

## JULY 1997 LAW REVIEW

### CHOSEN LIGHTNING PROTECTION ON GOLF COURSE MUST BE PROPERLY UTILIZED

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The December 1992 NRPA Law Review column entitled “No Duty to Warn of Obvious Risk of Golfing in Lightning Storm” described a 1991 decision by the Tennessee state supreme court (*Hames v. State*, 808 S.W.2d 41, Tenn. 1991) in which a golfer was struck by lightning on a state park golf course. In that particular case, the Tennessee supreme court found such adverse weather conditions would ordinarily be considered an open and obvious natural hazard. As a result, the court held there was no legal duty for a golf course operator to provide protective shelters and systems to warn of approaching adverse weather conditions. Moreover, the court noted such shelters and warning systems were the exception rather than the rule, particularly in state park golf courses where this particular incident occurred.

While the *Hames* court found that there was no duty owed to golfers to protect them from lightning strikes, this decision left open the possibility that, had there been an industry standard or customary conduct of protecting patrons from lightning strikes, the result might have been different. In so doing, the court in *Hames* acknowledged that the customs, practices, and usages in a field are indicative of the applicable legal standard of care.

In contrast to *Hames*, the case described herein, *Maussner v. Atlantic City Country Club*, 1997.NJ.175 (<http://www.versuslaw.com>), presents a situation in which there was “some evidence in the record that other golf courses in the immediate area of the Club utilized various methods to protect their patrons.” Accordingly, the court in *Maussner* found a golf course owed golfers a “duty of reasonable care to implement its safety precautions properly,” particularly when it had “taken steps to protect golfers from lightning strikes.” In so doing, however, the *Maussner* court stated that its holding in this case did “not go so far as to hold that golf course operators have an absolute duty to protect their patrons from lightning strikes.” According to the court, it refrained from imposing “this greater duty because it may still be cost-prohibitive to make all golf courses adopt particular safety procedures.”

#### GOLFERS IN THE MIST

In this case plaintiff Spencer Maussner contended that the defendant Atlantic City County Club, as an operator of a golf course, owed “a duty of care to their patrons to protect them from lightning strikes.” The facts of the case were as follows:

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At approximately 7:30 a.m. on Sunday, March 28, 1993, plaintiff Spencer Van Maussner, a longstanding member of the Atlantic City Country Club (Club), arrived at the Club with his friends Michael McHugh, Robert Dusz, and Peter Costanzo. The foursome regularly played golf together on Sunday mornings. Although a snowstorm had been predicted for that morning, the sportsmen were not deterred from pursuing their scheduled golf match.

The sky that morning was overcast with misty conditions, and it was drizzling rain by the time the group began to play. At approximately 8:00 a.m., the Club's starter directed the foursome to begin play at the tenth hole. As the group played their first two holes, the tenth and eleventh, the drizzle turned into a downpour, which subsided as they teed off at the twelfth hole. After hitting his approach shot to the twelfth green, McHugh noticed a lightning bolt, and the four players and their two caddies proceeded along the fairway intending to seek refuge at the clubhouse, which was approximately one half mile away. There were no man-made shelters along this route. While walking, plaintiff put up his umbrella to avoid the rain.

On route to the clubhouse, the group crossed onto the seventh fairway. Walking on the seventh fairway, McHugh and Dusz were about fifteen yards behind plaintiff and Costanzo. Suddenly there was a tremendous noise, and McHugh watched as a lightning bolt struck plaintiff, causing him substantial injuries. Both plaintiff and Costanzo fell to the ground. Dusz immediately went for help at the clubhouse, which was approximately 325 yards away, while McHugh remained behind to assist his friends. One caddie was sent to the nearby police station to obtain additional assistance. After ascertaining that Costanzo was stable, McHugh administered CPR to plaintiff until the police and the medics arrived. According to McHugh, the Club caddie master and Club pro arrived at about the same time as the police. During this time, lightning continued to appear in the sky.

In his complaint, Maussner contended that "a lightning strike on a golf course is a foreseeable risk that must be addressed by the owners of the course where various means of protection are feasible." Specifically, Maussner alleged that the golf course was unsafe for golfers because the Club:

(1) did not use available lightning detection equipment; (2) did not make proper use of various weather reporting services; (3) did not provide shelter at convenient spots throughout the course; (4) did not have an effective evacuation plan; and (5) did not adequately warn golfers of the hazards of lightning.

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In the opinion of Maussner's expert witness in recreation safety, the lightning was a "dangerous condition, and the design, management and maintenance of the Country Club created and exposed Maussner to the risk of being struck by lightning." Moreover, plaintiff's expert opined that "this accident could have been avoided" if the following "proper weather monitoring was used" by the Club."

Weather Service personnel had the technology to foresee those conditions that would have resulted in storm fronts producing lightning... [T]here was technology available (Sky Scan) in 1993 to the Atlantic City Country Club that would have enabled personnel to detect lightning up to as much as a forty (40) mile radius of the Country Club. This technology was available at a reasonable, minimal investment to the Country Club, was portable and would have provided more time to institute an evacuation plan for golfers . . . preventing the chance of someone being struck by lightning... [Further] the Club should have had a better system for warning the golfers of the need to evacuate the golf course by use of an audible signal.

### THE WEATHER CHANNEL

In response to Maussner's allegations of negligence, the Club asserted that it had "used reasonable care to make its premises safe for golfers. Specifically, the Club claimed as follows that it "monitored the weather channel and was in constant communication with the weather station."

Club management generally monitored the weather by listening to the weather advisory channel and placing calls to the Naval Aviation Facilities Experimental Center (NAFEC). The Club consulted the National Weather Service on the morning of the incident and, although inclement weather was predicted, there were no warnings that lightning was possible.

In so doing, however, the Club admitted that it "did not possess any equipment for detecting lightning, had not installed any audible warning devices, nor had they erected any shelters on the course." Instead, the Club indicated as follows that "signs were posted at the Country Club instructing members of its evacuation plan and how to proceed if inclement weather struck during play":

Club members were warned about the general risks of lightning by a notice from Don Siok, the Club golf pro, and a United States Golf Association (USGA) poster, which were both posted in the locker room. The notice from Siok advises golfers that:

WEATHER CONDITIONS SOMETIMES NECESSITATE OUR  
GOLF COURSE EVACUATION PLAN TO BE IMPLEMENTED  
WHEN AUTHORIZED PERSONNEL ADVISE YOU TO COME

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IN OFF THE COURSE, IT IS IMPERATIVE THAT YOU DO SO.

OUR WEATHER MONITORING SYSTEM (NAFEC AND WEATHER ADVISORY CHANNEL) ADVISES US OF DANGEROUS ELEMENTS IN THE AREA AND GIVES US TIME TO CLEAR THE COURSE TO INSURE YOUR SAFE EVACUATION.

THE U.S.G.A. RECOMMENDS YOU REACT IMMEDIATELY TO A DANGEROUS SITUATION AND TO SEEK SHELTER IF YOU FEEL DANGER FROM LIGHTNING (sic) OR STORM IS IMMINENT.

Based upon this evidence, the trial court granted summary judgment to the Club dismissing Maussner's case. In the opinion of the trial court, "the owners and operators of a golf course owed no duty to golfers to protect them from lightning strikes." In granting summary judgment to the Club, the trial judge stated as follows:

I don't find, in any of the case law, any duty on the part of a country club to protect against acts of God. The storm, or the lightning portion of the storm, at least, appears to have been unanticipated. Whether it was or not, when the first bolt of lightning struck, it was equally visible to [plaintiff] as it was to the pro or assistant pro . . . back in the shop, and he chose to expose himself by walking across the open fairways heading back to the pro shop...

The judge indicated that he did not "see that anything that the country club did, even if it might be considered negligent or less than the optimum . . . caused this injury to the plaintiff." The judge found that "the proximate cause was, first of all, an act of God, the lightning, and secondly, his own activities in exposing himself to the possibility of being struck by lightning."

On appeal, Maussner argued that the trial court had erred in failing to recognize a duty to protect business invitees of golf courses from lightning strikes. Specifically, Maussner contended that "this duty would obligate the Club and other golfing establishments to take affirmative measures in an effort to forestall injurious lightning strikes." According to Maussner these affirmative measures would include one or more of the following:

- (1) using available lightning detection equipment;
- (2) using of various weather reporting

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services; (3) placing lightning-proof shelters at convenient spots throughout the course; (4) maintaining an effective evacuation plan; and (5) posting warnings regarding the hazards of lightning.

### ACT OF GOD

As characterized by the appeals court, the trial judge's decision was based on the idea that “a defendant cannot be held liable for injuries that result from a lightning strike because a lightning strike is an act of God.” As defined by the appeals court, “an act of God is the cause of an accident if it is a purely natural force that could not have been prevented by any amount of foresight and pains and care reasonably to be expected of a defendant”:

An act of God is an unusual, extraordinary and unexpected manifestation of the forces of nature, or a misfortune or accident arising from inevitable necessity which cannot be prevented by reasonable human foresight and care. If plaintiff's injuries were caused by such an event without any negligence on the part of the defendant, the defendant is not liable therefor.

On the other hand, the appeals court acknowledged that “a plaintiff can recover from a defendant even where the defendant's negligence coincides with an act of God”:

[A] defendant is not relieved from liability where there is proof of his negligence, combined with some independent or foreseeable intervening cause which occasions the harm...[W]hen there has been a finding of wrongdoing which is an efficient and cooperative cause of the mishap, the wrongdoer is not relieved from liability by proof that an act of God was a concurring cause... [I]f the defendant has been guilty of negligence which was an efficient and cooperative cause of the mishap, so that the accident was caused by both the forces of nature and the defendant's negligence, the defendant is not excused from responsibility...

[W]here supposed precautionary measures actually and foreseeably increase the likelihood of a potentially lethal natural phenomenon and enhance the risk of injury, the negligent third party will not be excused from liability in any resulting accident simply because an act of God was involved. This determination requires the balancing of several factors: the nature of the attendant risk; the opportunity and ability to exercise care; and the public interest in the proposed solution.

Applying these principles to the facts of the case, the appeals court found modern technology has

rendered lightning storms more predictable.

We now know, for example, when conditions are favorable for tornadoes, and we know by satellite imagery and computer modeling when a hurricane will strike land and the probability that it will hit at a particular place. These once unforeseeable forces of nature must now be considered, at least to a great extent, foreseeable...

[T]here is now technology available that makes lightning's presence more predictable. This being the case, the presence of lightning is less an act of God and more a predictable destructive force. Thus, the nature of the attendant risk is that its presence is predictable, if not its individual manifestations.

Similarly, the opportunity and ability to exercise care in the case of lightning is now greater than it has been in the past. A golf course can warn golfers of what to do in the presence of lightning, can warn golfers of the approach of lightning by using signals, and can create and maintain lightning-proof shelters. A golf course can now also detect the existence of lightning by using some of the new technology.

#### SAFETY PROCEDURES IMPLEMENTED?

Accordingly, under the circumstances of this case, the appeals court found sufficient evidence existed to warrant a jury trial to determine “whether defendant Atlantic City Country Club properly implemented its safety procedures.”

We need not consider, under the circumstances of this case, whether all golf courses have an affirmative duty to protect their patrons from lightning strikes. We find, however, that where a golf course has taken steps to protect its patrons from lightning strikes, a duty of reasonable care arises to take these steps correctly under the circumstances...

Our holding has the following consequences. All golf courses have a duty to post a sign that details what, if any, safety procedures are being utilized by the golf course to protect its patrons from lightning. If a particular golf course uses no safety precautions, its sign must inform golfers that they play at their own risk and that no safety procedures are being utilized to protect golfers from lightning strikes.

If, however, a golf course chooses to utilize a particular safety feature, it owes a duty of reasonable care to its patrons to utilize it correctly. This latter standard means, for

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example, that if a golf course builds shelters, it must build lightning-proof shelters; if a golf course has an evacuation plan, the evacuation plan must be reasonable and must be posted; if a golf course uses a siren or horn system, the golfers must be able to hear it and must know what the signals mean; and if the golf course uses a weather forecasting system, it must use one that is reasonable under the circumstances.

The appeals court, therefore, reversed the summary judgment of The trial court in favor of the Club and remanded (i.e., sent back) this case to the trial court for further proceedings consistent with this opinion. On remand, a jury would determine whether the Club was negligent under the circumstances of this case.

With regard to the weather forecasting, a jury will have to determine whether the Club's use of NAFEC and the Weather Channel is reasonable under the circumstances. The jury may find that it was reasonable for the Club to use "Sky Scan" or another high-tech device for detecting lightning...[In so doing, the jury would also consider] the issue of the Sky Scan's susceptibility to failure...

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

According to the appeals court, on remand, a jury would also consider whether Maussner "was comparatively negligent for using his umbrella or... for playing golf in those particular weather conditions."