich.App. 6, 492 N.W.2d 472 (1992); *Hames v. State*, 808 S.W.2d 41 (Tenn. 1991); *Davis v. Country Club, Inc.*, 53 Tenn.App. 130, 381 S.W.2d 308 (1963). This view appears consistent with Florida law. *See Wamser v. City of St. Petersburg*, 339 So.2d 244, 246 (Fla. 2d DCA 1976).

If any duty to warn exists, it arises from the County's having undertaken to provide warnings of lightning to beachgoers. Having undertaken this responsibility, the County was obliged to exercise reasonable care in so doing. [citation to nonlightning case omitted] *Seelbinder v. County of Volusia*, 821 So.2d 1095, 1097 (Fla.App. 2002).

As the appellate court noted, imposing liability on the County just because Seelbinder was injured would be "akin to strict liability":

... there is no evidence that the County lifeguards were negligent. To say that a jury question of negligence arises post hoc from the fact of a lightning strike would impose an unfair and undue burden on the County akin to strict liability. Moreover, all the evidence at trial indicates that the lightning that struck Marlene was generated from the western storm, not the southern storm, so the causal link based on the failure to exercise discretion to call a red light based on the presence of the southern storm is missing.

The County has undertaken to give beachgoers warnings of the risk of lightning that relies on human observation and weather station monitoring. Once an identified storm risk is deemed sufficient to warrant warnings, the procedure prioritizes those persons in the water. There was no evidence offered that the County's employees failed to exercise reasonable care in executing the procedure, merely that the procedure failed to protect Marlene. *Seelbinder*, 821 So.2d at 1098-99.

#### Patton (after rugby game)

- *Patton v. United States of America Rugby Football*, 851 A.2d 566 (Md. 10 June 2004).

Patton, a rugby player, and his father (a spectator), were at an amateur rugby game where the National Weather Service had issued a "thunderstorm warning" for the area and where there was local rain and "lightning flashed directly overhead." Other games at the location stopped prior to Patton's game. Finally, the referee stopped Patton's game. Patton and his father then went to a row of trees to retrieve their personal possessions, when they were struck by lightning. The son survived, but the father died. The son sued the tournament organizers, referee, etc. Unfortunately, plaintiff's attorney never served the referee (who I think was most blameworthy) with process. The trial court granted motions to dismiss and the highest appellate court affirmed, because defendants had no duty to victims, who were voluntarily participating or voluntarily watching the game. The trial court said about the father-spectator:

[D]ecedent Donald Patton was a nonpaying spectator at a rugby match organized and overseen by [Appellees]. There is no indication from the record that Decedent had entrusted himself to the control and protection of [Appellees], indeed he was free to leave the tournament at any time. Additionally, there is no indication that he had lost the ability to monitor changing weather conditions and act accordingly. While [Appellants] allege the storm began near the beginning of the match, it was not until the conclusion of the game, that Decedent and plaintiff Robert Patton, attempted to escape the storm by running *towards* the

tree line adjacent to the open field to retrieve their belongings. It was here that both were struck by lightning.

The inherently unpredictable nature of weather and the patent dangerousness of lightning make it unreasonable to impose a duty upon [Appellees] to protect spectators from the type [of] injury that occurred here."

*Patton v. United States of America Rugby Football*, 851 A.2d 566, 596-570 (Md. 2004).

The highest court in Maryland continued:

As regards Robert Patton, the Circuit Court stated that "[w]hile it is arguable that [Appellees] had a greater duty to protect plaintiff Robert Patton, a player/participant from injury, they were under no duty to protect and warn him of lightening strikes and other acts of nature." The hearing judge relied on cases from other jurisdictions involving lightning strikes on golf courses to conclude that "lightning is a universally known danger created by the elements"<sup>24</sup> and, in the absence of evidence that Appellants created a greater hazard than brought about by natural causes, there is no duty to warn and protect.

*Patton*, 851 A.2d at 570.

The trial court and highest court agreed there was no special relationship, according to Restatement Second of Torts § 314A (1965). The highest court in Maryland then considered other lightning injury cases:

Of the relevant cases from our sister states, we find *Dykema v. Gus Macker Enters., Inc.*, 196 Mich.App. 6, 492 N.W.2d 472 (1992) to be particularly persuasive in the present case. In *Dykema*, the Michigan Court of Appeals held that the sponsors of an outdoor basketball tournament had no duty to warn a tournament spectator of an approaching thunderstorm that ultimately caused his injury. *Dykema*, 492 N.W.2d at 474-75. A thunderstorm struck the area of the tournament. The plaintiff, while running for shelter, was struck by a falling tree limb and paralyzed. *Dykema*, 492 N.W.2d at 473.

Like Maryland, Michigan recognizes the general rule that there is no tort duty to aid or protect another in the absence of a generally recognized "special relationship." *Dykema*, 492 N.W.2d at 474. The Michigan court stated that:

The rationale behind imposing a legal duty to act in these special relationships is based on the element of control. In a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety. Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself.

*Id.* (citations omitted). Like the situation of the plaintiff and tournament sponsors in *Dykema*, Appellants here cannot be said to have entrusted themselves to the control and protection of the rugby tournament organizers. *Id.* ("Plaintiff was free to leave the tournament at anytime, and his movements were not restricted by Defendant."). We do not agree that, as Appellants argue, "the participants in the tournament, in effect, cede control over their activities to those who are putting on the event." Robert and Donald Patton were free to leave the voluntary, amateur tournament at any time and their ability to do so was not restricted in any meaningful way by the tournament organizers. An adult amateur sporting event is a voluntary affair, and

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<sup>24</sup> This is a quotation from *Grace v. City of Oklahoma City*, 953 P.2d 69, 71, 1997 OK CIV APP 90, ¶3 (Okla.Civ.App. 1997).

the participants are capable of leaving the playing field on their own volition if they feel their lives or health are in jeopardy. The changing weather conditions in the present case presumably were observable to all competent adults. Robert and Donald Patton could have sought shelter at any time they deemed it appropriate to do so. [footnote cites *Dykema* and *Hames*.]

*Patton*, 851 A.2d at 574-575.

The highest court in Maryland also noted other cases involving warning about weather or lightning:

In *Caldwell v. Let the Good Times Roll Festival*, 717 So.2d 1263, 1274 (La.Ct.App. 1998), the Louisiana Court of Appeals held that the City of Shreveport and two co-sponsors of an outdoor festival had neither a general nor specific duty to warn spectators of an approaching severe thunderstorm that caused injuries due to its high winds. The court in *Caldwell* observed that:

Most animals,<sup>25</sup> especially we who are in the higher order, do not have to be told or warned about the vagaries of the weather, that wind and clouds may produce a rainstorm; that a rainstorm and wind and rain may suddenly escalate to become more severe and dangerous to lives and property. A thundershower may suddenly become a thunderstorm with destructive wind and lightning. A thunderstorm in progress may escalate to produce either or both tornadoes and hail, or even a rare and unexpected micro burst ... all of which are extremely destructive to persons and property.

*Caldwell*, 717 So.2d at 1271. See also *Seelbinder v. County of Volusia*, 821 So.2d 1095, 1097 (Fla.Dist.Ct.App. 2002) ("We begin by joining the almost universally agreed view that the County, in its capacity as 'landowner' or the equivalent, did not have a duty to warn invitees, including beachgoers that there was a risk of being struck by lightning.") (citations omitted); *Grace v. City of Oklahoma City*, 953 P.2d 69, 71 (Okla.Civ.App. 1997) ("Lightning is a universally known danger created by the elements. [The golf course owner] has no duty to warn its invitees of the patent danger of lightning or to reconstruct or alter its premises to protect against lightning[,] and "all persons on the property are expected to assume the burden of protecting themselves from them."); *McAuliffe v. Town of New Windsor*, 178 A.D.2d 905, 906, 577 N.Y.S.2d 942 (N.Y.App.Div. 1991) (upon the commencement of rain and thunder, the danger of lightning was admittedly apparent to plaintiff and there is no special duty to warn a specific swimmer against a condition that is readily observable by the reasonable use of one's senses). The reasoning in the foregoing cases, although not explicated in terms of special relationship analysis as such, is consistent with the result reached in the present case.

*Patton*, 851 A.2d n. 6, at 575.

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<sup>25</sup> This is hyperbole. During a thunderstorm, cows will stand near a tree, and when the tree is struck by lightning, it is common to find several dead cows near the tree. So cows need to be "told or warned" about lightning. People too. <grin>

## Sall (golf)

- *Sall v. T's, Inc.*, 117 P.3d 896 (Kan.App. 19 Aug 2005), *rev'd*, 136 P.3d 471 (Kan. 23 June 2006).

In *Sall*, a private golf course, SGC, in Kansas “monitor the local television stations, radar images on the Internet, and visually inspect the weather by stepping outside. SGC also has a weather radio.”<sup>26</sup> In my opinion, none of these measures are as effective as a local lightning-warning system. None of the methods used by this golf course detect electrified clouds, and having a golf course manager, who is ignorant of atmospheric physics, determine when dangerous conditions exist is ludicrous. There was also no policy on how often to check the weather.<sup>27</sup> Radar images on the Internet are delayed approximately 6 to 10 minutes<sup>28</sup>, which makes such images not useful for fast-moving storms. The victim was one of three people playing golf when a fast moving (60 knots<sup>29</sup>) storm appeared and he was stuck by lightning, almost killed, and “now requires total care.” The trial court granted summary judgment for the golf course. An incompetent intermediate appellate court affirmed, by deciding which alleged “facts” were true, instead of properly viewing evidence most favorable to plaintiffs, the nonmoving party. The intermediate appellate court agreed with the trial judge that the location of the lightning strike was not foreseeable, hence the golf course had no duty.<sup>30</sup> The Kansas Supreme Court seems to follow *Maussner*, reversed the summary judgment, and remanded for trial:

SGC undertook to monitor weather conditions and warn golfers to come in off the course when the manager on duty deemed it prudent. There was no suggestion that SGC undertook to provide any weather forecast to their patrons, and the scope of their undertaking was limited to whatever affirmative acts SGC undertook. [citation omitted] Unlike the situation in *South* and *Cunningham*, SGC's policy was undertaken to address the situation presented, protecting or warning golfers of inclement weather which included the threat of lightning. Because § 323 [of Restatements Second of Torts] allows a voluntarily assumed undertaking, it would not follow that the duty could only arise from an enforceable contractual agreement or promise as SGC suggests. If there is any requirement for a communicated promise, it would flow from the requirement that the plaintiff relied on the undertaking to his or her detriment.

The Court of Appeals' majority stated that it did not believe any court in the country has relied on § 323 to impose liability for a golf course lightning injury, but then stated: "In *Maussner*, the club did not use reasonable care to *implement its safety precautions* and that is

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<sup>26</sup> *Sall*, 136 P.3d at 474.

<sup>27</sup> *Sall*, 136 P.3d at 479.

<sup>28</sup> *Sall*, 136 P.3d at 483.

<sup>29</sup> *Sall*, 117 P.3d at 900.

<sup>30</sup> *Sall*, 117 P.3d at 901, 904.

why the court found the club liable." (Emphasis added.) 34 Kan.App.2d at 308, 117 P.3d 896. Implicit in the New Jersey court's decision was its reliance on Restatement (Second) of Torts § 323 (1964) and that a determination of whether the club was negligent in its undertaking was an issue for the jury. *Maussner v. Atlantic City Country Club, Inc.*, 299 N.J.Super. 535, 556, 691 A.2d 826 (1997), stated:

“What is clear is that here the Club assumed a duty to warn its business invitees. The existence of safety techniques and safety precautionary devices and the possibility that there is an industry standard will establish the parameters within which a jury should determine whether defendant reasonably exercised the duty that it assumed.”

*Sall*, 136 P.3d at 479.

Later the Kansas Supreme Court said:

Viewed in a light most favorable to the Salls, Chris' deposition testimony showed that he and Patrick were relying on SGC's policy of using air horns to signal golfers to return to the clubhouse in the event of inclement weather. As in *Burgess*, Patrick and Chris could have acted on their own to protect themselves by returning to the clubhouse at the first indication of severe weather returning to the area and, possibly, by not even playing golf because of the earlier weather conditions. SGC increased the risk of Patrick and Chris being injured by a lightning strike by the delay in sounding the air horn. There may be a dispute whether Patrick and Chris relied on SGC's warning before returning to the clubhouse because of their own awareness of the weather conditions; however, SGC was in a superior position to determine when it was prudent for golfers to come in for their safety because the managers relied on more than human observation which is all Patrick and Chris could use for their own safety.

*Sall*, 136 P.3d at 482.

reliance in *Sall*

The Plaintiff in *Sall* raised a legal argument that decedent relied on the golf course's undertaking to warn of lightning. The intermediate appellate court wrote:

In response to SGC's motion for summary judgment, the Salls raised a new issue-that SGC assumed a duty to warn and protect Patrick against dangerous weather because Patrick relied on a weather warning system. To support this claim, they attached Mrs. Sall's deposition where she testified that Patrick told her: "Mom, don't worry; they wouldn't be open if it wasn't safe."

The trial court heard arguments on SGC's motion and concluded that storms are capricious and foreseeing a lightning strike is a matter of speculation. Based on this lack of foreseeability, the trial court concluded that businesses do not have a duty to protect or warn patrons about lightning. The trial court also ruled that the facts of the case were "insufficient to invoke the benefits" of Restatement (Second) of Torts § 323 (1964).

*Sall*, 117 P.3d at 899.

The Kansas Supreme Court noted the same facts:

The Salls contend the evidence shows Patrick [Sall, the decedent] and Chris [Gannan, Patrick's friend] relied on SGC's undertaking because: (1) before going to the golf course on the day of his injury, Patrick called SGC to verify the complex was open given the weather conditions earlier in the day; (2) Patrick's mother questioned Patrick about the safety of playing that day and Patrick replied, " Mom, don't worry; they wouldn't be open if it wasn't safe' "; (3) during the course of playing the second hole, Patrick and Chris discussed whether storms might be moving back into the area and discussed the fact that SGC had a warning

system for dangerous weather and they would blow the air horn to warn them to come back to the clubhouse if dangerous weather was in the area; (4) Chris had played at SGC on many occasions and on at least one occasion he had heard the air horn and returned to the clubhouse because of dangerous weather; and (5) Chris' affidavit stated that both he and Patrick were relying on SGC to blow the air horn to warn them if dangerous weather was moving into the area. The Salls further contend Patrick was harmed because of his reliance on SGC's warning horn because he was struck by lightning approximately 2 to 3 minutes after the horn sounded.

In his dissent opinion, Judge McAnany found that when the evidence was viewed in a light most favorable to the Salls, the evidence disclosed:

"Tull, SGC's manager, did not check for weather information from approximately 3:50 p.m. until approximately 5 p.m. At 4:25 p.m. a weather advisory was issued on weather radio warning that fast-moving thunderstorms were approaching the area. SGC failed to take note of this warning, however, since the weather radio was apparently set on the 'alert mode,' which only sounds a warning in the event of a tornado or large hail. Had the radio been properly set, it is likely that SGC would have heard the 4:25 p.m. weather advisory.

"Patrick and Chris paid their greens fee and teed off at the first hole between 4:45 p.m. and 4:50 p.m. Chris saw two lightning strikes off to the west before the warning sounded. Leslie Lemon, a meteorologist specializing in radar, calculated that Tull sounded the storm warning horn at 5:04 p.m. Patrick was struck by lightning at 5:06 p.m. It took Chris 5 to 10 minutes to get back to the clubhouse after Patrick was struck."

34 Kan.App.2d at 309, 117 P.3d 896 [904].

Viewed in a light most favorable to the Salls, Chris' deposition testimony showed that he and Patrick were relying on SGC's policy of using air horns to signal golfers to return to the clubhouse in the event of inclement weather. As in *Burgess*, Patrick and Chris could have acted on their own to protect themselves by returning to the clubhouse at the first indication of severe weather returning to the area and, possibly, by not even playing golf because of the earlier weather conditions. SGC increased the risk of Patrick and Chris being injured by a lightning strike by the delay in sounding the air horn. There may be a dispute whether Patrick and Chris relied on SGC's warning before returning to the clubhouse because of their own awareness of the weather conditions; however, SGC was in a superior position to determine when it was prudent for golfers to come in for their safety because the managers relied on more than human observation which is all Patrick and Chris could use for their own safety.

*Sall*, 136 P.3d at 481-482.

The Kansas Supreme Court concluded:

We conclude, as did the trial court, that material factual issues remain on the issue of whether SGC negligently performed the duty it assumed under Restatement (Second) of Torts § 323 (1964) to monitor weather conditions and warn its patrons to come in off the golf course when the manager on duty deemed it prudent. Thus, the summary judgment granted to SGC must be reversed and the case remanded for trial.

*Sall*, 136 P.3d at 484.

Mack (softball game at prison)

- *Mack v. Wilkinson*, Not Reported in F.Supp.2d, 2006 WL 2090092 (S.D. Ohio 25 July 2006).

Prison inmate struck by lightning during softball game at prison, prisoner alleges negligent medical treatment and “cruel and unusual punishment”. Case dismissed without prejudice because of failure to exhaust administrative remedies. No discussion of merits of case.

### conclusion

Looking at the issue logically, there are two ways that a possessor of land can have knowledge of a hazardous condition: (1) previous injuries at that specific location or (2) previous injuries at similar locations (e.g., lightning kills dozens of people every year in the USA at outdoor recreational facilities). The actual knowledge of previous injuries at that specific location, coupled with a decision to protect the hut sometime, led a federal judge to find the National Park Service guilty of “wanton and reckless disregard” in *MacLeod*, discussed above, beginning at page 20.

The other rule of law that we can extract from the above cases (e.g., *Sall*, *Maussner*, *Seelbinder*) that there is no duty to warn of lightning, but if a possessor of land undertakes to provide such a warning, then the warning must not be negligently provided.

I suggest that some of the cases in the next section of this essay (e.g., *Butts*, *Tarshis*, *Gonzales*, *Mostert*, *Pacheco*, and especially *Breaux*) indicate the beginning of a trend to require warnings of naturally occurring hazards, such as riptide. At page 58 below, I argue that riptide is analogous to lightning.

### Case Law: Other Natural Hazards at Recreational Facilities

In this section, I discuss some of the major cases that hold that a possessor of land has *no duty* to warn invitees of naturally occurring conditions, such as weather. In some of these cases, the landowner is further insulated by the fact that the hazardous conditions occurred off-premises. In this section, I also discuss in this section the small number of cases in the USA that hold that a possessor of land *does* have a duty to warn invitees of naturally occurring hazardous conditions (e.g., riptide, flood in *Mostert*). In a few of these cases, a possessor of land was held liable even if the hazardous conditions occurred off-premises.



## Butts (swimming)

- *Butts v. Kouwenhoven*, 73 N.Y.S.2d 498 (N.Y.A.D. 2 Dept. 14 Oct 1947).

*Butts* is a little-noticed appellate opinion in New York State in 1947, involving a paying guest at a hotel who went swimming in the bay and drowned. The trial court found for defendants and decedent's wife appealed. In a terse opinion that cites no cases, the appellate court held that landowners have a duty not only to investigate the underwater conditions, but also to either make the area safe or at least warn guests of dangers:

The court correctly charged on this record that defendant Walz was under a duty to take reasonable care to discover the actual condition of the land under water in the area wherein his guests were invited and permitted to bathe, and either to make the area safe or warn them of its dangerous condition.

The court, however, on this record, incorrectly instructed the jury, without qualification, that said defendant was not required to inspect the bed of the Great South Bay to determine the slope of the ground, its depth, or to determine the presence of any object or condition on the bed of the bay which might be dangerous to bathers.

*Butts*, 73 N.Y.S.2d at 498.

An essential fact, not mentioned in *Butts*, but mentioned in a later New York State case,<sup>31</sup> is that the hotel in *Butts* was located directly on a 100 foot length of shoreline, so the hotel was contiguous with the bay.

In the year 2001, the highest court in New York State clarified that *Butts* only applied to hotels that were contiguous with the beach. See *Darby*, below at page 52. Thus, *Butts* is still good law in New York State.

If the holding in *Butts* were applied to golf courses, the operator of the golf course would have an affirmative duty to monitor local weather conditions above the golf course and to warn golfers of the danger of electrified clouds overhead, which could produce lightning. Since *Butts* charges a hotel on the water with "discover[ing] the actual condition of the land under water in the area wherein his guests were invited", it is reasonable that a golf course owner would need to obtain instrumentation to measure the local electric field at the clubhouse, to detect electrified clouds.

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<sup>31</sup> *Darby v. Compagnie National Air France*, 753 N.E.2d 160, 163, 728 N.Y.S.2d 731, 734 (N.Y. 2001).

## Tarshis (swimming at beach)

- *Tarshis v. Lahaina Inv. Corp.*, 480 F.2d 1019 (9th Cir. 21 June 1973).

The Tarshis family was from New York State and vacationed in Hawaii at a hotel which owned a 400 foot length of beach. On 28 Jan 1969, the family went swimming on the beach and they claimed *not* to see four warning signs and six red flags, which warned of “dangerous surf conditions”. The victim was “injured as the result of being thrown on the beach by a ‘huge wave.’ ” She sued in U.S. District Court in Hawaii, which granted summary judgment for defendants.

In granting appellee's motion for summary judgment the district court assumed, without deciding, that appellee owed appellant the duty to warn her of dangerous conditions in the Pacific Ocean along its beach frontage "which were not known to her or obvious to an ordinarily intelligent person and either were known or in the exercise of reasonable care ought to have been known to the [appellee]." We find this to be a correct statement of the law. *See, e.g., Gratto v. Palangi*, 154 Me. 308, 147 A.2d 455 (1958); *Perkins v. Byrnes*, 364 Mo. 849, 269 S.W.2d 52 (1954); *see generally*, Annot., 48 A.L.R.2d 104.

*Tarshis*, 480 F.2d at 1020.

The U.S. Court of Appeals reversed the trial judge's finding that the dangers of swimming that day “should have been known to ... an ordinarily intelligent person” and allowed plaintiff to proceed to trial.

See *Rygg*, below, beginning at page 47, for another case in the same jurisdiction.

## Gonzales (riptide)

- *Gonzales v. City of San Diego*, 182 Cal.Rptr. 73 (Cal.App. 4 Dist. 20 Apr 1982).

This is an unusually simple case that has provoked a lot of controversy. On 18 June 1978, Theresa Gonzales went to a public beach operated by the City of San Diego, California. The city had voluntarily put lifeguards at the beach. There were no warnings of riptide posted at that beach at that day, although plaintiffs later alleged that the city “knew[,] or in the exercise of due care, should have known of the dangerous riptide”.<sup>32</sup> Theresa drowned in the riptide. Her children sued the city.

The city moved for summary judgment, citing a California state statute § 831.2 (quoted above at page 7) granting immunity for public entities for injuries caused by natural conditions on unimproved land. The trial court granted the city summary judgement. The intermediate appellate court reversed, holding that cause of injury was some kind of

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<sup>32</sup> *Gonzales*, 182 Cal.Rptr. at 75.

hybrid dangerous condition, partly natural and partly artificial in character, the result of a combination of a natural defect within the property [i.e., the riptide] and the third-party conduct of the City [i.e., “performing that voluntarily assumed service negligently by failing to warn of” the riptide].

*Gonzales*, 182 Cal.Rptr. at 75.

The appellate court remanded the case back to the trial court. There are no further opinions in this case in Westlaw, so the final result is not known.

The appellate court correctly noting that the statute “only applies to natural conditions on unimproved realty.”<sup>33</sup> I believe that this appellate court *could* have reached the same result more directly by declaring that the city had effectively improved that land by voluntarily providing lifeguard services. Instead, this appellate court, without any discussion, *assumed* that the beach was unimproved property.<sup>34</sup>

The appellate opinion in *Gonzales* mentions the whining of the city and why it was not valid:

If it can be held liable under the instant circumstances, City claims the immunity of section 831.2 becomes meaningless since it will be obligated to make the Pacific Ocean safe for public use, an impossible task, or compel it to close such beaches entirely or to withdraw all lifeguard services voluntarily provided to unimproved public beaches. Not so.

City misconstrues not only the character of the dangerous condition involved, but also the pertinent legislative intent underlying the adoption of section 831.2. True, the statutory provision was enacted to relieve public entities of the duty, burden, and expense of putting natural areas in a safe condition and defending claims for injuries flowing from their use. In essence, it provides primary insulation from liability, freeing the public entity of the duty of providing any protective service. However, once the public entity provides the protective service so as to create a dangerous condition, by combining a known natural defect within the property and the negligent performance of its directly related, voluntarily-assumed protective service, the underlying intent, of the provision of freeing the public entity from the duty of performing protective services, becomes moot.

*Gonzales*, 182 Cal.Rptr. at 76.

This last sentence words by the appellate court gives a second way to argue liability: the city has no duty to provide lifeguards, but having undertaken that duty, the lifeguards must perform non-negligently. This is also the rule in *Maussner*, *Sall*, and *Seelbinder* — there is generally no duty to warn of lightning, but when a landowner provides such a warning, it must be done non-negligently.

A later California appellate case harshly criticized *Gonzales*:

In terms of what it means for public entities, *Gonzales* was most certainly wrong. (See generally *Rombalski v. City of Laguna Beach*, *supra*, 213 Cal.App.3d at p. 856, 261 Cal.Rptr. 820 (conc. opn. of Crosby, J.). Its rationale makes no sense. Posting lifeguards on a beach does *nothing* to alter the natural condition of the beach or the surf. At most it just invites

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<sup>33</sup> *Gonzales*, 182 Cal.Rptr. at 75.

<sup>34</sup> *Gonzales*, 182 Cal.Rptr. at 75.

people to enter the surf. The court confused the idea of inviting people into an area (by posting lifeguards) with the affirmative physical alteration of that area (e.g., by dredging). The case is also vulnerable to the same criticism that Justice Arabian had for the majority opinion in *Southland*: “The majority view has the practical effect of discouraging activities which benefit the victims amongst us.” (See *Southland, supra*, 203 Cal.App.3d at p. 670, 250 Cal.Rptr. 57 (dis. opn. of Arabian, J.).)

*Swann v. Olivier*, 28 Cal.Rptr.2d 23, 29, n. 14 (Cal.App. 4 Dist. 1994).

I find *Swann* appalling. Posting lifeguards on the beach induces people’s “reliance on the proper performance of that service”.<sup>35</sup> That’s why *Swann* can truthfully say that posting lifeguards “invites people to enter the surf.” No one should be inviting people to enter a hazardous area without warning of unseen dangers. Despite what *Swann* declares, *Gonzales* was not wrong.

Five years after *Gonzales*, the California legislature passed a statute that gave public entities immunity, thus overruling *Gonzales*. The statute says:

(a) Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. The provisions of this section shall apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division.

(b) This section shall only be applicable to causes of action based upon acts or omissions occurring on or after January 1, 1988.

California Government Code § 831.21 (enacted 1987, still current Mar 2007).

Discussed in *Arroyo v. State of California*, 40 Cal.Rptr.2d 627, 631-632 (Cal.App. 1995) and *Fluehr v. City of Cape May*, 732 A.2d 1035, 1040 (N.J. 1999).

Another case in the same jurisdiction is discussed below, beginning at page 44.

#### reliance in *Gonzales*

The detrimental reliance argument in *Gonzales* was enlarged in a subsequent California appellate case:

However, in the pleading case of *Gonzales v. City of San Diego, supra*, 130 Cal.App.3d 882, 182 Cal.Rptr. 73, the court faced an issue of first impression of whether the absolute immunity of section 831.2 shielded the City from liability *as a matter of law at the demurrer stage* where the complaint alleged an essentially hybrid dangerous condition relating to unimproved public property, partially natural and partially artificial in character, the result of a

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<sup>35</sup> *Arroyo v. State of California*, 40 Cal.Rptr.2d 627, 631 (Cal.App. 1995) (“The point of *Gonzales* is that when a public entity voluntarily provides a particular protective service for particular members of the public, which induces their reliance on the proper performance of that service, section 831.2 does not necessarily provide immunity.”); also see *Gonzales*, 182 Cal.Rptr. at 76 (“Under the circumstances at bench, where a public entity voluntarily assumes a protective duty toward certain members of the public, even though there is no liability for its acts or omissions, upon undertaking the action on behalf of the public and inducing public reliance, the entity will be held to the same standard of care as a private individual or entity.”).

combination of a natural defect of the real property and the relied-upon *conduct* of the governing public entity.

In *Gonzales*, the plaintiffs alleged the City voluntarily provided lifeguard and police protection to a beach and surf area it owned and controlled, and by providing these services had assumed the obligation to warn the general public of unsafe surf conditions along the beach by posting areas as unsafe for swimming when such conditions exist and patrolling and providing lifeguard services to protect beach users and assist those in need of rescue. The complaint alleged the decedent entered the surf on a summer afternoon believing the absence of posted warnings and any police or lifeguard patrols indicated the area was safe for public swimming. However, there was a riptide condition and she drowned. The plaintiffs alleged the riptide condition had existed in the surf for a period of time sufficient for the City to have taken protective measures to warn beach users from entering the surf and, although it knew or should have known of the condition, it compounded the dangerous condition by negligently failing to post any warning, by not marking the beach and surf areas as unsafe for public swimming and by not adequately patrolling the area or having sufficient lifeguard or police service present at the time of the incident. Consequently, the heirs alleged their mother's death was proximately caused by the City's negligence in creating a dangerous and defective condition by failing to warn of the riptide within the surf. The City asserted absolute immunity under section 831.2. In holding that immunity provision inapplicable, the court of appeal explained plaintiffs alleged a hybrid dangerous condition, partially natural and partially artificial in character, the result of a combination of a natural dangerous riptide condition and the City's voluntarily providing lifeguard service, inducing public reliance on that protective service, and performing its assumed service negligently by failing to warn of the known, hazardous, natural condition. In other words, once a public entity voluntarily provides a protective service for certain members of the public, inducing their reliance on the non-negligent performance of that service, the public entity will not be shielded from potential liability by section 831.2 where the dangerous character of the natural condition is compounded by the public entity's negligent performance of the voluntarily assumed protective service. (*Gonzales v. City of San Diego, supra*, 130 Cal.App.3d at pp. 885-887, 182 Cal.Rptr. 73; see also *Winterburn v. City of Pomona* (1986) 186 Cal.App.3d 878, 882, 231 Cal.Rptr. 105.)

*McCauley v. City of San Diego*, 235 Cal.Rptr. 732, 735 (Cal.App. 4 Dist. 1987), review denied (Calif. 1987).

*McCauley* later says:

The facts underlying *Gonzales* are clearly distinguishable from those we confront here. The protective services voluntarily assumed by the City in *Gonzales* were active and ongoing and of the character to induce reasonable public reliance. In comparison here, the passive nature of a series of warning signs is designed simply to warn the people to take care if they assume the risk in using the unimproved public property in its natural condition. In *Gonzales*, once the city voluntarily assumed the duty of providing lifeguard services, it induced public reliance upon the expertise of those who provided the lifeguard service in detecting and warning of the existence of dangerous rip currents, latent in character to the majority of the unknowing, swimming public. .... Indeed, *Gonzales* only stands for the proposition section 831.2 will not cloak a public entity with immunity *when its own conduct is partially responsible for inducing a person to be victimized by a dangerous condition of the nature of a hidden trap.*

[footnote 7 explains that a draft of § 831.2 “would have permitted liability if natural conditions on unimproved property amounted to a hidden trap known to the public entity.

However, by rejecting that qualification, the Legislature was not declaring that a governmental entity would be cloaked with the immunity set forth in section 831.2 where it voluntarily assumes a protective service, inducing public reliance and through the negligent performance of that protective service concurrently causes a member of the public to be victimized by a dangerous, latent, and natural condition, as in *Gonzales*.”] *McCauley v. City of San Diego*, 235 Cal.Rptr. 732, 736 (Cal.App. 4 Dist. 1987), review denied (Calif. 1987).

An unreported U.S. District Court characterized *Gonzales*:

... the California cases involving voluntary assumption of duty by a public entity require some reliance by individuals as a prerequisite to the existence of a duty. See *Hartzler [v. City of San Jose]*, 146 Cal.App.3d at 10, [120 Cal.Rptr. 5, 7 (Cal.App. 1 Dist. 1975)] (“[O]nce [the government] undertakes action on behalf of a member of the public, and thereby induces that individual’s reliance, it is then held to the same standard of care as a private person or organization.”) (Emphasis added). The *Gonzalez* case, upon which plaintiff relies, clearly involved such reliance. There the complaint alleged that the government entity owned and controlled a public beach and voluntarily provided lifeguard and police protection, thereby assuming an obligation to warn the general public of unsafe conditions in the surf next to the beach, to post areas unsafe for swimming when unsafe conditions existed, and to provide lifeguard services to protect beach users and to assist those in need of rescue. *Gonzales*, 130 Cal.App.3d at 884- 885. Decedent *Gonzales* arrived at the beach in mid-afternoon and, in the absence of any posted warnings or any lifeguard patrol warning of a dangerous rip tide condition known to the city defendant, assumed the area was safe for public swimming, entered the water and drowned. *Id.* *Gilberti v. U.S.*, Not Reported in F.Supp., 1993 WL 187732 at \*2 (N.D.Cal. 1993).

#### Missar (skiing)

- *Missar v. Camelback Ski Resort*, 30 Pa. D.&C.3d 579 (Pa.Com.Pl. 3 Aug 1984).

Missar sued resort for failure to warn of worsening weather conditions:

In the complaint, it is alleged that plaintiff fell and was injured while skiing at the resort on February 6, 1982 as the result, inter alia, of defendant’s failure to note worsening weather conditions and either to warn plaintiff and other skiers of the dangers involved or to close the skiing area when they became unsafe for skiing.

*Missar*, 30 Pa. D&C3d at 580.

The trial court granted summary judgment for resort because of a Pennsylvania statute that skiers assume the risk of injury while skiing. The opinion did *not* discuss failure to warn of weather, which I see as possibly distinguishable from injuries suffered while skiing during cold, but *not* stormy, weather. The opinion also mentions a second holding: an exculpatory contract set in five-point type is *not* enforceable, because it is too difficult to read.

Mostert (theater has duty to warn of flood)

- *Mostert v. CBL & Associates*, 741 P.2d 1090 (Wyo. 14 Aug 1987).

While Plaintiffs were watching a movie in an indoor theater in a shopping mall, the mall management (CBL) informed the theater that the NWS had issued warnings of severe thunderstorm, flash flood, and tornadoes, and that “local emergency management officials demanded that citizens stay indoors”.<sup>36</sup> The theater failed to inform its patrons, so after the movie was over, the patrons exited the theater and drove home. On the way home, plaintiff’s automobile was stalled by flood waters, and Plaintiff’s daughter drowned. Plaintiff sued both the mall (CBL) and the theater (AMC) for negligence.

This case was dismissed by the trial court, because the longstanding rule is that a landowner has a duty to warn people of non-obvious dangers on the premises, but in this case, the danger was outside the premises, and the drowning occurred two miles<sup>37</sup> from the theater. In a controversial 3 to 2 decision, the Wyoming Supreme Court held that the theater did have a duty to warn its patrons about weather hazards that were both known to the theater and could foreseeably cause injury.

Wyoming law imported from California has eight factors for a judge to consider when determining the existence of a legal duty in a tort case:

Some of the key policy factors to be considered are: (1) the foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved. *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, 342, 83 A.L.R.3d 1166 (1976).

*Gates v. Richardson*, 719 P.2d 193, 196 (Wyo. 1986).

The Wyoming Supreme Court then applied its eight factors to the facts alleged in *Mostert*:

1. The foreseeability factor — AMC was aware of a severe thunderstorm and the presence of tornadoes and flash flooding outside the mall and in the vicinity. It was also aware that the storm became progressively worse and that city officials had demanded that citizens stay off the streets to avoid injury.
2. The closeness factor — the injury suffered by appellants was not remote. Kumi Marie Mostert drowned only minutes after AMC's dereliction in not informing theatre patrons.
3. The degree of certainty factor (that plaintiff had suffered injury) — the injury suffered by the Mostert family was the greatest possible injury — the death of Kumi Marie.

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<sup>36</sup> *Mostert*, 741 P.2d at 1091.

<sup>37</sup> *Mostert*, 741 P.2d at 1102-1104 (Cardine, J., concurring and dissenting).

4. The moral blame factor — the Mostert family was a business invitee of AMC and unaware of the storm. AMC was aware of the storm, flooding and attendant dangers. AMC was aware that city officials had demanded that citizens stay off the streets to avoid injury. Despite this superior knowledge, AMC did nothing to warn its patrons.
5. The policy of preventing future harm factor — a rule that business managers have a duty to pass on knowledge to invitees regarding off-premises dangers may reduce injury in the future. If businesses understand they have this duty, they would likely tell patrons what they know about off-premises risks.
6. The burden on defendant factor — the burden of passing AMC's superior knowledge on to patrons regarding the flood appears to be minimal. Theaters find a simple way to pass on to patrons all kinds of information. While we cannot assess the financial costs to AMC, we do not foresee them to be overly excessive. Moreover, the chance of a natural disaster is rare.
7. The consequences to community and courts factor — the consequences of a "duty rule" on the community and court system is a neutral factor.
8. The insurance factor — we do not know the cost of insurance or its availability for the risk involved here. Even if insurance were not available, that single factor should not be dispositive of this case.

*Mostert*, 741 P.2d at 1094-1095.

The Wyoming Supreme Court mentioned the well-known case of *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976) in which a psychologist was held liable for failure to warn a victim of his patient's intent to kill her, which the Wyoming Supreme Court characterizes as an "off-premises risk".<sup>38</sup> That's a bit off the mark, because *Tarasoff* is **not** about the legal duty of a landowner to invitees. *Tarasoff* also balances a duty to warn a third party with a duty of confidentiality to a patient, an issue not found in any case about duty to warn of lightning.

The majority opinion specifically mentions the "minimal burden placed" on the theater in fulfilling this duty, when the court concluded:

Balancing the factors set out in *Gates v. Richardson*, *supra*, we do not detect a public policy against imposing a duty on AMC to advise patrons of off-premises dangers. The risks to which the Mostert family were exposed far outweighed the minimal burden placed on AMC to reveal its knowledge to its patrons.

We conclude that appellee AMC owed the Mostert family an affirmative duty to exercise reasonable or ordinary care for their safety which includes an obligation to advise them of off-premises danger that might reasonably be foreseeable. We are not suggesting by our determination that AMC had a duty to restrain its patrons or even a duty to advise them what to do. The duty as we see it is only to reveal what AMC knew to its customers. [FN4]

FN4. Determination of what knowledge AMC actually possessed concerning the inclement weather and resulting dangers in conjunction with any failure of duty on the part of AMC, remain matters in issue to be proven at trial.

*Mostert*, 741 P.2d at 1096.

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<sup>38</sup> *Mostert*, 741 P.2d at 1095.



The court held that the shopping mall owner (CBL) had no duty to the Plaintiffs, since CBL had warned the theater and the Plaintiffs exited the theater through a door in the theater, without passing into or through the shopping mall.<sup>39</sup>

There is no further opinion in the Westlaw database for *Mostert*. The Plaintiff's attorney informed me the case settled prior to trial.<sup>40</sup>

Fuhrer (possible duty to warn of riptide)

- *Fuhrer v. Gearhart-By-The-Sea, Inc.*, 760 P.2d 874 (Or. 30 Aug 1988).

The facts alleged by Plaintiff are set out in the Oregon Supreme Court's opinion:

Plaintiff's decedent was a paying guest at defendant Gearhart's resort. The hotel is adjacent to an ocean beach owned by the state. The state had jurisdiction over the beach pursuant to ORS 390.635.

While on the beach, decedent saw some children struggling in the ocean surf, apparently caught in an undertow, riptide or other hazardous condition of the waters adjacent to the beach. The children and their parents were also paying guests at the resort. Decedent and others attempted to save the children. The children were saved by the efforts of decedent and the other rescuers, but decedent died from drowning or cardiac arrest caused by his rescue efforts.

Gearhart did not warn its guests of the dangerous undertow, riptide or other hazardous conditions of the surf. It did not provide lifeguards, lifesaving equipment or warning flags. It also did not rescue or aid the rescue of decedent or the children. The state likewise did not warn, have lifeguards on duty or provide lifesaving equipment or warning flags. Plaintiff alleged that decedent's death was the result of defendants' failure to warn or provide safety measures.

*Fuhrer*, 760 P.2d at 877.

Fuhrer's widow sued the hotel and the state, which owned the beach. Both defendants moved to dismiss the complaint. The hotel argued it had no legal duty to warn of hazards off its premises. The state argued that it had no legal duty to warn/protect "against natural conditions."<sup>41</sup> The trial court granted the motions to dismiss, the intermediate appellate court affirmed, the Oregon Supreme Court remanded for consideration of three 1987 cases. The intermediate appellate court again affirmed the dismissals, and Plaintiff made a second trip to the Oregon Supreme Court.

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<sup>39</sup> *Mostert*, 741 P.2d at 1098-1099.

<sup>40</sup> Henry F. Bailey, personal communication, 22 March 2007.

<sup>41</sup> *Fuhrer*, 760 P.2d at 876.

Instead of discussing the usual factors to consider when establishing a legal duty in a tort case, the Oregon Supreme Court focused on “foreseeability and unreasonable conduct”.<sup>42</sup> The court noted that the fact that children were struggling in the water should have warned decedent of the danger, but perhaps with a warning decedent might have chosen another means of rescue.<sup>43</sup> The court concluded that the hotel *could* have a legal duty to warn of off-premise dangers:

It is the role of the trier of fact to determine whether it is unreasonable not to warn of a danger or otherwise provide protection in the specific circumstances of each case. Innkeepers and possessors of land have an affirmative duty to warn their paying guests and invitees of foreseeable unreasonable risks of physical harm; when the risk involves a dangerous condition off the premises, the trier of fact must decide the reasonableness of the failure to warn in all the circumstances.

In the present case, there is no allegation in the complaint that Gearhart knew or should have known of the dangerous condition of the ocean surf. Without knowledge of a dangerous condition or reason to know of the condition, Gearhart could not have foreseen an unreasonable risk of harm. If plaintiff were able to prove all the facts alleged in the complaint, plaintiff would still not have proved one element necessary to recovery, the foreseeability to defendant of an unreasonable risk of harm to persons in plaintiff's position. Even if Gearhart had an affirmative duty to take reasonable steps to warn and protect, the duty would extend only to warn of and protect from knowable risks. Because plaintiff might prove all the facts alleged and still not be entitled to recover, the complaint was properly dismissed.

*Fuhrer*, 760 P.2d at 879-880.

Thus, an incomplete or defective Complaint was fatal to Plaintiff's case against the hotel.

However *Fuhrer* does hold that a landowner can have a legal duty to warn of dangers off the premises.

The same lack of alleged foreseeability in the Complaint also doomed Plaintiff's case against the state, as owner of the unimproved beach.

Plaintiff has also alleged that the state, as owner of the beach, was similarly liable for failure to warn or protect. The state argued that it cannot be liable for natural conditions on undeveloped and unimproved public land. Even if this argument is correct, the state admits that it could be liable for failure to warn of, or protect from, natural conditions on developed and improved public land, and it cannot be determined at this stage of the proceedings which kind of land is involved. Accepting the allegations in the complaint as facts, as we must on a motion to dismiss, the analysis of the complaint against the state is the same as the analysis of the complaint against Gearhart. Because there is no allegation that the state was aware of, or had reason to know of, the dangerous condition, the complaint has failed to state ultimate facts sufficient to constitute a claim. [FN3]

FN3. This opinion concentrates on the failure to warn, as did the briefs of the parties. The failure to provide safety measures is measured by the same standard as the standard used for failure to warn. One factor in determining the reasonableness of any failure to warn or act is the opportunity and cost of warning

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<sup>42</sup> *Fuhrer*, 760 P.2d at 877-878.

<sup>43</sup> *Fuhrer*, 760 P.2d at 878-879.

or taking action. Normally, providing safety measures is more costly, and the cost may make a failure to act reasonable when a failure to warn would not be reasonable; otherwise, the analysis of the two situations should be no different. Because plaintiff has not alleged facts sufficient to constitute a claim against either defendant on a failure to warn theory, the complaint also fails on a failure to provide safety measures theory.

*Fuhrer*, 760 P.2d at 880.

However, *Fuhrer* stands for the proposition that a landowner can have a legal duty to warn of, and to protect against, naturally occurring hazards, not only undertow or rip tide in *Fuhrer*, but possibly also lightning in a future case.

The Oregon Supreme Court criticized the court below<sup>44</sup> for saying defendants did not create the risk of harm by the surf in the ocean.

The [Oregon] Court of Appeals' decision on remand in this case held that defendants did not create the risk of harm in that they did not "create" the dangerous condition of the surf. This does not bear on whether defendants unreasonably failed to warn or protect others who were at risk. In a warning case, the risk of harm created is exposure to a danger known to the defendant. In *Fazzolari*, [734 P.2d 1326 (Or. 1987)] the defendant school district did not create the rapist or the rape that injured the plaintiff in that case, but a jury could have found that the school district was or should have been aware of the risk of sexual assault and neither warned plaintiff nor took other action to protect plaintiff and others in her position. The risk in a failure-to-warn case is not the hazard itself, but the chance that someone predictably will be exposed to danger, be it rape or dangerous surf, if no warning is made.

A defendant may be liable if the defendant can reasonably foresee that there is an unreasonable risk of harm, a reasonable person in the defendant's position would warn of the risk, the defendant has a reasonable chance to warn of the risk, the defendant does not warn of the risk, and the plaintiff is injured as a result of the failure to warn.

*Fuhrer*, 760 P.2d at 878.

This is an important remark, because landowners also create neither weather nor lightning. However, landowners should at least warn their invitees of hazardous local weather conditions.

#### *Caldwell v. Let The Good Times Roll (wind)*

- *Caldwell v. Let The Good Times Roll Festival*, 717 So.2d 1263 (La.App. 25 Aug 1998), *cert. den.*, 729 So.2d 566 (La. 25 Nov 1998).

In June 1992, an annual Let The Good Times Roll festival was held inside a large tent in Shreveport, Louisiana riverfront. At 20:00, "the weather began to worsen, beginning with rain." At 20:13, the National Weather Service broadcast a severe weather warning for the area that included the festival. The Shreveport police radio dispatcher did not relay this warning until 20:45, a delay of 32 minutes, which might be a negligent delay. Off-duty police officers in the festival

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<sup>44</sup> *Fuhrer v. Gearhart By The Sea, Inc.*, 742 P.2d 58, 59 (Or.App. 1987) ("Plaintiff does not allege that conduct of either of the defendants created the risk to her husband. Even if a duty to warn might have existed because of a status, relationship or particular standard of conduct, the failure to warn did not create the risk to plaintiff's husband.").

tent heard the warning at 20:45, but the warning came too late. Violent wind gusts, estimated to be 75 miles/hour — which winds were part of a thunderstorm — caused the tent to collapse, injuring several people.

A jury found for plaintiffs, but a Louisiana appellate court reversed, because:

1. the occurrence of 75 mile/hour wind was not reasonably foreseeable, because such strong winds were “rare”. 717 So.2d at 1271-73.
  2. the city had no duty to protect the public from the weather. 717 So.2d at 1274-75.
- The Louisiana Supreme Court refused to hear an appeal.

#### Dykema (wind from thunderstorm)

- *Dykema v. Gus Macker Enterprises, Inc.*, 492 N.W.2d 472 (Mich.App. 8 Sep 1992) (Nonpaying spectator at outdoor basketball tournament injured by falling tree limb. Organizers and sponsors of tournament had no duty to warn plaintiff of approaching thunderstorm.), *leave to appeal denied*, 498 N.W.2d 740 (Mich. 1993).

*Dykema* is discussed above, beginning at page 19.

#### Princess Hotels (swimming in ocean)

- *Princess Hotels Internat., Inc. v. Superior Court*, 39 Cal.Rptr.2d 457 (Cal.App. 1 Dist. 28 Mar 1995), *review denied* (Cal. 1995).

A husband and former wife who lived in California took a vacation in Mexico at a hotel on the beach. The husband died and the former wife was seriously injured by “sudden undertow, large waves, and riptide currents” while swimming in the ocean. She sued the Mexican hotel in a California state court on a failure to warn theory. The hotel moved for summary judgment, which the trial court denied. An appellate court granted the motion for summary judgment, holding that the hotel neither owned nor controlled the beach. “Like all beaches in Mexico, the beach in front of the Pierre Marques is federal property, patrolled only by Mexican Marines and police. The beaches are considered government property, subject only to government control, and open to public access at any time.”<sup>45</sup> The court cited the rule of law: “... a landowner has no duty to warn of dangers beyond his or her own property when the owner did not *create* these dangers.”<sup>46</sup> And the court said: “... we hold that a hotel has no duty to warn its guests of a dangerous condition of adjacent property over which the hotel has no control, to wit, the ocean currents.”<sup>47</sup>

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<sup>45</sup> *Princess Hotels*, 39 Cal. Rptr. 2d at 458.

<sup>46</sup> *Princess Hotels*, 39 Cal. Rptr. 2d at 459, quoting *Swann*, 28 Cal. Rptr.2d at 26.

<sup>47</sup> *Princess Hotels*, 39 Cal. Rptr. 2d at 457.

Furthermore, the hotel provided a disclaimer in the Directory of Services pamphlet in each room. There was also a warning sign with red letters on a white background posted between the hotel and beach.<sup>48</sup> These alleged facts make it difficult for Plaintiff to prevail, but the appellate court did not consider these facts, because the hotel had no duty to warn of off-premises hazards.

There are two meanings of the word *control*, one meaning the legal authority to command, the other meaning the actual exercise of that authority. Normally, when we speak of a landowner's control of his/her land, we mean he/she has the authority to command, for example controlling access of people to his/her land or controlling activities of people on his/her land. The appellate court considered the other use of the word "control" in the *Swann* case — and held that man can *not* command the ocean, or, more precisely, the ocean will not obey man. *Princess Hotels* says:

*Swann* then waxed eloquent: "In the present case, by contrast, any thought of 'control' over the area of injury is out of the question. The idea that anyone can control the 'sledge hammering seas' and 'inscrutable tides of God' is debatable, to say the least. (See *Carolina Beach Fish [.] Pier v. Town of Carolina Beach* (1970) 277 N.C. 297 [177 S.E.2d 513] ..., quoting Melville's *MOBY DICK*.) The idea that [defendants] can control the ocean adjacent to their land is nothing short of ludicrous. 'Even the fabled King Canute with all of his power could not control the water by fiat.' (*Queen City Terminals, Inc. v. City of Cincinnati* (S.D. Ohio 1987) 666 F.Supp. 1035, 1039, fn. 4.)"

*Princess Hotels*, 39 Cal.Rptr.2d at 459-460, quoting *Swann*, 28 Cal.Rptr.2d at 28.

Plaintiffs in litigation about transient naturally occurring phenomena (e.g., rip tide, sandbars, lightning, etc.) are *not* asking for the defendants to remove the phenomena, but only to *warn* of the possibility or actuality of the phenomena. Therefore, it is not relevant whether man can control these naturally occurring phenomena. Are judges really so stupid that they sincerely confuse controlling access of people to land with controlling naturally occurring phenomena on that land? Or had the judges in *Swann* and *Princess Hotels* decided on a conclusion and were desperate to find a way to justify their decision, while appearing erudite?

*Swann* and *Princess Hotels* mentioned that "liability may be imposed on the landowners when they 'received a special commercial benefit from the area of the injury plus had direct or de facto control of that area.'" <sup>49</sup> The trial court denied summary judgment to the hotel, because the hotel profited from guests who chose that hotel because of its proximity to the beach.<sup>50</sup> The appellate court held that the rule required *both* control by, *and* "commercial benefit" to, the hotel, but — as mentioned in the paragraph above — "the ocean is simply not within the control of

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<sup>48</sup> *Princess Hotels*, 39 Cal. Rptr. 2d at 458.

<sup>49</sup> *Princess Hotels*, 39 Cal. Rptr. 2d at 459, quoting *Swann*, 28 Cal. Rptr.2d at 26.

<sup>50</sup> *Princess Hotels*, 39 Cal.Rptr.2d at 459.

humankind.”<sup>51</sup> This rule of law about “commercial benefit” was rejected by the California Supreme Court in a later case:

The opinions in *Swann* and *Princess Hotels*, and Justice Brown's dissent, fail to explain why liability for injuries on adjacent property should depend upon whether the defendant derives a commercial benefit from that property. .... If a visitor is injured on property controlled by the defendant, liability does not depend upon whether the defendant derived a commercial benefit from the property. [footnote omitted] We disapprove any language to the contrary in *Swann v. Olivier, supra*, 22 Cal.App.4th 1324, 28 Cal.Rptr.2d 23, and *Princess Hotels Internat., Inc. v. Superior Court, supra*, 33 Cal.App.4th 645, 39 Cal.Rptr.2d 457. *Alcaraz v. Vece*, 929 P.2d 1239, 1249-50, 60 Cal.Rptr.2d 448, 458 (Cal. 1997).

The California Supreme Court rejected the “commercial benefit” test, because that Court had earlier rejected the traditional distinction between invitees, licensees, and trespassers in liability cases.<sup>52</sup> However, in states where the traditional distinction remains good law, the concept of “commercial benefit” seems to be another way of identifying a duty to an invitee (i.e., people who pay for use of a hotel or recreational facility), as opposed to no duty to a licensee or trespasser. It would be inequitable for people to enter private land without paying the possessor of land and then demand improvements, such as warnings of natural phenomena. Indeed, some states have statutes that immunize landowners from torts for recreational use of their land when the user did not pay an admission fee, see examples beginning at page 7, above.

In reviewing some cases from other jurisdiction that held possessors of land were liable for failure to warn of off-premises hazards, the California appellate court took a nasty swipe at the Ninth Circuit:

The Ninth Circuit, in a case arising under Hawaii state law, held there was a duty to warn of “the powerful, surging surf [as] an unapparent, dangerous condition...” (*Tarshis v. Lahaina Investment Corporation* (9th Cir. 1973) 480 F.2d 1019, 1021.) The *Tarshis* opinion is short on analysis and relies only on rather old law, which suggests that a private beach owner (not an innkeeper) was liable for injuries in adjacent rivers or oceans. (See *Gratto v. Palangi* (1958) 154 Me. 308, 147 A.2d 455; *Perkins v. Byrnes* (1954) 364 Mo. 849, 269 S.W.2d 52.) *Princess Hotels*, 39 Cal.Rptr.2d at 461.

The appellate court in *Princess Hotels* concluded that the victims were responsible for their own injuries:

We regularly review and must affirm summary judgments in tort cases denying recovery to plaintiffs who have plainly been the *sole* authors of their own injuries, through carelessness or by engaging in conduct fraught with risk. (See, e.g., *State of California v. Superior Court* (1995) 32 Cal.App.4th 325, 39 Cal.Rptr.2d 1 [A horseback rider, knowing horses and mountain bikes do not mix, nevertheless rides a state park trail on which they do; the horse is spooked by a mountain bike and throws plaintiff; plaintiff sues the *state* on a wholly invalid

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<sup>51</sup> *Princess Hotels*, 39 Cal.Rptr.2d at 461.

<sup>52</sup> *Rowland v. Christian*, 443 P.2d 561, 568, 70 Cal.Rptr. 97, 104 (Cal. 1968). See *Alcaraz v. Vece*, 929 P.2d 1239, 1244, n.2, and 1249 (Cal. 1997).

theory of liability.]) Ocean swimming is dangerous; in this case, that dangerous conduct exacted a horrible price, but the hotel simply bore no legal responsibility for the tragedy. *Princess Hotels*, 39 Cal.Rptr.2d at 461.

#### Rygg (swimming in ocean)

- *Rygg v. County of Maui*, 98 F.Supp.2d 1129 (D.Hawai'i 30 Dec 1999) (denying summary judgment motion of hotel),
- *Rygg v. County of Maui*, 122 F.Supp.2d 1140 (D.Hawai'i 3 Aug 2000).

The Rygg family from Montana was a paying guest in a hotel in Hawaii on 13 Mar 1998, when Philip John Rygg was injured by a shorebreak wave that slammed his head into the ocean bottom and damaged his spinal cord. This accident left John a quadriplegic. He died 77 days later of pulmonary complications. John's family sued the hotel and the county of Maui for negligently failing to warn of dangerous ocean currents. The defendants moved for summary judgement. The court took note of a Hawaii state statute that had been passed in 1994.

*Hotelkeeper's liability limited for certain beach and ocean activities.* In a claim alleging injury or loss on account of a hazardous condition on a beach or in the ocean, a hotelkeeper shall be liable to a hotel guest for damages for personal injury, death, property damage, or other loss resulting from the hotel guest going onto the beach or into the ocean for a recreational purpose, including wading, swimming, surfing, body surfing, boogie boarding, diving, or snorkeling, only when such loss or injury is caused by the hotelkeeper's failure to warn against a hazardous condition on a beach or in the ocean, known, or which should have been known to a reasonably prudent hotelkeeper, and when the hazardous condition is not known to the guest or would not have been known to a reasonably prudent guest. A hotelkeeper owes no duty and shall have no liability for conditions which were not created by the hotel to a person who is not a guest of the hotel for injury or damage resulting from any beach or ocean activity.

As used in this section, "beach" means the beach fronting the hotel, and "hotel guest" means a guest of that particular hotel and other persons occupying the assigned rooms. Hawaii Revised Statute § 486K-5.5, quoted in *Rygg*, 98 F.Supp.2d at 1132.

The District Judge is inconsistent about this statute. In one place,<sup>53</sup> the judge says "the holding in *Tarshis* appears to have been legislatively overridden by H.R.S. § 486K-5.5". (*Tarshis* is discussed above, at page 34.) But one page later, the judge says:

Furthermore, Plaintiffs correctly point out that the only substantive limitation on liability contained in the statute is the fact that a beachfront hotel is no longer liable for injuries incurred by casual passersby who have no nexus with the hotel. See Plaintiffs' Opposition, Oct. 20, 1999, at 4. In all other respects, the general duty to warn guests incorporated in H.R.S. § 486K-5.5 essentially reflects the standard laid out in *Tarshis*. Compare H.R.S. § 486K-5.5 (a hotelkeeper shall be liable "only when such loss or injury is caused by the hotelkeeper's failure to warn against a hazardous condition on a beach or in the ocean, known, or which should have been known to a reasonably prudent hotelkeeper, and when the hazardous condition is not known to the guest or would not have been known to a reasonably

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<sup>53</sup> *Rygg*, 98 F.Supp.2d at 1135, n. 3.

prudent guest") with *Tarshis*, 480 F.2d at 1020 (holding that a hotel owed its guest "the duty to warn her of dangerous conditions in the Pacific Ocean along its beach frontage which were not known to her or obvious to an ordinarily intelligent person and either were known or in the exercise of reasonable care ought to have been known to the [hotel]").

*Rygg*, 98 F.Supp.2d at 1136.

The judge's latter statement appears to be true: the statute is nearly the same as the holding in *Tarshis*, except that the statute abolishes liability of the hotel to nonguests.

The U.S. District Judge found that the hotel did not "front" the beach within the meaning of the statute, because a road and a park owned by the county are both located between the hotel and beach.<sup>54</sup> Therefore, the statute did not apply in this case, and the case would need to be decided by the common law of Hawaii. The court cited three Hawaii cases for the proposition that a possessor of land could have a duty to warn of off-premises hazards, if it is foreseeable that guest could go to those locations. The court found that summary judgment could *not* be granted to the hotel, because the hotel might have a duty warn guests of hazards at locations where they could foreseeably go.

In the instant case, Plaintiffs have proffered evidence from which a reasonable jury might conclude that it was foreseeable that Plaintiffs and other hotel guests might go to Kamaole II Beach Park. In particular, Plaintiffs repeatedly point to Defendant's brochure, which touts the hotel's location "overlooking the golden sands of Kamaole Beach Park II." Plaintiffs' Opposition, Oct. 20, 1999, at Exh. B. The Court cannot find as a matter of law that it was not foreseeable to Defendant that its hotel guests might go to Kamaole II Beach Park and be injured there by dangers of which Defendant knew or should have known.

Furthermore, the Court rejects Defendant's argument that this outcome violates the State of Hawaii's public policy. Defendant's liability is limited by the common law requirement that the injury must have been foreseeable. Defendant's assertions that hotels will have to imprison their guests to avoid liability is unfounded. [footnote omitted] Accordingly, the Court DENIES Defendant's motion for summary judgment. [footnote omitted]

*Rygg*, 98 F.Supp.2d at 1138-39.

The U.S. District Court judge wrote a lengthy opinion that concluded that the warning signs and at least one red flag posted by the lifeguard were adequate warnings.<sup>55</sup>

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<sup>54</sup> *Rygg*, 98 F.Supp.2d at 1134.

<sup>55</sup> *Rygg*, 122 F.Supp.2d at 1140-1163.



## Pacheco (riptide)

- *Pacheco v. U.S.*, 220 F.3d 1126 (9th Cir. 31 July 2000).

The Pacheco family were residents of Kansas, who traveled to California on a vacation at the Big Sur Beach in Los Padres National Forest. The Beach is operated by Parks Management Company, but the land is owned by the U.S. Government. The facts alleged by Plaintiffs include:

When the Pacheco family entered the Beach by automobile and paid the [\$5 per auto] entry fee, they were given two toy plastic beach buckets for use on the Beach. One of the toy buckets was perforated, apparently to let sea water drain out when a child used it to play in the surf. While Ivy was playing and wading, not swimming, in a calm portion of the water, the surf rolled up on the Beach. It caught her, and the riptide swept her out into the ocean where she drowned. Her mother and her grandmother both rushed to save Ivy, but they too were caught by the riptide and carried into the ocean where they also drowned. Those familiar with riptides appreciate that a riptide can suck the sand out from underfoot, cause you to lose your balance and then swiftly sweep you out to sea. The Pacheco family from the Midwest was not familiar with the danger lurking beneath the blue waters at the Beach. It is not necessary to go into deep water, or even venture far into the surf, to be at the mercy of riptides.

*Pacheco*, 220 F.3d at 1128.

There were no warnings given by either the Parks Management Company or the U.S. Government:

One feature of the Beach, which is not advertised or otherwise made known, is that this particular Beach allegedly has particularly hazardous surf with strong riptides and undercurrents which flow swiftly with great force from the shore back into the ocean. When the Pachecos visited the Beach, there was no warning whatsoever about the riptides. The danger of the riptides, capable of carrying persons out into the ocean, is not readily apparent, particularly to young children who are less able to anticipate the dangers and cope with the undertow. Nevertheless, the dangerous riptides were known to defendants and to others in the vicinity. The drownings in this case were not the first such incident. Other visitors allegedly have been carried out to sea; only a couple of months before this incident one man had to be rescued by helicopter. Plaintiff alleges that defendants for at least a year prior to this incident had actual knowledge of the extreme hazards of this Beach and, in particular, should have foreseen the likelihood of a child being caught and swept away to drown.

*Pacheco*, 220 F.3d at 1128.

The remaining family sued for the three wrongful deaths. The U.S. District Court dismissed the Complaint, because defendants had no duty to warn of naturally occurring dangers. The U.S. Court of Appeals, in 2 to 1 decision, reversed.

Looking at the facts in a practical, realistic, and common sense manner as we see it, this situation has the elements of something similar to entrapment, not criminal, but civil. As counsel for the United States conceded in response to questioning at oral argument, an express invitation to enter the ocean alters the analysis. While there was no express representation that the ocean adjacent to the Beach was suitable for wading, appellant alleges that at the time the Pachecos paid their entry fee to the Beach, they were given two plastic toy beach buckets for use at the Beach, one of which had a perforated bottom suitable for draining sea water.

Supplying perforated buckets could be construed as encouraging children to use the water in their beach play as well as representing that such action would be safe.

*Pacheco*, 220 F.3d at 1131-32.

The U.S. Court of Appeals concluded:

We find that the facts as alleged could support a claim based on a theory that the defendants actually invited children to play, by giving them toy buckets, in the water immediately adjacent to the dry part of the beach, and therefore had a duty to warn the Pachecos of the dangerous condition and breached this duty. Ivy Pacheco was not swimming in the ocean but rather wading in the surf that washed up on the sand. The defendants had actual knowledge of the danger of this behavior, yet did nothing to pass this knowledge on to visitors. The defendants had created an open public display of their control of the area, and there was nothing to signal that their control ended at the high water mark. There was no way for the public to get to the water without paying the access fee at the Beach entry and information booth. While defendants could not eliminate the hazards in the ocean, they could satisfy their duty to appellants by posting or distributing warnings on the property under their control. [citation omitted] It is a triable question whether under all the circumstances it is reasonable to conclude that the portion of the water immediately adjacent to the dry part of the Beach was controlled by defendants. That is not the same as control of the ocean, but only control of the limited area which the ocean sometimes covers.

*Pacheco*, 220 F.3d at 1132-33.

This is the final opinion in Westlaw, the result on remand for trial is not known.

A law student wrote a note that argues that the U.S. Court of Appeals in *Pacheco* applied the law of Hawaii, not California, to an injury at a beach in California, thus *Pacheco* reached the wrong result.<sup>56</sup>

The holding in *Pacheco* was favorably cited by the U.S. Court of Appeal for the Third Circuit:

Although *Banks* [*v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984)] involves the death of a guest from the actions of a third party, it nonetheless states a principle that is relevant to the question before us, which it calls the "sphere of control" test. That is to say, when an innkeeper possesses or exercises sufficient control over the property adjacent to his premises, he has the power to take protective measures to reduce the risk of injury on that property. Having such power, the innkeeper has a duty to exercise it to the benefit of his patrons.

The specific factual setting of a case will ultimately dictate whether a party is in the position to control or has the power to control land adjacent to his property such that a duty to protect or warn arises. *See id.* at 227. The "sphere of control" test requires that we look at the circumstances of the case to ascertain whether sufficient control exists over the adjacent premises. Relevant indicia of control include who is responsible for the safety of guests, who has the authority to dictate who may use the property, and whether the guests were invited by the property owners to use the adjacent land. *See Pacheco v. United States*, 220 F.3d 1126, 1131- 32 (9th Cir. 2000). If, for example, an innkeeper leases property to operate a hotel, but the government retains control over the land for the use of general public, the innkeeper must

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<sup>56</sup> Amy Baghranian, Note, "Entering Uncharted Waters: The Abandonment of the Control Standard in *Pacheco v. United States*," University of California at Davis Law Review, Vol. 35, pp. 1045-1083 (April 2002).

only warn guests of dangers on the leased property and the ingress or egress therefrom. *See Stedman v. Spiros*, 23 Ill.App.2d 69, 161 N.E.2d 590 (1959), *cited in Banks*, 722 F.2d at 223-24; *see also Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308, 1311 (9th Cir. 1977) (finding that a hotel had no duty to protect someone who was injured diving from a seawall owned by the hotel but used as a public easement "[b]ecause the hotel had no right to control the use of the public thoroughfare ... [and][i]t is inequitable to impose a duty of maintenance on one without authority to control use").

*Fabend v. Rosewood Hotels and Resorts, L.L.C.*, 381 F.3d 152, 156 (3rd Cir. 2004) (Plaintiff injured by "dangerous shorebreak condition" at the beach while bodysurfing at the Virgin Islands.) The District of Columbia Circuit then remarked:

The Fifth Circuit in *Banks*, as well as our sister circuits, have adopted a "sphere of control" test which also recognizes a boundary of responsibility for proprietors that extends beyond their front door. *Banks* employed such a test in determining whether a hotel had a duty to protect a guest from a criminal assault just outside the hotel's exit and on a public sidewalk. *Id.* at 227. Applying the Restatement, the Third Circuit adopted that test in *Fabend v. Rosewood Hotels and Resorts, LLC*, 381 F.3d 152, 156 (3d Cir. 2004). "[W]hen an innkeeper possesses or exercises sufficient control over the property adjacent to his premises, he has the power to take protective measures to reduce the risk of injury on that property" and "has a duty to exercise it to the benefit of his patrons." *Id.* The sphere of control test, *Fabend* held, "requires that we look at the circumstances of the case to ascertain whether sufficient control exists over the adjacent premises." *Id.*; *see Pacheco v. United States*, 220 F.3d 1126, 1132 (9th Cir. 2000) (where defendants charged permit fee for beach access, the Court looked to, among other things, whether "defendants exercised control over what visitors to the beach did" in determining whether defendants had a duty to warn of dangers in the water adjacent to the beach). [footnote omitted]

*Novak v. Capital Management and Development Corp.*, 452 F.3d 902, 909-910 (D.C.Cir. Jul 07, 2006), rehearing en banc denied (Sep 26, 2006) (Plaintiffs were attacked while leaving dance club. "The club's operators allegedly knew that there had been numerous attacks on their customers in and around the club at that time of night and yet failed to take steps to protect Novak and Valdivia." The U.S. Court of Appeals reversed summary judgment by trial court.)

#### Cunningham (tornado)

- *Cunningham v. Braum's Ice Cream and Dairy Stores*, 80 P.3d 35 (Kan. 12 Dec 2003).

This is a conventional case, which holds that an owner of land has no legal duty to warn of adverse weather off-premises. There was a National Weather Service tornado warning in effect for the area, and employees of Braum's store were aware of telephone reports of a tornado in the area. In response, the employees decided to shut the store, and "shooed" their customers out of the store. While one of the customers was driving away, a "tornado threw a truck into their car." The trial court granted defendant's motion for summary judgment and the Supreme Court of Kansas affirmed.

The store had a written emergency action plan, which called for everyone to be informed of the weather information and then either (1) leave the premises or (2) go into the refrigerated milk room.<sup>57</sup> It's not clear from the opinion, but it seems that customers were *not* aware of the emergency action plan, so the customers could not have relied on that plan. The Kansas Supreme Court regarded the written emergency action plan as applying to local severe weather, but not to the distant hazards in this case. The Kansas Supreme Court, without reading the entire plan, held that this emergency action plan did not constitute an undertaking to protect customers.<sup>58</sup>

Darby (drowned in ocean)

- *Darby v. Societe des Hotels Meridien*, 1999 WL 459816 (S.D.N.Y. 29 June 1999) (summary judgement for hotel),  
*Darby v. Compagnie National Air France*, 753 N.E.2d 160, 728 N.Y.S.2d 731 (N.Y. 7 June 2001) (answered certified questions),  
*Darby v. Compagnie Nat. Air France*, 13 Fed.Appx. 37 (2nd Cir. 20 June 2001) (affirmed summary judgment for hotel).

In 1986, a man drowned in the ocean off Rio de Janeiro, while he was a paying guest at a hotel. His common-law wife sued in U.S. District Court in New York City, because the hotel in Brazil was served by a reservations system that had an office in New York City.<sup>59</sup> After a long battle over personal jurisdiction, the U.S. District Court finally considered the merits of the case, and granted summary judgment for defendants.<sup>60</sup> Because the parties failed to adequately brief Brazilian law, and “neither party has identified a material conflict between the applicable New York and the applicable Brazilian law,” the trial court applied New York law.<sup>61</sup> The U.S. District Court wrote:

... it is well settled that the duty of a landowner extends only to those areas of his land that he operates, maintains and controls, and not to the lands of another.

....

It is undisputed, however, that the Copacabana beach is owned, operated, and maintained by the Brazilian government and not by SHM. Accordingly, although one would hope that

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<sup>57</sup> *Cunningham*, 80 P.3d at 37.

<sup>58</sup> *Cunningham*, 80 P.3d at 43.

<sup>59</sup> *Darby v. Compagnie National Air France*, 735 F.Supp. 555 (S.D.N.Y. 1990).

<sup>60</sup> *Darby v. Societe des Hotels Meridien*, 1999 WL 459816 (S.D.N.Y. 1999).

<sup>61</sup> *Darby*, 1999 WL 459816 at \*4.

defendant would have warned its guests, including Zeiler, of any known risks or dangerous conditions existing on the beach, it had no duty to do so. Contrary to Darby's assertions, there is nothing in the record to support a finding that SHM is liable for the acts and omissions on the part of the Brazilian government. [FN6]

FN6. Darby contends that defendant "further assumed off-premises responsibility" for its guests when they provided security guards, stationed on the sidewalk outside the hotel, who would walk guests across the street to the beach. (Chase Aff. 3). The fact that defendant provided security guards, however, does not make it an "insurer" of its guests' safety. *Cf. Aronson v. Hyatt International Corp.*, 202 A.D.2d 153, 608 N.Y.S.2d 187 (1st Dept 1994). Similarly, liability does not attach to defendants simply because they included pictures of the beach in their promotional brochures or provided "beach towels, umbrellas and chairs." *See id.*

Moreover, even assuming *arguendo* that SHM did control the Copacabana beach, New York recognizes that there is no legal duty to warn of natural phenomena occurring in ocean beaches. *See, e.g., Smyth v. County of Suffolk*, 172 A.D.2d 741, 569 N.Y.S.2d 128 (2nd Dept. 1991). In *Herman v. State of New York*, 94 A.D.2d 161, 463 N.Y.S.2d 501 (2nd Dept. 1983), *aff'd*, 63 N.Y.2d 822, 482 N.Y.S.2d 284 (1984), a diver sued the State for injuries sustained when his head struck a submerged sandbar where the State had not posted signs warning bathers of the presence of sandbars. Although it was uncontroverted that formations of sandbars are phenomena common to ocean beaches in general and to the to the section of the beach where plaintiff's injury occurred in particular, the court held that the State was not liable for failure to warn of "a naturally occurring" condition where "the State did nothing to create sandbars or foster their presence." *Id.* [FN7]

FN7. Darby relies on *Tarshis v. Lahan Investment Corp.*, 480 F.2d 1019 (9th Cir. 1973), for the proposition that SHM owed Zeiler a duty to warn him of dangerous conditions in the ocean "which were not known to [him] or obvious to an ordinarily intelligent person." *Id.* At 1020. In *Tarshis*, however, the defendant hotel *owned* portions of the beach where plaintiff was injured, and representations had been made to guests warning against the use of the beach on the day in question. That is not the case here. Moreover, *Tarshis* has not been followed by the New York courts. *See, e.g., Herman*, 94 A.D.2d. 161.

....

Accordingly, assuming *arguendo* that Zeiler drowned as the result of rip currents in the ocean of the Copacabana beach, SHM is not liable as it had no duty to warn Zeiler of natural hazards occurring on an ocean beach that it did not own, occupy, or control.

*Darby*, 1999 WL 459816 at \*6-\*8.

The U.S. District Court ignored the *Butts* case (discussed above at page 33), which Plaintiff cited.

Plaintiff appealed and the U.S. Court of Appeals certified questions of state law. The highest court in New York State distinguished *Butts*, noting that the hotel in *Butts* was located directly on a 100 foot length of shoreline, while the beach in Brazil was located off the premises of the hotel, with a four-lane road between the hotel and beach. In fact, the Brazilian government "owned,

maintained and controlled the beach.”<sup>62</sup> The highest court in New York State declined to hold that a hotel “has a duty to warn guests as to the danger of using an off-premises beach”. The U.S. Court of Appeals then affirmed the summary judgment for defendants.<sup>63</sup>

#### Breaux (riptide)

- *Breaux v. City of Miami Beach*, 899 So.2d 1059 (Fla. 24 Mar 2005).  
See also, *Poleyeff v. City of Miami Beach*, 818 So.2d 672, 673-679 (Fla.App. 12 June 2002) (Cope, J., dissenting).

The traditional rule in Florida was that a possessor of land had no duty to warn of naturally occurring hazards in the ocean. *Adika v. Beekman Towers, Inc.*, 633 So.2d 1170, 1171 (Fla.App. 1994) (“... an innkeeper in Florida has no duty to warn its guests of naturally occurring surf conditions off of a public beach.”), *review denied*, 640 So.2d 1106 (Fla. 23 June 1994).

In February 2000, the Florida Supreme Court issued a ruling that held the state had tort liability for injuries at a public beach.

Thus, a governmental entity operating a public swimming area will have the same operational-level duty to invitees as a private landowner — the duty to keep the premises in a reasonably safe condition and to warn the public of any dangerous conditions of which it knew or should have known.

*Florida Department of Natural Resources v. Garcia*, 753 So.2d 72, 75 (Fla. 2000). This liability existed if the beach had been held out for use by swimmers, even if that beach had not been formally designated for public use.<sup>64</sup> The scope of the holding in *Garcia* was clarified in a subsequent case, *Breaux v. City of Miami Beach*.

The *Breaux* case, decided in March 2005 by the Florida Supreme Court, involved the death of two swimmers at a Miami beach from riptide, in which the majority opinion held that the city had a duty to warn:

If “the government[al] entity held the area out to the public as a swimming area or led the public to believe the area was a designated swimming area,” the governmental entity owes an operational-level duty of care to those using the swimming area. *Garcia*, 753 So.2d at 76. .... The City therefore had an operational-level duty of care “to warn the public of any dangerous conditions of which it knew or should have known” at the 29th Street beach area. *Garcia* at 75.

*Breaux v. City of Miami Beach*, 899 So.2d 1059, 1064-1065 (Fla. Mar 24, 2005).

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<sup>62</sup> *Darby*, 753 N.E.2d 160, 163 (N.Y. 2001).

<sup>63</sup> *Darby*, 13 Fed. Appx. 37, 39 (2dCir. 2001).

<sup>64</sup> *Garcia*, 753 So.2d at 76-77.

As defenses, the city claimed sovereign immunity and noted that the particular beach had not been formally designated a swimming area and no lifeguards were posted there. On the other hand, the city did *not* post “no swimming” signs. And the city knew that people were swimming at this beach.<sup>65</sup>

The majority opinion found<sup>66</sup> that the city had put the following at the beach where the injury occurred:

- public restrooms with showers,
- water fountains,
- telephones,
- metered parking, and
- a beach concessionaire that rented beach chairs, umbrellas, and watercraft; from which the city and state, derived “revenue from the public’s use” of this land.

For these reasons, the court found the government “has a duty to exercise reasonable care under the circumstances to those foreseeable users of that swimming area.”<sup>67</sup>

This Florida Supreme Court opinion only held that the city had a duty. The opinion did *not* analyze facts to see if there was either a breach of the duty, negligence, or proximate cause. The Florida Supreme Court remanded this case for trial. However, note that at “beaches where the city had provided lifeguards, the public was warned of rip currents in the area” by warning flags.<sup>68</sup> Because the city *knew* of the riptide conditions (and the swimmers did not know), it seems likely that the city breached its duty to warn in *Breaux*.

*Breaux* is remarkable in that it held that a possessor of land had a legal duty to warn people of natural hazards (e.g., riptide, and — as the dissenting opinion hints — lightning).

In a terse paragraph, the majority opinion says the transient nature of the rip current is not the issue. This paragraph is important, because lightning is also transient.

Lastly, the fact that rip currents are transient in nature is not dispositive on the issue of the City's duty to warn. Under *Garcia*, the focus is not on the nature of the dangerous condition but on whether the governmental entity knew or should have known of the dangerous condition. Whether the City knew or should have known of the dangerous rip currents at the 29th Street beach location on the day of the accident is an issue of fact to be decided by a jury. *Breaux v. City of Miami Beach*, 899 So.2d at 1066.

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<sup>65</sup> *Breaux*, 899 So.2d at 1065.

<sup>66</sup> *Breaux*, 899 So.2d at 1061-62, 1065.

<sup>67</sup> *Breaux*, 899 So.2d at 1061.

<sup>68</sup> *Breaux*, 899 So.2d at 1062, 1066.

The only mention of lightning in this case is in the opinion of a dissenting judge, who wrote:

Rather than exposing Florida's governmental entities where our beaches are located to tort liability, this Court should respect that the ocean and gulf waters adjacent to these beaches are filled with natural dangers which are controlled only by nature and that these dangers are simply inherent in the use of these waters. There are sharks, barracudas, stingrays, jelly fish, undertows, riptides, sandbars, coral reefs, lightning, and literally thousands of other natural dangers. Courts in other states with extensive beaches have recognized that there can be no tort recovery against the government from injuries caused by these natural transitory dangers in the ocean. *Lupash v. City of Seal Beach*, 75 Cal.App.4th 1428, 89 Cal.Rptr.2d 920, 926 (1999) (ocean can have high points, low points, riptides, rip currents, swirls, splashing waves, sand crabs, driftwood, seashells, and all kinds of danger, and there is no duty to protect anyone against these dangers.); *Herman v. State*, 94 A.D.2d 161, 463 N.Y.S.2d 501 (N.Y.App.Div. 1983) (no duty to protect against shifting sandbars). In *Garcia*, this Court acknowledged this by stating:

[I]t would be an intolerable and unnecessary burden to expect the State to post "No Swimming" signs up and down its expansive coastline on the chance that residents of the State may, on their own, select a particular area to enjoy the ocean or other waterways.

*Garcia*, 753 So.2d at 77 [(Fla. 2000)].

To hold a governmental entity liable for hazards it creates or hazards which are stationary in an area where the government puts a park is one thing. It is wholly different to make the government liable for transient natural hazards in the ocean or gulf.

Unfortunately, the result of placing this burden of liability on the governmental entities in which Florida's beaches are located will predictably result in seriously reducing public access to beaches because governmental entities conclude that they cannot practically or financially afford to protect users against the unlimited natural hazards of the ocean or gulf. Certainly, a foreseeable consequence of this decision will be the closing of public restrooms and public concessions [footnote omitted] in areas in which the governmental entity makes a budgetary decision not to place lifeguards. I believe this is a very bad result for Florida and for the public.

*Breaux v. City of Miami Beach*, 899 So.2d at 1073-1074 (Wells, J., dissenting).

Note that the majority opinion clearly limits liability to beaches that are improved (i.e., by having facilities such as restrooms, showers, water fountains, public telephones, picnic tables, concessionaire, etc. — and particularly when the government derives revenue from the public's use of the beach), so the many miles of Florida's beaches in a natural state (i.e., *unimproved*) are *not* included in the majority's opinion.

In passing the Florida Supreme Court repudiated a statement by a lower court about drowning being a "natural characteristic" of water. The lower court had written:

Nor is it necessary to buy entirely into the horrors with which the appellees threaten us [FN7] if they should lose these appeals. It is enough to say that drowning because of a natural characteristic of the very waters in which it occurs is simply one of the perhaps rapidly diminishing set of circumstances for which, without more, no human being or entity should be considered "to blame," deemed "at fault" or, therefore, held civilly liable. While the law of torts may properly serve to distribute risks among those whom society, speaking through the



courts, holds responsible for a particular unwelcome event, it should not be employed to assign fault — with the result that the transfer of money is required — when none can be fairly said to exist. In this instance, in other words, because there is no wrong, there can be no remedy. ....

FN7. These range from the hallucinatory, including the destruction of Florida's tourist industry, to the very practical, including the requirement of making exquisitely fine distinctions between and among, for example, the relative proximity of particular defendants' businesses to the beach, the extent of the particular "warnings" required and the status and expertise of particular plaintiffs in the dangers of swimming, all of which would arise if a contrary rule were adopted. In that regard, we note that the broadness of our holding pretermits the necessity of resolving, in this very case, such almost impossible issues as whether the Saxony's duty to its guest, Ms. Poleyeff, extended to the area adjacent to the Seville, whether that duty extended to Mr. Breaux either as a rescuer or as a generic user of the beach, whether the Seville's duty to Mr. Breaux extended to Ms. Poleyeff, whether its breach had any causative effect upon Mr. Breaux's actions in attempting to save her in light of his obvious knowledge of a danger which had already arisen, and on and on.

*Poleyeff v. Seville Beach Hotel Corp.*, 782 So.2d 422, 425 (Fla.App. 2001),  
*quashed by Breaux v. City of Miami Beach*, 899 So.2d 1059 (Fla. 2005).

The Florida Supreme Court retorted:

... we expressly disagree with the Third District's statement that "drowning because of a natural characteristic of the very waters in which it occurs is simply one of the perhaps rapidly diminishing set of circumstances for which, without more, no human being or entity should be ... held civilly liable." *Poleyeff II*, 818 So.2d at 673 n. 2 (quoting *Poleyeff I*, 782 So.2d at 425). Rather, we agree with Judge Cope's conclusion that the City's argument "that it has no duty to warn ... [of] naturally occurring conditions in the water" is contrary to our controlling precedent in *Garcia*. *Id.* at 677 (Cope, J., dissenting). The analysis set forth in *Garcia* is not limited to man-made dangers. *Garcia* cites with approval the Second District Court of Appeal's decision in *Andrews*, which involved natural dangerous currents. *See Garcia*, 753 So.2d at 75-76. Moreover, as noted by Judge Cope, in *Butler*, which is also cited with approval in *Garcia*, a majority of this Court rejected Chief Justice McDonald's assertion that "[g]overnmental entities should not be liable for naturally occurring dangerous conditions in bodies of water adjacent to public beaches." *Butler*, 501 So.2d at 580 (McDonald, C.J., dissenting), *quoted in Poleyeff II*, 818 So.2d at 678 (Cope, J., dissenting).

*Breaux v. City of Miami Beach*, 899 So.2d at 1065-1066.

The Florida Supreme Court in *Breaux* does not mention "God" or "Act of God". Therefore, *Breaux* implicitly rejects the Act of God defense.

On 20 March 2007, I contacted Plaintiff's attorney, Howard Pomerantz, who told me that litigation was continuing. The victory for plaintiffs in *Breaux* will not be available in the future for other plaintiffs, as the Florida legislature enacted a statute that immunized possessors of land from liability for rip current injuries.<sup>69</sup>

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<sup>69</sup> Howard Pomerantz, personal communication, 20 March 2007.

## Conclusion

Above, at page 32, I summarized the holdings in the reported cases involving lightning injury at recreational facilities. There are several cases (e.g., *David, Hames, Grace* on golf courses and *Blanchard* for parks) that hold that shelters need neither lightning protection nor a warning sign. There are several cases (e.g., *Pichardo, Dykema, Patton*) that hold that a game need not be stopped because of local lightning.

The majority view seems to be that possessors of land have no legal duty to warn of naturally occurring hazards, especially when those hazards are located off-premises (e.g., *Caldwell, Dykema, Princess Hotels, Cunningham, and Darby*). However, an increasing minority of courts (*Butts, Tarshis, Gonzales, Mostert, Fuhrer, Pacheco, and especially Breaux*) have found a legal duty to warn of ripcurrent or other naturally occurring hazard, even when it occurs off-premises. I have no idea why ripcurrents are sometimes associated with legal duty to warn and lightning is *not* associated with a legal duty to warn, because I think they are analogous — both involve duty of possessors of land to warn invitees of a transient, naturally occurring hazard.

I think the law on the topic of warnings of naturally occurring hazards is inconsistent and difficult to justify. I suggest the following principle that courts should use. The following paragraphs are my personal view, not necessarily the law recognized by courts.

### my proposed rule of law

Wilderness areas are inherently dangerous. One can be bitten by a snake while hiking in the desert. One can be buried by an avalanche while hiking on a snow-covered mountain. One can be struck by lightning while outdoors in a thunderstorm. Swimmers in the ocean can be swept out to sea by a rip tide. People who go into a wilderness area assume the risk of such injuries.

But when the possessor of land both:

- (1) improves the land by erecting buildings, providing lifeguards for swimmers, etc., and
- (2) charges people for admission, so the landowner is not only clearly inviting people to visit his/her property, but also profiting from those visitors<sup>70</sup>

then I urge that the landowner has a legal duty to warn people of hazards and to protect people against foreseeable harms.

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<sup>70</sup> The issue of profiting was particularly persuasive to the court in *Breaux*. State statutes that immunize landowners from compensating injured persons (see above, at page 7) commonly distinguish between landowners who allow people to enter their land without charge and landowners who charge for admission, the latter not being immunized.

There is also a spectrum of improvement. As one moves indoors, there is a higher level of duty on the landowner, as shown by numerous slip and fall cases. In my view, a golf course, with its carefully manicured lawn<sup>71</sup> (and often containing a restaurant onsite), is more highly improved than a beach whose only improvement is a parking lot nearby.

The only recreational lightning warning/protection case won by plaintiffs is *MacLeod*, which involved a lightning strike near the summit of a tall mountain in a National Park, which is definitely in a wilderness area. However, note that the summit had been improved by the installation of a hut, which I argue transformed the summit from a wilderness area to some kind of civilized place, where people reasonably believed that they could safely seek shelter.

Wilderness areas are dangerous. But when natural land is improved by providing conveniences (e.g., buildings) and safety features (e.g., lifeguards for swimmers), then society should insist on the landowner at least providing warning signs to remind invitees of foreseeable hazards. Technology has existed for more than 250 years to detect electrified clouds overhead and warn of the possibility of local lightning. Businessmen who operate recreational facilities, such as golf courses, should have a legal duty to use such warning technology, instead of passively accepting dozens of deaths in the USA every year from lightning during recreation.

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My most recent search for court cases on this topic was in March 2007.

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<sup>71</sup> Imagine attempting to play golf in a corn field, after the farmer harvested the corn. (!)