

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY NYAZIE, as Administrator : CIVIL ACTION
of the Estate of KHADIJA :
NYAZIE, Deceased and BARRY :
NYAZIE and ZARMINA NYAZIE, :
husband and wife, in their own :
right, and TAIBA NYAZIE and :
AISHA NYAZIE and FATIMA NYAZIE :
and MARIAM NYAZIE, :
Plaintiffs :
VS. :
ROGER KENNEDY, DIRECTOR :
NATIONAL PARK SERVICE and :
NATIONAL PARK SERVICE and :
BRUCE BABBIT, DIRECTOR :
UNITED STATES DEPARTMENT :
OF THE INTERIOR and :
UNITED STATES DEPARTMENT :
OF THE INTERIOR and :
UNITED STATES OF AMERICA, :
Defendants : NO. 97-0120

MEMORANDUM AND ORDER

I. INTRODUCTION

This wrongful death and survival action has been brought under the Federal Tort Claims Act, 28 U.S.C. §2671 et. seq., by the parents and siblings of Khadija Nyazie, a fifteen year old former resident of Upper Darby, Pennsylvania, to recover damages arising from her drowning in the Potomac River at Great Falls National Park, Virginia. Defendants have filed a motion to dismiss under 28 U.S.C. §12(b)(1) for lack of subject matter jurisdiction or, in the alternative a motion for summary judgment. For the reasons which follow, I will grant the Motion to Dismiss in part and deny it in part.

II. FACTS AND HISTORY

Great Falls Park is one of several sites in the National Capital area administered by the National Park Service ("NPS") and is overseen by the superintendent of the George Washington Memorial Parkway. The Potomac River runs through the park and, although swimming or wading is prohibited, trails and overlooks allow scenic hiking for visitors. To raise maintenance funds, the Park charges each entering car a \$4.00 entrance fee which is collected at the sole visitors' entrance. That entrance is marked with warnings regarding the dangers of the river¹

On August 24, 1995, at approximately 6:45 p.m., Khadija Nyazie, a fifteen-year old girl, and her family paid the fee and entered Great Falls National Park in Great Falls, Virginia to "picnic and enjoy the scenic view of the Potomac River."

Plaintiffs' Complaint, at ¶5 (hereinafter "Complaint").

According to plaintiffs, they received no brochures, handouts or warnings regarding safety within the park. After parking in the lot adjacent to the Visitor's Center, plaintiffs walked to the family picnic area. Khadija and fourteen-year old Saiftullah Alam left the group to walk the park trails and get a better view of the river. Plaintiffs allege that there were "no warning signs anywhere from the picnic area to the location where Khadija and Saiftullah stopped." Plaintiffs' Response to Defendant's Motion to Dismiss, at 11 (hereinafter "Response"). The two

¹ The sign at the entrance states, "DANGER. Deadly Current, Slippery Rocks. Even Wading Can Kill. No Wading. No Swimming"

children left the trails and began to climb out onto the rocks at the river's edge above the falls. Directly in front of them was the Potomac River which veered into a ten to fifteen foot waterfall. The two sat on the rocks and, as Khadija attempted to reach the water, she fell into this waterfall zone. Her companion tried to reach her, but he too was pulled into the water.² Although Saiftullah was able to swim to an island of rocks where he was rescued, Khadija was not found until two days later, August 26, 1995. She was pronounced dead at Suburban Hospital in Bethesda Maryland.

Plaintiff Barry Nyazie, father of the deceased Khadija and administrator of her estate, filed an administrative claim for damages resulting from her death in the amount of \$7 million dollars.³ On August 20, 1996, the claim was denied in a letter sent via certified mail.⁴

² The only reported witnesses to this accident were Mrs. Tamara Sue Bloomer and Mr. Mark A. Olon who were also visiting the park. Mrs. Bloomer reported the accident to appropriate officials.

³ 28 U.S.C. § 2675 notes that "[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." Defendants claim that the only proper plaintiff in this case is Barry Nyazie as Administrator of his daughter's estate since he is the only plaintiff who satisfied the prerequisite of filing an administrative claim. Defendants have not pursued this issue in their motion to dismiss/motion for summary judgment.

⁴ The letter stated that:
In the instant matter, the administrative record contains no evidence to establish any negligent or wrongful act or omission on the part of the Government in this matter. The record contains

Following this denial, a complaint was filed on January 7, 1997 naming the following as plaintiffs: Barry Nyazie, Administrator of the Estate of Khadija Nyazie; Barry and Zarmina Nyazie, parents of Khadija; and Taiba, Aisha, Fatima and Mariam Nyazie, siblings of Khadija. Together they brought suit against Roger Kennedy, the Director of the National Park Service; Bruce Babbitt, Secretary of the Interior; the National Park Service; the United States Department of the Interior; and the United States of America. Plaintiffs asserted that the drowning resulted solely from the "carelessness, recklessness and negligence of the defendants" and based defendants' liability on the following actions: (i) allowing a dangerous condition to exist on the property of which they knew or should have known; (ii) failing to warn or post adequate warning signs of such dangerous conditions; (iii) failing to take precautions to prevent this type of accident; (iv) failing to erect barriers, fences, chains, ropes, etc. near the accident site; (v) failing to adequately inspect, supervise and provide sufficient personnel to patrol the park; (vi) failing to make adequate and necessary repairs and to maintain the park. Complaint, at ¶20.

Defendants filed the instant Motion to Dismiss, or in the alternative, for Summary Judgment on July 11, 1997. As grounds

evidence that the Government provided adequate notice of any hazards involved. Further, the conditions were open and obvious. Additionally, the unsupported allegations of negligence on the part of the Government fall within the discretionary function exception of the F.T.C.A. and, consequently, are not covered by the Act 28 U.S.C. 2680(a).

for this Motion they assert that, under the Federal Tort Claims Act, the only proper defendant is the United States and, hence, the other defendants should be dismissed. Additionally, defendant, the United States, moves for dismissal of the entire action for lack of subject matter jurisdiction or, in the alternative, for summary judgment in favor of defendants based on the discretionary function exception to the Act.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the jurisdiction of a federal court over the subject matter of the complaint. Walls v. Ahmed, 832 F. Supp. 940, 941 (E.D. Pa. 1993); Liakakos v. CIGNA Corp., 704 F. Supp. 583 (E.D. Pa. 1988). In reviewing a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989); D.P. Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984). Lack of subject matter jurisdiction is a ground for dismissal and may be raised at any time by the parties or by the court sua sponte. Walls, 832 F. Supp. 940, 941; Liakakos, 704 F. Supp. 583, 586. Because at issue in a factual 12(b)(1) motion is the trial court's very power to hear the case there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its jurisdiction. Mortensen v. First Fed. Sav. & Loan Ass'n.,

549 F.2d 884, 891-92 (3d Cir.1977). Thus, the court may consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction. Gotha v. U.S., 115 F.3d 176 (3d Cir. 1997). As the instant case involves a challenge to this court's subject matter jurisdiction, a motion to dismiss is proper and cannot be converted into a motion for summary judgment.

IV. DISCUSSION

A. DISMISSAL OF PLAINTIFF'S CLAIMS AGAINST ALL DEFENDANTS OTHER THAN THE UNITED STATES

Defendants contend that, under the Federal Tort Claims Act, the only proper defendant in this matter is the United States of America. I agree with this argument and find that plaintiffs' claims against defendants Roger Kennedy, the Director of the National Park Service; Bruce Babbitt, Secretary of the Interior; the National Park Service; and the United States Department of the Interior should be dismissed and defendant United States of America be substituted.

Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Federal Deposit Insurance Corp v. Meyer, 510 U.S. 471, 475 (1994) citing Loeffler v. Frank, 486 U.S. 549, 554 (1988). Sovereign immunity is jurisdictional in nature. Indeed, the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941). See also United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States

may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction").

The Federal Tort Claims Act (hereinafter "FTCA") provides congressional consent to suit of the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 1346. As a caveat, however, the Act states that

The remedy against the United States . . . for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.

28 U.S.C. § 2679(a). Hence, the FTCA provides immunity for federal employees from claims of common law tort by making the United States the sole potential defendant. 28 U.S.C.

§2679(a)(b).⁵ If the Attorney General certifies that a defendant employee was in fact acting within the scope of employment, the

⁵ Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Reform Act), which amended the FTCA, 28 U.S.C. §1346(b), 2671-80, in response to Westfall v. Erwin, 484 U.S. 292 (1988), which declined to accord absolute immunity from common law claims to federal Government employees acting in the scope of their employment. The Reform Act restored their absolute immunity by establishing an exclusive remedy against the United States under the FTCA for certain negligent or wrongful acts of federal employees acting within the scope of employment. See United States v. Smith, 499 U.S. 160 (1991).

action against the employee is deemed an FTCA action and the United States is substituted for the federal employee as party defendant. 28 U.S.C. §2679(d)(1).

With respect to federal agencies, the Act clearly states that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under §1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." 28 U.S.C. §1346(b). Specifically, the federal courts have held that "[a]ctions brought under the FTCA must be brought against the United States. A government agency may not be sued in its own name." Scheimer v. National Capital Region, Nat. Park Service, 737 F. Supp. 3, 4 (D.D.C. 1990). See also Sprecher v. Graber, 716 F.2d 968 (2d Cir.1983); Hughes v. United States, 701 F.2d 56 (7th Cir.1982).

In the case at bar, plaintiffs named as defendants Roger Kennedy, the Director of the National Park Service, and Bruce Babbitt, Secretary of the United States Department of the Interior. The Attorney General has asserted, and plaintiffs have agreed, that these individuals were acting in their official capacities as employees of the defendant, United States of America. As such, the claims against them must be dismissed and the United States, already named as a proper defendant, shall be substituted in their place.

Likewise, both the National Park Service and the United States Department of the Interior were named in the Complaint as

defendants to this action. Under §2679(a) of the FTCA, these federal agencies are not vulnerable to suit based on negligence by their employees. I find, and plaintiffs have wisely conceded, that the negligence claims against them must also be dismissed, leaving the United States as the sole defendant in this action.

B. DISCRETIONARY FUNCTION EXCEPTION

Defendants assert that plaintiffs' claims against the United States are barred by the discretionary function doctrine and, therefore, that this action should be dismissed for lack of subject matter jurisdiction.

As discussed above, a party may bring an action against the United States only to the extent that the government waives its sovereign immunity. Federal Deposit Insurance Corp., 510 U.S. at 475. Although, the Federal Tort Claims Act constitutes a waiver of that immunity for tort claims that arise from a government employee's conduct within the scope of his or her employment, that waiver is not absolute. The discretionary function exception bars FTCA claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused." 28 U.S.C. §2680. Underlying the exception is a congressional wish "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. S.A. Empresa de Viacao Aerea Rio

Grandense (Variq Airlines), 467 U.S. 797, 814 (1984) citing United States v. Muniz, 374 U.S. 150, 163 (1963).⁶ Application of this exception, therefore, precedes any negligence analysis as a threshold, jurisdictional issue. Kiehn v. United States, 984 F.2d 1100, 1102 (10th Cir. 1993). See also Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279 (3d Cir. 1995) (dismissing a tort claim against the U.S. for lack of subject matter jurisdiction under the FTCA's discretionary function exception); Garcia v. United States, 896 F. Supp. 467, 471 (E.D. Pa. 1995) (Because the discretionary function exception is a limitation on the waiver of sovereign immunity, claims which fall within the exception must be dismissed for lack of subject matter jurisdiction.).⁷

To determine whether challenged conduct falls within the discretionary function exception, the court must analyze it under a two-step test. First, because the exception only covers actions that are "discretionary in nature," the court must decide if those actions involve an "element of judgment or choice."

⁶ By designing this discretionary function exception, "Congress took 'steps to protect the Government from liability that would seriously handicap efficient government operations.'" United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Variq Airlines), 467 U.S. 797, 814 (1984) citing United States v. Muniz, 374 U.S. 150, 163 (1963).

⁷ Three circuits have held that the burden of proving the exception lies with the government. See Prescott v. United States, 973 F.2d 696 (9th Cir. 1992); Carlyle v. United States, 674 F.2d 554 (6th Cir.1982); Stewart v. United States, 199 F.2d 517, 520 (7th Cir.1952). However, in United States v. Gaubert, 499 U.S. 315, 325 (1991), the Court explained that for a plaintiff's claim to survive, the challenged actions cannot "be grounded in the policy of the regulatory regime." While this statement suggests that the burden lies with the plaintiff, the issue has not been clearly decided by either the Supreme Court or the Third Circuit and I do not address it now.

United States v. Gaubert, 499 U.S. 315, 322 (1991) citing Berkovitz v. United States, 486 U.S. 531, 536 (1988). "It is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. Id. at 322 citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984). If a federal statute, regulation or policy specifically sets forth a directive, an employee will not be shielded by the exception for failure to follow that directive. Berkovitz, 486 U.S. at 536. However, "[i]t is the governing administrative policy, not the [government's] knowledge of the danger that determines whether certain conduct is mandatory for purposes of the discretionary function exception." Rosebush v. U.S., 119 F.3d 438, 441 (6th Cir. 1997). Considerations of negligence are irrelevant to this analysis. As the Third Circuit has stated, "[t]he test is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion." Smith v. Johns-Manville Corp., 795 F.2d 301, 308-309 (3d Cir. 1986).

Second, once the element of discretion is established, the court must determine "whether that judgment is of the kind that the discretionary exception was designed to shield." Gaubert, 499 U.S. at 322-323 (citations omitted). Essentially, the discretionary exception "protects only governmental actions and decisions based on considerations of public policy" including

those grounded in social, economic or political concerns. Id. (citations omitted). Thus, "the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis." United States Fidelity and Guarantee Company v. United States, 837 F.2d 116, 120 (3d Cir. 1988). The FTCA expressly provides that the exception "applies to policy judgments, even to those constituting abuse of discretion." Rosebush, 119 F.3d at 441 citing Dalehite v. United States, 346 U.S. 15, 33 (1953).

Plaintiffs essentially claim that defendants were negligent in (1) allowing a dangerous condition to exist and failing to maintain the park; (2) failing to warn about such conditions through either signage or brochures; (3) failing to erect barriers or fences around such hazards; and (4) failing to inspect and supervise the park. They assert that this conduct does not fall within the discretionary function exception and, as such, is not immune from suit. Having scrutinized the policies, directives, manuals and guidelines of the National Park Service and Great Falls National Park, I find that, with respect to the warning signs, barriers and supervision, the Park's decisions are immunized. However, the failure to hand out warning brochures escapes the reach of the discretionary function exception.⁸

(1) Discretion

⁸ Due to the paucity of National Parks within the Third Circuit region, there is little precedent in this Circuit applying the discretionary function exception in the National Park/National Forest context. Hence, I rely substantially on persuasive case law from other courts.

The first relevant inquiry asks whether the controlling statutes, regulations and administrative policies mandate that the National Park Service maintain the Park, post and distribute warnings, erect barriers and supervise the Park in a certain manner. Well-founded precedent has determined that such decisions fall squarely within the discretion of the government.

In Blackburn v. United States, 100 F.3d 1426 (9th Cir. 1996), a diver sued under the FTCA for injuries sustained when he dove off a bridge in Yosemite National Park. His alleged claims against the government included failure to warn, negligent design and maintenance of the bridge and failure to abate hazards associated with diving off the bridge. Id. The Court, upon reviewing the various statutes and Management Policies under which the National Park Service employees operated, found that they "necessarily encompass an element of discretion in deciding how and when to warn the public of known dangers." Id. At 1431. The Court continued on to state that:

Although the policy manuals outline general policy goals regarding visitor safety, they do not set out the specific means by which the NPS employees are to meet these general goals. Further more, the policy manuals' broad mandate to warn the public of and protect it from special hazards involves the exercise of discretion in identifying such hazards in determining which hazards require an explicit warning and in determining the precise manner in which to warn it of those hazards.

Id. at 1431 (citations omitted).⁹

⁹ Plaintiffs contend that Blackburn is distinguishable from the instant matter. According to plaintiffs, that case held that it was only discretionary to identify hazards and determine which required an explicit warning and which hazards spoke for themselves. The distinction, argue

Similarly, in Valdez v. United States, 56 F.3d 1177 (9th Cir. 1995), the plaintiff was rendered quadriplegic when he fell down a waterfall in Kings Canyon National Park after attempting to descend down the side of the falls and losing his footing. The plaintiff made five claims in that matter including: (1) negligently designing and maintaining a trail in a way that appeared to lead into the waterfall; (2) failing to adequately warn; (3) failing to keep the area safe; (4) failing to prevent such actions by park visitors by erecting barriers; and (5) failing to warn the public of potential hazards through educational materials. Id. at 1178. Holding that the discretionary function exception applied to all of these concerns, the Court stated that “[the Park] guidelines can be considered mandatory only in the larger sense that they set forth broad policy goals attainable only by the exercise of discretionary decisions.” Id. at 1179.

Repeatedly, courts have recognized that decisions regarding maintenance, warning, barriers and supervision of the national parks involve a great degree of discretion by park officials. With respect to maintenance see Rosebush, 119 F.3d at 442 (“The controlling statutes, regulations and administrative policies did

plaintiffs, is that, in this case, Great Falls personnel already determined that the hazard was hidden and a warning was required.

Plaintiffs’ description of Blackburn, however, falls among the many cases that they mischaracterize. Plaintiffs fail to note that the Blackburn court also found that, once a hazard is identified as requiring a warning, a discretionary decision is involved in determining “the precise manner in which to warn of those hazards.” Blackburn, 100 F.3d at 1431. While it is true that Great Falls personnel did identify the water as a hazard requiring a warning, they still maintained complete discretion as to how to notify the public of the danger.

not mandate that the Forest Service maintain its campsites and fire pits in any specific manner. Accordingly, the conduct of the Forest Service in making these decisions was within the discretionary function exception to the FTCA's waiver of immunity.); warnings see Kiehn v. United States, 984 F.2d 1100, 1102 (10th Cir. 1993) (Decision whether or not and how to post warning signs at national monument was fully within the National Park Service's discretion); Johnson v. United States, 949 F.2d 332, 338 (10th Cir. 1991) (Broad statutory/regulatory framework for the National Park Service leaves to NPS's discretion the decision not to provide additional warnings for mountain climbers); Zumwalt v. United States, 928 F.2d 951, 958 (10th Cir. 1991) (Decision not to install warning signs in Pinnacles National Monument was within exercise of discretion); guardrails see Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1991) (Broad language in congressional mandate to NPS did not specifically govern design and construction of parkway guardrails and, hence, the decision was a discretionary one); Bowman v. United States, 820 F.2d 1393 (4th Cir. 1987) (Decision not to place guardrail along Parkway embankment was discretionary decision); inspection and supervision see Autery v. United States, 992 F.2d 1523 (11th Cir. 1993) cert. denied 511 U.S. 1081 (1994) (Broad guidelines stating that "saving and safeguarding of human life takes precedence over all other park management activities," in absence of more specific guidelines, did not remove discretion from decision whether or not to inspect

hazardous trees in the park); Lockett v. United States, 938 F.2d 630, 639 (6th Cir.1991) (Proper response to the discovery of PCBs in a residential area, including not making any response at all, is within the discretionary function exception to the FTCA).

In contrast, several cases have ruled that the conduct at issue included no "element of judgment or choice" because a regulation set forth a specific directive. For example, in Faber v. United States, 56 F.3d 1122 (9th Cir. 1995), the plaintiff, who was injured when he dove into a natural pool at the Tanque Verde Falls, asserted negligence stemming from the National Forest Service's failure to warn. Prior to the accident, the Forest Service, knowing that a significant number of diving accidents were regularly occurring at the Tanque Verde Falls, promulgated a Tanque Verde Management Plan requiring the development of a sign plan, creation of an ongoing media program and provision of "a presence" to verbally warn the public of dangers. Id. Despite this directive, the Forest Service failed to provide any warnings or implement any of the prescribed safety measures. Id. As such, the court held that "the Forest Service did not exercise any choice in failing to warn about the dangers associated with diving from the Falls." Id. at 1125. Unlike the cases discussed above, definite guidelines existed which mandated certain action. See also Mandel v. United States, 793 F.2d 964, 967 (8th Cir. 1986) (Failure to properly execute a previously adopted safety policy was not discretionary in nature); Soto v. United States, 748 F. Supp. 727, 730 (C.D. Cal. 1990) (When the

District disregarded all of the Forest Service rules that apply to dispersed areas, failure to warn could not be the exercise of a discretionary function).

In the instant case, NPS's decisions regarding maintenance, warning signs, guardrails and supervision in the park all contain some "element of judgment or choice" that makes them discretionary. Nothing within the governing administrative policy dictates specifically how the park should manage safety precautions. Chapter 8.1 of the Management Policies states that "Visitors will be given appropriate information to encourage safe and lawful use of the parks and to minimize any resulting adverse impacts on park resources." Chapter 8.5 goes on to note that:

The saving of human life will take precedence over all other management actions. The National Park Service and its concessioners, contractors, and cooperators will seek to provide a safe and healthful environment for visitors and employees. . . . However, park visitors assume a certain degree of risk and responsibility for their own safety when visiting areas that are managed and maintained as natural, cultural or recreational environments. Where practicable and not detrimental to NPS mandates to preserve park resources, known hazards will be reduced or removed. Where it would be inconsistent with congressionally designated purposes and mandates or where otherwise not practicable to make physical changes, efforts will be made to provide for persons' safety and health through other controls, including closures, guarding, signing, or other forms of education.

Management Policies, at Chap. 8.5. Additionally, Chapter 1 of the NPS Sign Manual states that "the individual park manager, following the guidelines and procedures set down in the [National Park Service Traffic Control Sign and System Guideline], has the responsibility for determining whether or not a sign is necessary

or appropriate at a given location." Sign Manual, at 1-1.¹⁰ These regulations are virtually identical to those under which the NPS operated in Blackburn, Valdez and Rosebush. Thus, in contrast to plaintiffs claims, the regulations actually grant a great deal of latitude in implementation to the NPS to determine which situations are hazardous and how to handle those dangers.¹¹ Nothing dictates that a specific number of signs or guardrails need be placed around the Potomac River to warn of its dangers. The NPS could, in its wisdom, decide to erect no warnings in a particular area without violating any directives. Like the regulations in Blackburn, Valdez, Rosebush and numerous other decisions, these policies create broad goals that can only be attained by the exercise of discretionary decisions.¹²

Plaintiffs claim that the defendants violated an established policy by failing to give them brochures with inserts warning of

¹⁰ Defendants also refer the court to the Affidavit of Audrey F. Calhoun, Superintendent of George Washington Memorial Parkway, National Capital Region, National Park Service, Department of the Interior. Ms. Calhoun states that "[t]here are no federal statutes which specifically proscribe or describe a course of conduct or action for the National Service to follow" in management of the park. Affidavit of Calhoun at 2.

¹¹ See Tippett v. U.S., 108 F.3d 1194, 1197 ("the general goal of 'protecting human life' [under Chapter 8.5] in the nation's national parks is not the kind of specific mandatory directive that operated to divest [park officials] of discretion.").

¹² Other relevant regulations are found in the Loss Control Management Program Guidelines. Chapter 22 states that "all areas will provide any special materials, signs and programs to alert the public of potential dangers." Loss Control Management Guidelines (LCMG), Chap. 22, p.2. Additionally, the guidelines mandate that "the park safety Officer should review the signing of the park and determine if it is appropriate for the area signed and if it is in good repair." Id. None of these provisions remove the discretion of the NPS to determine how to handle warnings.

the hazards in the park.¹³ Response, at 37. They submit that, “[o]nce these management guidelines mandated these warnings be given to Park visitors through these brochures/inserts, there was no discretion to an employee to ignore and violate a mandated policy of the National Park Service.” Response, at 37-38. While failure to follow a directive would escape the discretionary function exception, plaintiffs point to no specified policy of the National Park Service that requires brochures to be distributed at the entrance gate. The only applicable provision in the Management Policies of the NPS states that “[v]isitors will be given appropriate information to encourage safe and lawful use of the parks and to minimize any resulting adverse impacts on park resources.” Nothing in that regulation requires that this information be disseminated to each entering car through a brochure. Unlike the rules in Faber, this statement is a far cry from a clear directive. Moreover, the Loss Control Management Guidelines, Chapter 22, state that “[b]rochures specific to the area should contain safety messages that direct attention to special hazards or attractions that could be

¹³ The warning insert to the park brochure stated, in relevant part:

Warning: Drowning is Real

- Frequent drownings occur in the Great Falls area. Anyone entering the river is at risk.
- The Potomac seems so tranquil that people are unaware of danger. Water currents are extremely strong with massive undertows even where the surface looks calm.
- Stay away from the water’s edge; wet rocks are slippery. Fish only from the shore.

Plaintiff’s Exhibit C.

potentially hazardous to the visitor." LCMG, Chap. 22, p.2.¹⁴

This provision, contained in the section describing appropriate educational materials, only mandates what should be in a brochure, not that the Great Falls Park staff is required to hand each visitor vehicle a brochure.¹⁵

As a final note in this part of the analysis, plaintiffs place substantial reliance on the case of George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990), where the court held that the decision of Forest Service officials to take no precautions against a known and dangerous alligator at a designated swimming area was not within the discretionary function exception to the Federal Tort Claims Act. The court decided that there was no element of choice presented by the

¹⁴ In order to read this provision in context, it is essential to note the purpose of the Loss Control Management Guidelines. The introduction states:

This guideline has been prepared to provide both field units and office managers with sufficient information to develop a comprehensive safety and occupational health program. However, each area must design its own safety and occupational health effort based on local circumstances and operations.

LCMG, introduction, p.iii. Thus, the broader mandate of the Guidelines leaves substantial discretion with the park officials.

¹⁵ In her deposition of December 3, 1997, Audrey F. Calhoun, Superintendent for the George Washington Memorial Parkway, stated that there is no policy that mandates that brochures or any other type of handout be given to visitors of the park. Deposition of Audrey F. Calhoun, p. 59. Additionally, Ms. Calhoun explained that:

[The brochures] are given out in various forms. People can pick them up at the visitor center. If the entrance station is manned, people can pick the brochure up there. It's one of the things that the fee collector may hand out along with the ticket, the receipt for paying the fee. They can pick the brochure up at the Parkway headquarters. We can mail the brochure out to people if they request it.

Id. at p. 61. Hence, even assuming that plaintiffs did not receive any type of brochure upon entering the park, no policy, directive or mandate was violated by the park personnel. Although the park had a goal of providing the handout to each vehicle, this goal is not a directive.

failure to respond to this danger. Id. However, plaintiffs reliance on this case is misplaced for two reasons. First, it is distinguishable from the present situation in that the gushing, white water river which resulted in Khadija Nyazie's untimely death was open and obvious, whereas the alligator in George was not.¹⁶ George, 735 F. Supp at 1531. Moreover, the court based its decision on a finding that the government had "no reasonable range of choices" and was simply negligent in deciding not to warn of the alligator. Id. at 1532.¹⁷ This reasoning misunderstands the scope of the exception and "improperly

¹⁶ Although both the National Park warning brochure and Superintendent Calhoun stated that the dangers of the river may not be obvious to someone unfamiliar with the current, the river was certainly more open than the hazard in George. As support for this proposition, it is helpful to determine what the George court meant by "open and obvious."

First, it distinguished George from Bowman v. United States, 820 F.2d 1393 (4th Cir. 1987) where the court found that a decision not to put a guardrail or post signs along a steep embankment was protected by the discretionary function exception, on the grounds that the danger was open and obvious. George, 735 F. Supp. at 1531.

The court also distinguished Chrisley v. United States, 620 F. Supp. 285 (D.S.C. 1985), aff'd 791 F.2d 165 (4th Cir. 1986) where the government maintained a dam, but posted no signs warning of the steep embankment and the swift current even though the shoreline was a popular fishing area. Plaintiff's son fell in the water and drowned and the court held that the decision of whether to restrict the area in question or to post warning signs was a discretionary function, especially since the danger was not hidden. Id. at 289. Accord Rich v. United States, 119 F.3d 447 (10th Cir. 1997).

Finally, although not discussed in George, the case of Valdez v. United States, 58 F.3d 1177 (9th Cir. 1995), presents a case that is factually similar to the one at bar. As did Khadija Nyazie, the plaintiff, in that case, fell down a waterfall. The court found that the discretionary function exception applied to the government's decision on how to warn of the waterfall since the danger was apparent. It stated that "[b]ecause the NPS cannot apprise the public of every potential danger posed by every feature of the Park, a degree of judgment is required in order to determine which hazards require an explicit warning and which hazards speak for themselves." Id. at 1180.

¹⁷ The court stated "[s]urely, it cannot be contended that the forest officials had discretion to decide whether overriding policy considerations of protecting the alligator(s) and the natural state of the area outweighed the safety of the humans using the designated swimming area." George, 735 F. Supp. at 1531.

entangle[s] issues of negligence with the determination of whether the discretionary function exception applie[s]." Roop v. United States Park Serv., 882 F. Supp. 567, 571 (S.D.W. Va. 1995). As the Eleventh Circuit has held, the discretionary function exception "applies to policy judgments, even to those constituting abuse of discretion." Dickerson, Inc. v. United States, 875 F.2d 1577, 1581 (11th Cir. 1989).

In the instant case, regardless of whether or not the NPS was negligent providing safeguards against the tragic accident, the decisions as to maintenance, warnings, brochures, guardrails and supervision in the park were a product of sheer discretion granted to the officials by the NPS Management Policy.

(2) Considerations of Public Policy

Even if the challenged Government conduct does involve an element of discretion, the discretionary exception will not shield the challenged conduct unless it is based on considerations of public policy. Blackburn v. United States, 100 F.3d 1426,1433 (9th Cir. 1996). Again, clear precedent advocates vigorously in favor of the defendant's position that its decisions are permeated with policy concerns. However, defendant's case falters when considering the failure to hand out the warning brochure.

As stated above, regardless of whether or not there is evidence that policy factors were the basis of a challenged decision, the discretionary function exception applies if the

decision is susceptible to policy analysis. Rosebush v. United States 119 F.3d 438, 444 (6th Cir. 1997). See also Hughes v. United States, 110 F.3d 765 (11th Cir.1997). Decisions whether and how to make federal lands safe for visitors require making policy judgments protected by the discretionary function exception. Rosebush, 119 F.3d at 443. See also Autery v. United States, 992 F.2d 1523, 1527 (11th Cir. 1993)(claims for injuries sustained when a tree fell on car as plaintiffs were driving through Great Smokey Mountain National Park barred by discretionary function exception because Park Service decisions concerning safeguarding visitors constitutes protected discretionary conduct); Bowman v. United States, 820 F.2d 1393, 1395 (4th Cir. 1987) (design and use of Park Service facilities on the Blue Ridge Parkway a discretionary function because it requires balancing safety, aesthetics, environmental impact, and available financial resources); Wright v. United States, 868 F. Supp. 930 (E.D. Tenn.1994), aff'd, 82 F.3d 419 (6th Cir.1996) (exception protects decisions concerning how and whether to warn the public that trees might fall on a hiking trail).

As discussed above, in Blackburn v. United States, 100 F.3d 1426 (9th Cir. 1996), plaintiff alleged negligence by the NPS for failure to warn of the dangers in diving off a bridge. The court found that the NPS's decisions not to erect barriers on the bridge or put warning signs on the bridge itself were based on considerations of public policy, stating that:

The decisions regarding the election, placement and

text of the signs were based on considerations of visitor enjoyment, preservation of the historical features of the bridge, the need to avoid a proliferation of man-made intrusions, and protection of wildlife and the general riparian environment.

Id. at 1434. Upon finding that the decision was "precisely the kind the discretionary function exception was intended to immunize from suit," the court held the Government immune from tort liability. Id. (citations omitted).

The recent Sixth Circuit case of Rosebush v. United States, 119 F.3d 438 (6th Cir. 1997), also demonstrates what has been considered an acceptable policy decision within the boundaries of the discretionary function exception. In that case, the plaintiffs sued the United States Forest Service to recover for injuries suffered by their sixteen-month old daughter when she fell into a fire pit at a national campground. Id. They alleged negligent maintenance of a dangerous condition, failure to erect barriers and negligent management. Id. Holding the Government immune from suit, the court stated:

The management and maintenance decisions of the Forest Service at the Camp 7 Lake Recreation Campground including the decision to have open fire pits, the design of the pits, whether to enclose them within railings, and whether to warn of their dangers involves balancing the needs of the campground users, the effectiveness of various types of warnings, aesthetic concerns, financial considerations, and the impact on the environment, as well as other considerations.

Id. at 444. See also, Wilson v. United States, 940 F. Supp. 286, 290 (D. Or. 1996) aff'd ____ F.3d ____ (9th Cir. 1998) (the decision not clear woody debris from lake was within discretionary function exception since it was "grounded in

social, economic and political policy"); Fahl v. United States, 792 F. Supp. 80, 83 (D. Az. 1992) (suit dismissed under exception because "[r]equiring the Park Service to place guardrails and warnings at every conceivably dangerous place in the park would certainly conflict with the avowed policy of attempting to interfere as little as possible with nature in addition to being a costly undertaking").

The courts have found, in several instances, that failure to warn did not fall into the discretionary function exception because there was no link between the policy considerations and the decision at issue. "[W]here the challenged governmental activity involves safety considerations under an established policy, rather than the balancing of competing policy considerations, the rationale for the exception falls away and the U.S. will be responsible for the negligence of its employees." Aslakson v. United States, 790 F.2d 688, 693 (8th Cir. 1986). For example, in Summers v. United States, 905 F.2d 1212 (9th Cir. 1990), plaintiffs sued the NPS for failure to identify and warn of the danger to barefoot visitors of hot coals on park beaches.¹⁸ The court held that, although the decision was one involving discretion under the first prong of the discretionary function test, it resembled more a departure from the safety considerations established in the Service's policies than a mistaken judgment in a matter clearly involving choices

¹⁸ Note that the Ninth Circuit has declined to recognize much of the dicta in Summers as law. See Blackburn, 100 F.3d at 1432.

among political, economic, and social factors. Id. at 1216. Because the park service did not even consider the danger to visitors from the hot coals, policy concerns "played no part in the formulation of the changed Park Service policy on fire rings." Id. 1216. See also Gotha v. United States, 115 F.3d 176 (3d Cir. 1997)(failure to provide adequate safeguards on a narrow pathway at U.S. Naval Facility, although a discretionary decision, was more a product of inaction rather than of policy considerations so discretionary function exception does not apply); Cope v. Scott, 45 F.3d 445, 451 (D.C.Cir. 1995) ("having taken steps to warn users of dangers inherent in the [use of the Park's roadway], the Park service cannot argue that its failure to ensure that those steps are effective involves protected 'discretionary' decisions.").

In contrast to Summers, the case at bar involves several decisions regarding maintenance, warnings, barriers, and supervision/inspection that unequivocally involved a balancing of policy considerations. Chapter 1.3 of the NPS Management Policies states that:

Congress's mandate to the Park Service has been expressed as conserving resources while providing for their enjoyment by today's citizens in a manner that will leave them unimpaired for future generations. There will inevitably be some tension between conservation of resources on one hand and public enjoyment on the other. The National park Service is charged with the difficult task of achieving both.

Management Policies, at chap. 1.3. See also 16 U.S.C. §1. With respect to warning signs, chapter 9.11 continues on to declare

that:

Signs will be held to the minimum number, size, and wording required to serve their intended functions, so as to minimally intrude upon the natural or historic setting. They will be placed where they do not interfere with park visitors' enjoyment and appreciation of park resources.

Management Policies, at 9.11.

Other policy concerns have been identified by Audrey F. Calhoun, the Superintendent, George Washington Memorial Parkway, National Capital Region, National Park Service, department of Interior. Regarding supervision of the park, she states that

Decisions on the deployment of National Park Service personnel by day of the week and time of day are based upon balancing concerns for visitor safety, visitor enjoyment of the park, maintenance requirements, natural and historic resources protection, budgetary constraints, and allocation of limited staff and financial resources.

Affidavit of Audrey F. Calhoun, at 17. She goes on to explain, with respect to maintenance and barriers that,

The major factors in deciding if and how to specifically install barrier fences on the shoreline would include historic and aesthetic considerations, the structural integrity of any fence due to changing levels of the river, the impact to the environment, cost estimates, budgetary restraints, public safety, and impact on the quality of the visitors' experience in and enjoyment of the park . . . Shoreline fencing was and is not required under any existing law, regulation, or standard.

Id. at 21-22.¹⁹

¹⁹ The introduction to the Loss Control Management Guidelines also states:

Paradoxically, many of the natural features found in parks pose significant safety risks to the uninformed visiting public, yet those same features cannot be eliminated nor guarded against in the same manner that a prudent person would expect to find in an industrial or home setting. Therefore, NPS public safety

Like the defendants in Rosebush and Blackburn, the National Park Service clearly engaged in a balancing of various policies in deciding how and when to provide for visitor safety in the park. As evidenced by the already existing signs and the park brochure, the NPS was aware of the dangers associated with the river. Taking into consideration the competing concerns of public safety, feasibility, aesthetics, budgetary constraints, and unrestricted visitor enjoyment of the park, it set up a system by which to manage these hazards, thus distinguishing it from the defendants in Summers. Whether or not the signs, barriers, maintenance and supervision were sufficient to prevent accidents of the sort that occurred or whether the government negligently engaged in an inappropriate balancing is outside the scope of the court's power of review. Furthermore, plaintiffs' claim that the recent erection of new signs and barriers "certainly burst the bubble on defendants' argument that the fencing was an eyesore" and "not permissible" has no impact on the determination that these decisions were based on considerations of public policy. Response, at 24.²⁰ These

efforts are focused on interpreting the values of the park's natural features and educating the visitor concerning the proper precautions one must take to have a safe and healthful journey at that specific park unit.

LCMG, introduction, p.iii.

²⁰ Plaintiffs spend a significant amount of time discussing whether or not the warning signs and barriers were adequate. This line of argument misunderstands the discretionary function exception. Layton v. United States, 984 F.2d 1496, 1502 (8th Cir.) cert. denied 510 U.S. 877 (1993) ("Whether . . . employees were negligent in making any . . . decisions is irrelevant."); Kennewick Irr. Dist. v. United States, 880 F.2d 1018, 1029 (9th Cir. 1989) ("[N]egligence is simply irrelevant to the discretionary function inquiry.").

decisions were "precisely the kind the discretionary function was intended to immunize from suit." Childers v. U.S., 40 F.3d 973, 976 (9th Cir. 1995).

However, one remaining concern lingers. Although defendant did have discretion as to whether brochures were to be distributed to visitors, it had already established a general practice of handing them out to every entering car. The Park officials had made a policy-based determination, albeit one they were not required to make, that handouts were helpful to prevent accidents and should be given at the entrance gate. Viewing the facts in the light most favorable to plaintiffs, plaintiffs did not receive a brochure on the day of the accident. The failure to hand plaintiffs a brochure at the front gate seems not to be a decision grounded in the balancing of policy considerations or a concern for attaining various goals of the National Park Service, but rather mere inadvertence on the part of the Park rangers. This decision is not of the kind that Congress sought to protect. See Gotha, supra; Cope, supra.

As a final caveat, the ruling today is not the final pretrial word on the appropriate disposition of this matter, nor is it a ruling on the defendant's liability. Should additional discovery reveal policy reasons for not handing a brochure to plaintiffs, the case may be dismissed on summary judgment grounds. Moreover, because discretionary function immunity applies to every other contested governmental action, plaintiffs' ultimate case may only prevail on the showing of a causal

connection between the failure to receive a brochure and the accident. However, at this juncture, absent further information, I cannot dismiss this entire action for lack of subject matter jurisdiction.

V. CONCLUSION

Because the defendant's decisions regarding warning signs, supervision, maintenance and barriers involved discretion and entailed a balancing of policy concerns, I hold that the discretionary function exception applies and that the Government is immune from suit on these issues. However, because the failure to hand out a warning brochure to plaintiffs does not fall within the ambit of this exception, the Motion to Dismiss must be granted in part and denied in part.

An appropriate order follows.