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Lightning: A Double Hit for Golf Course Operators

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LIGHTNING: A DOUBLE HIT FOR GOLF COURSE OPERATORS

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I. INTRODUCTION

DATELINE: Chaska, Minnesota, June 13th, 1991.

> There was no place to hide at Hazeltine National [Golf Course] Thursday when a spectator-William Fadell, 27, of Spring Park, Minn.-died after being struck by lightning during the first round of the 91st U.S. Open [golf championship]. Shortly after noon, the sky turned black over this 7,149-yard layout about 30 miles west of Minneapolis. Then there were repeated and angry claps of thunder, accompanied by furious bolts of electricity. Play was suspended at 12:49 p.m., at which point golfers scurried to vans for protection or transportation back to the clubhouse. But there are no such provisions for galleries, and Mr. Fadell, standing beneath a willow tree to the left of the 11th tee, was struck by lightning as he watched what was to be a celebration of golf. "Sad, sad, sad," said Lee Trevino after finishing his 18 holes. "They said they sounded a siren out there," he rued. "If they did, I never heard it."[1]

DATELINE: Carmel, Indiana, August 8th, 1991.

> A 39-year-old Indiana man was struck and killed by lightning Thursday during the first round of the PGA Championship, the second lightning fatality involving a spectator at one of golf's major tournaments this summer. Thomas Weaver . . . was hit on the left shoulder at about 2:30 p.m. Thursday, a few feet from his car parked in a lot about a mile from the golf course. . . . Weaver and thousands of other fans in a crowd estimated at about 25,000 were heading to cars or other shelters around the course before and after the warning sirens sounded to halt play. PGA officials were shaken by the incident. Jim Awtrey, the executive director of the PGA of America, said that "since the Hazeltine death, all his organization's procedures had been reviewed, and tournament staff

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1. Bob Verdi, *No Place to Hide: Death Strikes the U.S. Open*, CHI. TRIB., June 14, 1991, at C1.

> was using its own radar warning system, besides getting input from local and national weather officials."[2]

DATELINE: Venice, Florida, May 17th, 1991.

> The sun was out, and although Mike Healy remembers seeing a few dark clouds in the distance, the thought of leaving the golf course and heading for shelter never occurred to him or his playing partners. "The bolt that hit me was the first lightning strike of the day," Healy said. "[The lightning] ripped a hole in my hat about the size of a baseball and burned all the hair on that side of my head. It burned the hair on both sides of my arms and chest and there were some burn-type marks across my back."[3]

Ancient civilizations considered lightning a religious symbol.[4] Greek mythology labeled lightning bolts the tools of warning and vengeance of Zeus, the king of all gods.[5] Thursday is named after the Norse god of thunder and lightning, Thor.[6] The Basuto tribe in Africa pictured lightning as the great, swooping thunderbird, Umpundulo.[7] Aristotle believed that fumes from the ground ignited to make storm clouds which shot off lightning bolts.[8] The reality is that when lightning hits a human being, an electrical current shoots through a person's body at 300 miles per second.[9] This electrical current fires off a succession of up to forty different electrical peaks, each peak carrying up to fifty million volts of electricity.[10] Despite the prospect of a fifty million volt jolt of electricity, too many golfers view lightning, not as a herculean hazard, but just another golf course hazard.[11]

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2. Leonard Shapiro, *P.G.A. Championship; Another Spectator Killed by Lightning*, L.A. TIMES, Aug. 9, 1991, at C1.

3. Bob Harig, *Golfers; Natural Lightning Rods*, ST. PETERSBURG TIMES, June 11, 1992, at C1.

4. Ray Formanek Jr., *With Summer Comes Lightning Season—Will You Be in for a Shock?; Nature: Up to 300 People in the United States Are Killed by the Phenomenon Each Year. Safest Bet: Head for Cover*, L.A. TIMES, July 28, 1991, at A2.

5. *Id.*

6. BENJAMIN A. WATSON, THE OLD FARMER'S ALMANAC BOOK OF WEATHER AND NATURAL DISASTERS 203 (1993).

7. *Id.*

8. *Id.*

9. Teri Randall, *50 Million Volts May Crash Through a Lightning Victim*, CHI. TRIB., Aug. 13, 1989, at C1.

10. *Id.*

11. "I was hoping to squeeze in nine holes before this rain starts," said Henry Wilcoxon who played The Bishop in the motion picture Caddyshack. CADDYSHACK (Orion Pictures Co. 1980). As The Bishop sunk an unbelievable putt in the middle of a torrential thunder and lightning storm, he asked his caddie, Carl Spackler played by Bill Murray, "Well, what do you think fella?" *Id.* Carl told The Bishop "I'd keep playing, I don't think the heavy stuff is going to come down for quite a while." *Id.* The Bishop responded "you're right, anyway the good

Around the world at any moment there are close to 2000 thunderstorms in progress and lightning strikes the earth 6000 times a minute.[12] This amounts to somewhere between eight and nine million lightning strikes per day.[13] In the United States alone, lightning kills up to 300 people per year and injures as many as 1500 people per year.[14] Lightning causes more human death and injury than tornadoes or hurricanes.[15] The National Climatic Data Center statistics reveal that from one in every three to twenty lightning deaths occur on golf courses.[16]

Although statistics may indicate that the chance of being struck by lightning on a golf course is rare, the unpredictable and awesome power of a lightning bolt gives golf course operators reason to pause.[17] When lightning strikes a populated golf course, the golf course proprietor faces a double hit.[18] Not only is play on the golf course halted, reducing golf course revenue, but the golf course may be liable for injury to a golfer during the lightning storm.

This article examines the liability of golf course operators for personal injury to golfers from lightning. Despite the growing number of

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Lord would never disrupt the best game of my life." *Id.* The Bishop was then struck down by lightning.

12. Tony Smith, *On Lightning: Hair Standing on End May Be Warning of an Impending Strike; Methods to Avoid Being Struck by Lightning*, 303 BRIT. MED. J. 1563 (1991).

13. WATSON, *supra* note 6, at 203.

14. Formanek *supra* note 4, at A2; Sally Deneen, *In Lightning's Capital, It Isn't Taken Lightly*, MIAMI HERALD, June 13, 1995, at HS 5.

15. Torch Lewis, *Avoid Lightning. . .and EPA's Excesses*, 75 BUS. & COM. AVIATION 112 (1994).

16. George White, *Lightning, Golf Form Deadly Mix; 1 in Every 20 Lightning Deaths Occur on Golf Courses, But Many Shun Warning Systems*, ORLANDO SENTINEL, July 30, 1993, at D8.

17. Despite the fact that lightning strikes the earth between eight and nine million times per day, due to the size of the earth, a person is about as likely to get hit by lightning as he/she is to win a big lottery jackpot. WATSON, *supra* note 6, at 203. The odds of getting fatally zapped by lightning are about 1 in 3 million. For comparison's sake, there is a 1 in 5,800 chance of dying in a traffic accident, a 1 in 39,000 chance of dying from a fall at home, and a 1 in 342,000 chance of perishing in an airplane crash. *Id.* at 223.

18. Perhaps the most famous "double hit" in golf occurred in the final round of the 1985 United States Open Golf Championship at the Oakland Hills Country Club in Birmingham, Michigan. On the fifth hole T.C. Chen, the leader of the tournament after the third round, struck his ball twice during one golf swing enroute to scoring a quadruple bogey - eight. T.C. Chen's "double hit" cleared the way for Andy North to win his second United States Open Golf Championship. T.C. Chen went on to win the 1987 Los Angeles Open and now at age 37, competes on the Japanese Professional Golf Tour. Andy North, troubled by a variety of health problems, won a total of three professional golf tournaments in his over twenty year career. Two of those victories were United States Open victories. *U.S. Open People: Andy North*, SPORTS ILLUSTRATED, June 26, 1995, at G 42; Tim Rosaforte, *Inside Golf*, SPORTS ILLUSTRATED, June 26, 1995, at G 60.

golfers and golf courses in the United States, this article will examine the two appellate court cases which evaluate the liability of golf course proprietors, for personal injuries caused by lightning.[19] This article will propose, using the United States Golf Association guidelines, a legal standard to measure golf course liability for lightning strikes. This article will conclude by applying this liability standard to conventional and high-tech methods available to a golf course owner to protect golfers and other patrons from lightning injuries and to shield the golf course from liability.

II. LANDOWNER LIABILITY FOR PERSONAL INJURY CAUSED BY LIGHTNING

DATELINE: Fort Lauderdale, Florida, August 4th, 1993.

> "Lightning is underrated as a force of nature," said Bob Bourne, the golf pro at Weston Hills Country Club, who says he is amazed at the hazardous conditions golfers will weather. "I told my members the other day, 'somebody's going to have to die at Weston before you guys come in off the golf course.' "[20]

There are several appellate court cases in which the operators of private and public facilities have been held liable for lightning injuries to patrons.[21]

In *Green v. Insurance Co. of North America*, the plaintiff filed a negligence claim against the telephone company for personal injuries she received when lightning struck her telephone line while she was talking

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19. According to William Goegtler of the National Golf Foundation, 1150 South US 1, Jupiter, Florida 33477, the market facts survey, which has been conducted by the National Golf Foundation every year since 1936, marked 1994 as the third year in row that the number of people playing golf declined slightly from a high of 24.8 million golfers in 1991 to 24.3 million golfers in 1994. Part of the reason for the decline in the number of golfers, according to market analysts, is the lack of available and affordable golf courses. The National Golf Foundation 1994 market facts survey also reveals that over 300 new golf courses opened in 1994 which is about the same rate of increase since 1990. There are 14,939 golf courses in the United States. NATIONAL GOLF FOUNDATION MARKET FACTS SURVEY 1990 THROUGH 1994.

20. Robert Lohrer, *Gary Boros Nearly Struck by Lightning*, MIAMI HERALD, Aug. 4, 1993, at D2.

21. Although not an appellate court case, Muehlfelder v. Crystal Woods Golf Club, Inc., No. 85L-27954, 1993 WL 456113 (Cir. Ct. Ill.), is a good example of a trial court case involving a golf course. In this case, a 25-year-old golfer was killed when lightning struck a wooden weather shelter during a thunderstorm at the defendant golf course. The plaintiff argued that the defendant was negligent for failing to provide a lightning proof shelter and for building the shelter on the highest point of the golf course. The defendant golf course argued that the golfer's death was caused by an act of God, and that it did not have a responsibility to protect the shelter against lightning. The plaintiff received a $250,000 verdict.

on the telephone.[22] The plaintiff alleged that the failure of the telephone company to properly insulate or otherwise protect her from lightning strikes to the telephone line was negligence.[23] The telephone company denied the plaintiff's allegations and claimed that it equipped the plaintiff's telephone line with state of the art lightning protection safety equipment.[24]

The Louisiana appellate court initially held that the telephone company had a duty to protect its customers from reasonably foreseeable injuries.[25] The court went on to say that lightning striking a telephone line is foreseeable.[26] The court concluded that the telephone company's duty required the installation and maintenance of the best available lightning protection equipment.[27] The court found that the telephone company's lightning protection safety equipment "met the highest standards of science as applied to the telephone industry and were in good working order at the time of the accident" and denied the plaintiff's negligence claim.[28]

In *Macedonia Baptist Church v. Gibson*, church members improperly installed a lightning rod and grounding cables on the church steeple.[29] On August 21, 1988, lightning hit the lightning rod and traveled down its grounding cables and struck Nora Gibson while she was walking on the church walkway.[30] Mrs. Gibson was injured when a side flash from the grounding cable struck her.[31] Mrs. Gibson sued the church for negligent installation of the lightning rod because the grounding cables were too close to the church walkway.[32] The jury returned a verdict for the plaintiff.[33] The church appealed, challenging the jury's finding on two grounds. First, the church argued that its failure to properly install the lightning rod was not the proximate cause of the plaintiff's injury.[34] The Texas appellate court equated proximate cause with foreseeable injury to a foreseeable person.[35] The court stated that "for a result to be legally

22. Green v. Insurance Co. of North America, 275 So. 2d 425, 426 (La. Ct. App. 1973).
23. *Id.* at 428.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 431.
29. Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. Ct. App. 1992).
30. *Id.* at 559.
31. *Id.*
32. *Id.* at 557
33. *Id.*
34. *Id.* at 559.
35. *Id.*

foreseeable, all that is required is that the injury be of such a general character as might be reasonably anticipated and that the injured party should be so situated with relation to the wrongful act that the injury might reasonably have been foreseen."[36] The court ruled that the church's negligent failure to properly install the lightning rod and grounding cables was the proximate cause of the plaintiff's injury and affirmed the trial court verdict for the plaintiff.[37]

Second, the church claimed that it could not be held liable for lightning striking the plaintiff because lightning is an act of God.[38] The Texas appellate court ruled that for an act of God, such as lightning, to be the proximate cause of personal injury, the act of God must be the direct and exclusive cause of a person's injury.[39] In this case, the court noted that both the lightning bolt and the church's negligent installation of the lightning rod and grounding cables caused the plaintiff's injury.[40] Consequently, under this court's definition, the defendant may be held liable for its negligent act because the lightning bolt, an act of God, is not the sole proximate cause of the plaintiff's injury.[41]

In *Bier v. City of New Philadelphia*, the plaintiff's picnic at the Tuscora Park was cut short by a thunderstorm.[42] While the plaintiffs were packing up their picnic baskets near the rented, metal-roofed, picnic shelter, lightning struck the picnic shelter and killed one of the plaintiffs' relatives and injured the other plaintiffs.[43] The plaintiffs filed a negligence claim against the City of New Philadelphia and the New Philadelphia Parks and Recreation Board, the owner and operator of Tuscora Park.[44] The plaintiffs' claimed that the failure of the defendants to provide lightning proof, outdoor picnic shelters was negligence.[45] The defendants moved for summary judgment claiming that lightning is an act of God for which the defendants cannot be held liable.[46]

The Supreme Court of Ohio agreed with defendants contention that a defendant is not liable for injuries caused by an act of God.[47] How-

36. *Id.*
37. *Id.* at 559-60.
38. *Id.* at 560.
39. *Id.*
40. *Id.*
41. *Id.*
42. Bier v. City of New Philadelphia, 464 N.E.2d 147, 148 (Ohio 1984).
43. *Id.* at 148.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

ever, the court stated that if proper care and diligence by the defendants would have prevented the plaintiffs' injury, then the defendant cannot avoid liability by blaming the act of God, in this case, lightning.[48] The court noted that if the negligence of the defendants combines with an act of God, like lightning, and directly contributes to the plaintiffs' injury, the defendants will be liable, "notwithstanding [they] may not have anticipated or been bound to anticipate" the lightning concurring with the defendants' negligence to produce personal injury.[49]

In opposition to summary judgment, the plaintiffs attached an affidavit by Marvin M. Frydenlund, an expert in lightning protection.[50] Mr. Frydenlund stated that the defendants should have recognized the need to protect the public by constructing lightning-proof picnic shelters.[51] The court agreed with the plaintiffs' expert and reversed the trial court's order granting the defendants' summary judgment and remanded the case for a trial on the merits.[52]

In summary, this representative sample of cases decline to absolve a private or public land owner from liability just because an act of God, lightning, also contributes to a patron's injury. These cases refuse to rely on the unpredictability of lightning to insulate a facility operator from a negligence claim. Although these cases do not specifically concern lightning strikes to golf course patrons, the legal analysis contained in these cases seems to be equally applicable to golf course proprietors.[53]

Surprisingly, only two appellate court cases specifically analyze the liability of a golf course for lightning strikes to golfers. Perhaps even more surprising is that *Davis v. The Country Club, Inc.* and *Hames v.*

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48. *Id.*

49. *Id.* at 149.

50. *Id.*

51. *Id.*

52. *Id.*

53. For instance, defendant golf courses typically argue that deaths or injuries caused by lightning are acts of God. *See* Hames v. State, 808 S.W.2d 41, 43 (Tenn. 1991); Muehlfelder v. Crystal Woods Golf Club, Inc., No. 85L-27954, 1993 WL 456113 (Cir. Ct. Ill.). However, the cases cited in the text indicate that it is not an acceptable excuse for any defendant to say that the lightning caused death or injury to a golfer is the result of an act of God, if the defendant could have avoided the act through proper care and diligence.

The Arkansas case of Glen Falls Group Insurance Company v. Simpson, 439 S.W.2d 292 (1969), provides an interesting side in these kinds of cases. Simpson was playing golf at the Rosswood Country Club when he was struck by lightning. The issue presented to the Arkansas Supreme Court was whether the Rosswood Country Club's liability insurance covered Simpson's injury. The court, in ruling that Simpson's injury fell within the Rosswood Country Club's liability insurance coverage, stated that as a golfer Simpson's lightning injury arose out of the maintenance, ownership and use of the golf course. *Id.* at 293-94.

State of Tennessee, are both Tennessee court cases. However, it is not surprising that both cases are consistent in analysis.

In *Davis v. The Country Club, Inc.*, fourteen year old Phyllis Davis was playing a round of golf with a sixteen year old companion, John Reitz.[54] Storm clouds arose, but Phyllis and her companion continued to play golf.[55] Thirty minutes later the storm struck, and at that time Phyllis and her companion sought cover in a weather shelter, which was not lightning proof, near the sixteenth green.[56] Subsequently, Phyllis was injured when a bolt of lightning struck the weather shelter.[57] Phyllis' father, Clifford Davis, sued the operators of the golf course for negligence.[58] Davis claimed that the failure of the golf course to provide a lightning-proof weather shelter near the elevated area of the 16th green was negligence.[59] The Tennessee court stated that lightning is an act of God and therefore, may not be the sole basis for a negligence claim.[60] The court went on to state, however, that when an act of God combines or concurs with a negligent act to proximately cause personal injury; the negligent defendant may be held liable.[61] The court observed that the risk of a lightning bolt striking the weather shelter near the 16th green was too remote and unforeseeable to be the proximate cause of the plaintiff's injuries.[62] The court reasoned that since the lightning strike was unforeseeable, neither the lightning nor the defendant's negligent act of failing to provide a lightning-proof weather shelter was the proximate cause of the plaintiff's injury.[63] The court then ruled that the golf course was not liable for the plaintiff's personal injury.[64]

In *Hames v. State of Tennessee*, Phillip Hames was playing a round of golf at Warrior's Path State Park when he was struck and killed by a bolt

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54. Davis v. The Country Club, Inc., 381 S.W.2d 308, 310 (Tenn. Ct. App. 1963).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 311.
59. *Id.*
60. *Id.* at 310. *See also* Stanbridge v. United States, 718 F.2d 1100 (6th Cir. 1983). In this case the court held that "lightning which occurs in the atmosphere during a storm is an Act of God." *Id.*
61. Davis v. The Country Club, Inc., 381 S.W.2d 308, 310 (Tenn. Ct. App. 1963). *See also* Stanbridge v. United States, 718 F.2d 1100 (6th Cir. 1983). In this case, the court held that "a landowner . . . would only be held liable for Acts of God if it negligently breached a duty of care owed to the invitee, and this negligence, joined with the Act of God, proximately caused the invitee's injury." *Id.*
62. Davis v. The Country Club, Inc., 381 S.W.2d 308, 311 (Tenn Ct. App. 1963).
63. *Id.* at 311.
64. *Id.*

of lightning.[65] The decedent's wife brought a wrongful death action against the state-owned golf course.[66] She claimed that, although lightning is an act of God, the failure of the golf course to adequately warn golfers to vacate the golf course because of an impending lightning storm and the failure of the golf course to provide lightning-proof weather shelters on the golf course was part of the proximate cause of her husband's death.[67] The Tennessee court rejected the plaintiff's claims for two reasons.[68] First, the court reasoned that the defendant's conduct did not fall below the standard of care for a reasonably prudent golf course operator because "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."[69] In accord with the *Davis* case, this court ruled that the risk of lightning is too remote to impose liability upon the proprietors of a golf course.[70] The court also observed that the risk of playing golf in a lightning storm should be obvious to adults golfers.[71] The court went on to state that a golfer has a duty "to pack up the clubs and leave before the storm begins to wreak havoc."[72] The court also found significant the lack of an industry standard or custom requiring a golf course to provide lightning-proof weather shelters and to warn golfers of lightning storms.[73]

Second, the court stated that the lightning bolt, not the defendant's alleged negligent conduct, was the proximate cause of the Philip Hames' death.[74] The court adopted the rule of law which states that when two distinct and unrelated causes combine to cause personal injury and one of the causes is a direct cause while the other merely furnishes the condition by which the injury occurred, the direct cause is the sole proximate

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65. Hames v. State, 808 S.W.2d 41, 42 (Tenn. 1991).

66. *Id.*

67. *Id.* at 43.

68. *Id.* at 45.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id. See also* Dykema v. Gus Macker Enterprises, Inc., 492 N.W.2d 472 (Mich. Ct. App. 1992). In this case, the court agreed with the *Hames* court that the approach of a thunderstorm is readily apparent to reasonably prudent individuals, and therefore it is an individual's own responsibility to protect himself from the weather. The court went on to hold that "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." *Id.* at 475.

73. Hames v. State, 808 S.W.2d 41, 45 (Tenn. 1991).

74. *Id.*

cause of the injury.[75] In the *Hames* case, the court characterized the lightning bolt as the direct cause and therefore the sole proximate cause of Mr. Hames death.[76]

In summary, these Tennessee[77] cases decline to find that the golf course operator has a legal duty to protect golfers from lightning strikes and that the admitted or alleged negligence of the golf course operator may be one of the proximate causes of personal injury to a golfer in a thunderstorm.[78] Rather, these cases consider lightning too unpredictable to impose a legal duty on golf course proprietors but not too unforeseeable to be the sole proximate cause of injury to a golfer struck by a lightning bolt.[79]

III. THE STANDARD OF CARE FOR GOLF COURSE OPERATORS

DATELINE: Clearwater, Florida, July 23rd, 1989.

> Keith Jacobsen was on the seventh hole of Clearwater Country Club's golf course Sunday during a violent thunderstorm when his substantial mane of hair stood on end. "All of a sudden, wham. My clubs flew, and his clubs flew," said Jacobsen, 21, of Largo. "After I heard the thunder, I knew I was okay—that I wasn't dead." Jacobsen, who calls himself a "golf addict," said he knew that he and three of his friends should have left the course when the storm began shortly after 5 p.m. But they were intent on getting in nine holes of golf. He was carrying three clubs — a 9-iron, a 6-iron and a putter — as he approached the green of the seventh hole. Jacobsen looked at his golf partner, who happened to

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75. *Id.* (citation omitted).

76. *Id.*

77. The Tennessee courts have not declined to award workers compensation benefits to employees injured by lightning. Mason Dixon Lines v. Lett, 297 S.W.2d 93 (Tenn. 1956) (resort employee); Oman Constr. Co. v. Hodge, 329 S.W.2d 842 (Tenn. 1959) (construction worker). The Tennessee Supreme Court in both of these cases found that the employer exposed the employees to a peculiar risk of injury from lightning because of the employees job duties. *Accord* Nelson v. Country Club of Detroit, 45 N.W.2d 362 (Mich. 1951) (golf course employee — caddie); Illinois Country Club v. Industrial Comm'n, 56 N.E.2d 786 (Ill. 1944) (golf course employee — caddie).

78. Hames v. State, 808 S.W.2d 41 (Tenn. 1991); Dykema v. Gus Macker Enterprises, Inc., 492 N.W.2d 472 (Mich. Ct. App. 1992).

79. Davis v. Country Club, Inc., 381 S.W.2d 308, 311 (Tenn. Ct. App. 1963); *Hames*, 808 S.W.2d at 45. *See also* Estate of Fisher v. City of South Portland, No. CV-92-714, 1994 LEXIS 147191 (Super. Ct. Me.). In this case, the decedent was killed when he was struck by a bolt of lightning while golfing on a course maintained by the defendant city. The plaintiff argued that the defendant was negligent for failing to post warnings regarding the danger of playing golf while thunderclouds are in the area or failing to provide lightning shelters. However, the jury returned a verdict in favor of the defendant, who had argued at trial that it had no duty to provide such warnings and the decedent assumed the risk.

> glance at Jacobsen at the same time. Their hats flew off. Their hair stood on end. Jacobsen said he felt white-hot heat on the back of his neck. Then they heard a tremendous crack and both found themselves on the ground. Jacobsen said he felt as though someone had whipped him with a cable. Their other two golfing partners, who were a distance away, thought Jacobsen and the other stricken man were injured. "They both thought we were dead because we had fallen to the ground," Jacobsen said. "We were both just amazed that we were okay. It was so phenomenal."[80]

The United States Golf Association (USGA) and The Royal And Ancient Golf Club of St. Andrews, Scotland, the major governing bodies of golf throughout the world, proscribe the following rule: "As there have been many deaths and injuries from lightning on golf courses, all clubs and sponsors of golf course competitions *are urged to take every precaution* for the protection of persons against lightning."[81] Neither the *Davis* or the *Hames* Tennessee court opinions refer to this rule.[82] Rather, the *Hames* court bemoans the nonexistence of a golf course industry standard or custom concerning lightning protection for golfers.[83] This lawyering oversight perhaps explains the hesitation of the Tennessee court to view the liability of golf course operators on a par with the liability of other facility operators.[84]

Besides the USGA rule, the USGA provides golf courses with lightning protection warning signs, golf cart stickers and free consultation to stress the importance of the golf course proprietor's responsibility to provide lightning protection for golfers.[85] Despite the *Hames* court's observation, the USGA does not take for granted that "adult golfers" will obviously recognize the risk of playing golf in a lightning storm.[86] The USGA lightning warning signs and stickers advise golfers that in the event of lightning, golfers should avoid open and elevated areas, espe-

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80. Alicia Caldwell, *'All of a Sudden, Wham' Golfers Report Close Brush with Lightning*, ST. PETERSBURG TIMES, July 25, 1989, at 1.

81. THE UNITED STATES GOLF ASSOCIATION AND THE ROYAL AND ANCIENT GOLF CLUB OF ST. ANDREWS, SCOTLAND, THE RULES OF GOLF 112-13 (1995) (emphasis added).

82. *See Hames*, 808 S.W.2d 41; *Dykema*, 492 N.W.2d 472.

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

84. *Compare* Green v. Insurance Co. of North America, 275 So. 2d 425, 426 (La. Ct. App. 1973); Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. Ct. App. 1992); and Bier v. City of New Philadelphia, 464 N.E.2d 147, 148 (Ohio 1984); *with* Hames v. State, 808 S.W.2d 41 (Tenn. 1991); and Dykema v. Gus Macker Enterprises, Inc., 492 N.W.2d 472 (Mich. Ct. App. 1992).

85. United States Golf Association, Sticker, Lightning Safety Tips.

86. *Id.*

cially water, any kind of metal, including maintenance machinery, golf carts and fences, powerlines, and isolated trees.[87] The USGA lightning warning signs and stickers also advise golfers to seek cover in lightning proof shelters, the golf course clubhouse, densely wooded areas, or low-lying areas at the first sign of a thunderstorm and lightning.[88] The USGA lightning rule and other guidelines, which predate the Tennessee court decisions, are useful to determine whether golf course operators have a legal duty to protect golfers from the danger of lightning and to fix the parameters of the golf course operator's legal duty.[89] If the USGA is to be taken at its word, it is clear that the USGA believes, unlike the Tennessee courts, that golf course operators possess a duty to exercise reasonable care to protect golfers from lightning. The application of this reasonable care standard to golf course proprietors presents other problems.

Reasonable care certainly requires golf courses to provide conspicuous USGA warning signs and golf cart stickers for each golf cart advising golfers of the danger of lightning and the proper response in the event of lightning. The reasonable care standard also demands that golf courses that choose to provide weather shelters construct lightning-proof weather shelters.[90] Finally, it is not a stretch of the reasonable care standard to insist that golf courses use a siren and golf course marshals or other personnel to warn golfers of approaching lightning and to usher golfers to safety.[91] All of these precautionary steps fall within the USGA rule that urges all golf courses to take every precaution to protect golfers and other patrons from lightning strikes.[92] Most golf courses have voluntarily adopted these precautionary steps or have involuntarily

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87. *Id.*

88. *Id.*

89. *Id.*

90. *See supra* note 21 and accompanying text; Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. Ct. App. 1992); Bier v. City of New Philadelphia, 464 N.E.2d 147, 148 (Ohio 1984).

91. United States Golf Association, Sticker, Lightning Safety Tips; THE UNITED STATES GOLF ASSOCIATION AND THE ROYAL AND ANCIENT GOLF CLUB OF ST. ANDREWS, SCOTLAND, THE RULES OF GOLF 112-13 (1995).

The Boca West Country Club, a ninety hole golf facility in Boca Raton Florida, is one of largest golf resorts in Florida. Recently, the Board of Directors of Boca West reviewed their lightning protection policy for the golf courses. Boca West's Director of Golf, Brad Luken, stated that it is common knowledge among golf course professionals that a lightning protection policy that does not include a weather siren and golf course marshals who help golfers take shelter in a lightning storm is just asking for trouble. Interview with Golf Brad Luken, Boca West Country Club Director (Sept. 16, 1994).

92. United States Golf Association, Sticker, Lightning Safety Tips.

adopted these precautionary steps at the urging of the golf course insurer.[93]

Yet, the efforts of the USGA and golf courses to warn and protect golfers has not eliminated lightning injuries to golfers or prevented golfers injured by lightning from suing golf courses.[94] Perhaps the best a golf course can hope for is that its USGA sponsored efforts to warn golfers of lighting and to protect golfers in a lighting storm amount to "every precaution" as prescribed by the USGA lightning rule and "reasonable care" under the law.[95] It should! What complicates the duty of golf course proprietors is modern technology.

Modern technology has not only applied science to the craft of making golf equipment[96] but has also brought science to the golf course operator's ability to detect lightning and warn golfers of approaching lightning storms.[97] Proponents of these high tech devices aim to replace

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93. *See supra* notes 53 and 90. Brad Luken, the Director of Golf at the Boca West Country Club, and Jay DiPietro, the President and General Manager of the Boca West Country Club, advise that it is standard policy for insurance companies to demand that golf courses implement certain lightning protection measures. These measures include lightning warning signs and stickers, weather sirens, course marshals, and lightning proof weather shelters placed strategically throughout the golf course.

94. *See* Hames v. State, 808 S.W.2d 41 (Tenn. 1991); Dykema v. Gus Macker Enterprises, Inc., 492 N.W.2d 472 (Mich. Ct. App. 1992).

95. *See* Green v. Insurance Co. of North America, 275 So. 2d 425, 426 (La. Ct. App. 1973); Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. Ct. App. 1992); Bier v. City of New Philadelphia, 464 N.E.2d 147, 148 (Ohio 1984); *Hames*, 808 S.W.2d 41; *Dykema*, 492 N.W.2d 472; Muehlfelder v. Crystal Woods Golf Club, Inc., No. 85L-279541993, WL 456113 (Cir. Ct. Ill.); Caldwell, *supra* note 80, at 1.

96. Golf Digest and Golf Magazine are the two largest golf publications. Golf Digest and Golf Magazine offer regular monthly tips and reviews of the latest high tech golf equipment. Golf Digest devotes one entire monthly issue to a review of golf equipment. *Equipment Preview '95*, GOLF DIG., Dec. 1994; *Headline*, GOLF MAG., Jan. 1995.

97. There appear to be at least four major high tech lightning protection systems on the market with other manufacturers still working on the development of other systems. The Prevectron III Plus lightning protection system is marketed in the United States by National Lightning Protection Corporation. The President of National Lightning Protection Corporation, R.W. Rapp describes the Prevectron III Plus system as a lightning collection system in which the Prevectron III Plus detects the change in the electrical charge in the atmosphere and then pulls the lightning to a grounded pole. Letter with enclosures from R.W. Rapp, President of National Lightning Protection Corporation, to Al Ribas (Mar. 14, 1995).

The F-10 Lightning Detection System is sold by Airborne Research Associates, 260 Bear Hill Road, Waltham, Massachusetts 02154. The F-10 Lightning Detection System uses optical and electrical sensing devices to detect intracloud lightning within a maximum range of five to thirty miles depending on visibility. Airborne Research Associates, F-10 Lightning Detection System Pamphlet (1995).

The Thor Guard Lightning Prediction System is leased by Electrosensors, Inc., P.O. Box 523772, Miami, Florida 33152. The Thor Guard system combines not only lightning detection within a radius of thirty miles but also a lightning warning system, called the Voice of Thor.

the manually operated, lightning warning siren with the automatic, lightning warning system.[98] This new technology seeks to substitute automatic, lightning detection systems for the naked eye gaze of a golf course proprietor.[99] These high tech, lightning detection and warning systems are not cheap, ranging in price from $3,000 to $5,000 for an average eighteen hole golf course.[100] Yet the purchase price of these systems may be less than the liability price tag for a golf course without one of these systems.[101] The key question for golf course operators is whether the USGA rule urging golf courses to take "every precaution" and the legal rule requiring golf courses to exercise "reasonable care" means that golf courses must buy an automatic lightning detection and protection system.[102]

New technology, like these automatic lightning protection systems, presents a delicate balance of advantages and disadvantages for golf course operators. The primary concern of golf course proprietors must

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Thor Guard Lightning Protection System Pamphlet and Voice of Thor Lightning Warning System Pamphlet (1995).

The Stormaster Lightning Warning System is marketed by American Lightning Protection, Inc., 732 Front Street, P.O. Box 778, Louisville, Colorado 80027. The Stormaster System detects the electrical field of approaching lightning within a six to nine mile radius which then triggers a siren alarm to warn golfers to vacate the golf course. Stormaster Lightning Warning System Pamphlet (1995).

In addition, KTAADN Inc., which is funded by the National Aeronautics and Space Administration (NASA), is currently developing its own lightning prediction system.

98. Gary M. Crist, *The Lightning Hazard: Whose Responsibility?*, GOLF MARKET TODAY, Jan./Feb. 1995, at 23.

99. *Id.*

100. The F-10 Lightning Detection System with power, battery backup and speaker options costs around $3,000. Airborne Research Associates Pamphlet (1995). The Stormaster Lightning Warning System which would include four satellites and one master control unit to cover an average eighteen hole golf course costs $4,250. American Lightning Protection, Inc. and the Stormaster Lightning Warning System Pamphlet (1995). The Prevectron III Plus System costs $3,500 per unit. However, four units, totaling $14,000, are needed to cover an average size golf course. Also, the installation fee for the Prevectron III Plus System may be as high as $28,000 depending on the golf course. Letter with enclosures from R. W. Rapp, President of National Lightning Protection Corporation, to Al Ribas (Mar. 14, 1995).

101. Compare the cost of an automated lightning protection system ranging from $3,000 to $5,000 for an average size golf course to the median jury verdict for all wrongful death claims in Florida of $500,000 and the median jury verdict for all premise liability claims in Florida of $75,000. *See* Jury Verdict Research Service, FLORIDA EDITION 1995-1996, LRP Publications (1995).

102. *See* Green v. Insurance Co. of North America, 275 So. 2d 425, 426 (La. Ct. App. 1973); Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. Ct. App. 1992); Bier v. City of New Philadelphia, 464 N.E.2d 147, 148 (Ohio 1984); Hames v. State, 808 S.W.2d 41 (Tenn. 1984); Dykema v. Gus Macker Enterprises, Inc., 492 N.W.2d 472 (Mich. Ct. App. 1992); Muehlfelder v. Crystal Woods Golf Club, Inc., No. 85L-27954, 1993 WL 456113 (Cir. Ct. Ill.); Caldwell, *supra* note 80, at 1.

be the reliability of these systems and the newer, smaller companies promoting these devices.[103] The safety claim that these systems reduce human error in the detection and warning of lightning depends on the proper design, installation, maintenance and activation of these systems.[104] The concern of golf course proprietors is that by purchasing one of these systems the golf course not only buys lightning protection but a lawsuit against the golf course when the system fails and a golfer is struck by lightning.[105] Yet the reasonable care standard of the law and the "every precaution" standard of the USGA seems to beckon golf course owners to purchase these systems and bear the risk of system failure.[106]

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103. None of the four companies marketing the lightning protection systems mentioned in footnote 97 are listed on any stock exchange. FORT LAUDERDALE SUN SENTINEL, BUSINESS SECTION, WALL STREET REPORT, June 25, 1995. Major financial management companies and financial managers are not familiar with these four companies. One financial manager reported that all four companies were small, high tech companies without a proven financial business history. Interview with William Dagostino, Certified Financial Planner, Smith Barney Shearson, 1200 N. Federal Highway, Suite 100, Boca Raton, Florida 33432.

The only reliability studies have been conducted by the manufacturers and marketers of the lightning protection systems. For example, the National Lightning Protection Corporation states in its brochure that the Prevectron III Plus system is 96% to 98% effective. Prevectron III Plus Pamphlet 2 (1995).

104. Even if properly installed and activated, the Stormaster Lightning Warning System may not work according to the Stormaster brochure. The brochure states that "false alarms" are still possible. Stormaster Lightning Warning System Brochure (1995).

105. Logically, golf course operators ask the following question: Even if the golf course purchases a lightning protection system, if the systems fails, has the golf course not just armed the golfer or other injured patron with an additional basis for claiming negligence. Interview with Brad Luken, Boca West Country Club Director of Golf, and Jay DiPietro, President and General Manager of Boca West Country Club (Sept. 9-16, 1994).

The answer to the foregoing question illustrates the kind of balanced legal analysis required in most negligence cases. It will be easier for a golf course to be found liable to a golfer for a lightning strike when the golf course does not have the latest, high tech lightning protection system assuming that it is reasonable for the golf course to purchase such a system. The reason is the USGA rule urging golf courses to take every precaution to protect golfers from lightning injuries. The injured golfer's argument is that an automatic lightning protection system would have helped prevent the injury and such a system is available and affordable.

On the other hand, it will be more difficult for a golf course to be found liable to a golfer for a lightning strike when the golf course has in place and operational an automatic lightning protection system. Again, the reason is the same USGA rule. The injured golfer's argument is that the golf course failed to take every precaution and reasonable steps to protect golfers from lightning. The injured golfer's argument rings hollow when the golf course not only employs conventional lightning protection methods but also invests in an automatic lightning protection system. Golfers who refuse to heed a golf course's lightning warnings or to take advantage of other lightning protection measures may hardly complain that the golf course did not take reasonable care to warn and protect the golfer from lightning.

106. *See Green*, 275 So. 2d at 426; *Macedonia Baptist Church*, 833 S.W.2d at 559; *Bier*, 464 N.E.2d at 148; *Hames*, 808 S.W.2d 41; *Dykema*, 492 N.W.2d 472; Caldwell, *supra* note 80, at 1.

For some golf courses the cost of these automatic lightning protection systems is unreasonably expensive. The reasonable care standard does not require the unreasonable.[107] The prudent golf course owner contemplating the purchase of one of these systems should use the system not as a substitute for but as an addition to existing lightning protection measures, at least until better reliability studies become available.[108] Proof of the proper operation of one of these automatic lightning protection systems, coupled with other conventional lightning protection measures, thwarts any claim that the golf course failed to take reasonable steps to protect golfers from lightning injury.[109] The prudent golf course operator should also take steps to protect itself from liability if the high-tech lightning protection system fails.[110] First, insurance is always a good idea.[111] But even more important, the golf course should require the manufacturer and the seller of the automatic lightning protection system to contractually bear the brunt of the liability expense for system failure.[112] This shifting of the liability risk, especially when dealing with

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107. Reasonable care is defined by the circumstances existing at the time a person acts. Reasonable care requires the courts to inquire what a reasonably prudent person would do under similar circumstances. W. PAGE KEETON ET AL., ON THE LAW OF TORTS 173-75, 193-96, 236-38 (5th ed. 1984). This standard applied to golf courses means that the golf course must do something to warn golfers of lightning and to protect golfers from injury. Reasonable care for the Boca West Country Club located in Boca Raton, Florida, where well over 100,000 rounds of golf are played on each of its five golf courses annually, is much different than the reasonable care required by the Carnation Public Golf Course located in Carnation, Washington, where golf can only be played comfortably, nine months a year on one small eighteen hole golf course. In each case, the level of lightning protection needed will vary because of the location of the golf course, the area of the golf course and the financial resources of the golf course.

108. *See Green*, 275 So. 2d 425, 426; *Macedonia Baptist Church*, 833 S.W.2d 557, 559; *Bier*, 464 N.E.2d 147, 148; *Hames*, 808 S.W.2d 41; *Dykema*, 492 N.W.2d 472; Caldwell, *supra* note 80, at 1.

109. *Id.*

110. *See supra* note 104.

111. *See supra* note 53. Akin to homeowners insurance, golf courses should consider purchasing a general liability insurance policy to cover injury to golfers and other golf course patrons due to the negligence of golf course personnel. These "umbrella" liability insurance policies can be purchased through most commercial insurance agents. Interview with Thomas Cundy, P & C Insurance, Inc., 2021 East Commercial Boulevard, Suite 206, Fort Lauderdale, Florida 33339.

112. *See supra* note 104. There are a number of preventative measures that can be taken by a golf course to help shift the liability for failure of the automatic, lightning protection system to the seller/manufacturer of the system. The purchase contract for the lightning protection system should include in writing all of the product warranties and product representations either in the text of the contract or incorporated by reference and attached to the contract. The purchase contract should require the seller to guarantee the proper installation of the system by trained technicians. The golf course should demand in writing that the seller is responsible for the testing of the system and certify that the system is fully operational

new technology and new businesses, is not unusual.[113] The manufacturers and sellers of these systems should not object to this shift of the liability risk if the claims in the promotional literature are true.[114] If the manufacturer or seller objects, then perhaps it is not reasonable to buy such unsupported and uncertain technology.[115]

IV. CONCLUSION

DATELINE: Rochester, New York, June 27th, 1991.

> Pat Bradley was walking down the middle of the first fairway with playing partner Kathy Whitworth and was about to hit her second shot in the opening round of the Rochester (N.Y.) International a month ago when she had what she describes as "one of the scariest experiences in my life." "Lightning flashed right in front of our eyes," Bradley was saying the other day. "It just came out of nowhere. No warning, nothing. I just said to her, 'Whit, I'm not going any further. Let's get out of here.' We just ran. I'm really surprised no one had a heart attack out there. The thing was, they were monitoring radar and everything. But you can have the greatest instruments in the world and it still won't always tell you it's coming. Mother Nature is not to be fooled and, as far as I'm concerned, life is too short for anyone to stay on a golf course when it happens."[116]

DATELINE: Lighthouse Point, Florida, May 2nd, 1995.

> Jenna Bernardo, the little girl who was struck by lightning while playing softball at a Lighthouse Point ballpark four weeks ago, has remained comatose and the outlook is not good, her family said Tuesday. . . . On May 2, about 10 members of Jenna's softball team, the Exchange Club, were out practicing at Frank Mc-

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before turning the system over to the golf course. The purchase contract must require the seller to adequately train golf course personnel in the operation of the system. The golf course should consider requiring the seller to fully insure or otherwise fund against any property damage or personal injury sustained by the golf course, golf course employees, agents or other independent contractors and golf course customers or guests. The purchase contract must also guarantee to provide adequate maintenance of the system. Finally, the golf course should also consider the insertion of a "hold harmless" clause in the purchase contract. This hold harmless clause should shift any liability, including attorney fees and costs, for failure of the lightning protection system to the seller. SCOTT J. BURNHAM, DRAFTING CONTRACTS Ch. 10, 12 and 15 (2d ed. 1992). *See also* Michael Flynn, *Construction Contracts and Contractors: Hurricane Andrew Reteaches Consumers*, 17 NOVA L. REV. 1093 (1993).

113. *See supra* note 112.

114. *See supra* note 96.

115. *See supra* notes 102, 103, and 106.

116. Leonard Shapiro, *Dangerous Combination: Lightning, Golf Just Don't Mix*, WASH. POST, June 27, 1991, at B1.

> Donough Park. The sun was still shining at 6:30 p.m., although some clouds were building on the northwest horizon. Suddenly, a bolt of lightning knocked all the girls to the ground, along with their coach, Donald Reid. Everyone got back up, except Jenna. The lightning had bypassed trees, flagpoles and adults to make a direct hit on the smallest girl on the team.[117]

DATELINE: West Palm Beach, Florida, July 2nd, 1995.

> A golfer on the second hole at Ibis Golf and Country Club was killed instantly when he was struck by lightning . . . . Jong Bae Suh, 53, was following through on his swing when a bolt of lightning struck his club . . . . Suh was playing with a foursome at the course . . . when the storm broke out. The group found shelter in a home under construction. When the rain subsided, the men returned to their game [and Suh was then struck by lightning].[118]

No matter how hard golfers and golf courses try, neither will be able to fool Mother Nature. Lightning and playing golf do not go together. Yet golfers continue to tempt Mother Nature's lightning and then blame the golf course when they are struck by lightning.[119] Golf courses cringe at the added expense of trying to protect golfers from lightning and sigh when its efforts fail.[120] Despite the best intentions and the best efforts of golf organizations, the preventable injuries to golfers from lightning remain unprevented.[121] Perhaps golf organizations and golf course proprietors cannot change the odd mindset of some golfers to play "lightning golf."[122]

Regardless, the golf organizations and golf course proprietors must still operate reasonably to protect golfers from lightning injuries. This duty of reasonable care requires golf courses to employ conventional and reliable, high tech methods to detect lightning in the golf course area, to warn golfers of approaching lightning and to advise golfers how

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117. Patricia Walsh, *Outlook Bleak for 8-year-old Hit by Lightning*, MIAMI HERALD, May 31, 1995, at 1BR.

118. Christine Stapleton, *Lightning Kills Golfer at Ibis*, THE PALM BEACH POST, July 2, 1995 at B1.

119. *See* Hames v. State, 808 S.W.2d 41 (Tenn. 1991); Dykema v. Gus Macker Enterprises, Inc., 492 N.W.2d 472 (Mich. Ct. App. 1992).

120. *See supra* note 104.

121. *See* Green v. Insurance Co. of North America, 275 So. 2d 425, 426 (La. Ct. App. 1973); Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 559 (Tex. Ct. App. 1992); Bier v. City of New Philadelphia, 464 N.E.2d 147, 148 (Ohio 1984); *Hames*, 808 S.W.2d 41; *Dykema*, 492 N.W.2d 472; Caldwell, *supra* note 80, at 1.

122. *Id.* This footnote brings to mind the recent television commercials in which odd combinations of sports are juxtaposed to satisfy bar patrons television requests. One of the "odd combinations" is "full contact golf" which combines football and golf. Can "lightning golf" be far behind?

to protect themselves from lightning. Golf course vigilance to this duty is a double hit; it not only protects the golf course from liability but may also save golfers from injury.[123]

123. *See supra* note 18. Any kind of double hit in golf is simply referred to as a "T.C. Chen."