

DUTY TO FOLLOW ESTABLISHED PROCEDURES TO WARN BEACHGOERS OF
LIGHTNING STORMS

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Generally, there is no legal duty to warn of the risks associated with open and obvious natural conditions like lightning strikes. 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.

On the other hand, once a landowner assumes a duty to provide warnings of weather conditions to those authorized to use the premises, a legal duty may arise to implement such measures in a non-negligent fashion. To illustrate this point, the July 1997 NRPA Law Review column entitled "Chosen Lightning Protection on Golf Course Must Be Properly Utilized," described the case of *Maussner v. Atlantic City Country Club*, 299 N.J. Super. 535, 691 A.2d 826 (N.J. Super. App. Div. 04/04/1997) wherein 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."

Similarly, in the case of *Seelbinder v. County of Volusia* described herein, the County had adopted policies and procedures to protect beachgoers from lightning strikes. As a result, consistent with *Maussner*, the *Seelbinder* court also found that a legal duty to warn might arise "from the County's having undertaken to provide warnings of lightning to beachgoers." However, as described below, there was no evidence that the County's lifeguards and beach supervisors had failed to reasonably implement the adopted policies and procedures.

DUTY TO WARN OF LIGHTNING?

In the case of *Seelbinder v. County of Volusia*, No. 5D00-3308 (Fla. App. 05/31/2002), forty-seven-year-old plaintiff Marlene Seelbinder (Seelbinder) was seriously injured when she was struck by lightning as she stood on a public beach on the north end of New Smyrna Beach in Volusia County, Florida. The facts of the case were as follows:

On September 18, 1994, Seelbinder, her husband and two children had arrived around noon, used their season pass to gain entrance to the beach and parked in the "packed sand" near where the soft sand began. Seelbinder said that as the day wore on, she could see a storm moving in from the south, but it was down at the end of the beach and she was not worried about it. They ultimately decided to pack up and go because it started to sprinkle rain and the sky was "dark" to the south with an "approaching dark storm." However, the sky overhead was still clear and there were no dark clouds in the immediate vicinity.

Seelbinder put the children in the car and got rid of the trash, while her husband went to get their son in from the water. They worked at a steady pace, but not as rapidly as they might have worked had they known there was a threat of lightning. She estimated it was about fifteen to twenty minutes from the time it started to sprinkle until she was struck at 3:29 p.m. Seelbinder never saw or heard any lightning before she was struck.

Seelbinder sued Volusia County, alleging that “the County's beach lifeguards were negligent in failing to warn her of the risk of lightning.” According to Seelbinder, the lifeguards monitored County controlled beaches for storm activity and would call a "red light" alert when they learned of an approaching storm. As noted by Seelbinder, a "red light" alert required the lifeguards to get all beachgoers out of the water and direct all beachgoers west of the traffic area into the soft sand area (which was less likely to attract lightning because it was dry).

On the day of the accident, Seelbinder claimed the County had negligently failed to call a "red light" alert until 3:24 p.m., even though the County was aware as of 3:01 p.m. that a lightning storm was approaching the beach from the southwest. Accordingly, Seelbinder claimed the County had negligently failed to warn her of “the hazard of remaining on the beach once ‘red light’ conditions existed.”

The trial court entered judgment in favor of the County. In so doing, the trial court found no evidence the County had violated any legal duty it owed to Seelbinder. Moreover, the trial court ruled that the County's actions, or failure to act, were not the legal cause of Seelbinder's injuries. Seelbinder appealed.

As characterized by the appeals court, Seelbinder claimed “the County's lifeguards were negligent in failing to give timely warnings to beachgoers in the vicinity of the lifeguard tower 641, including Seelbinder, that there was a storm in the vicinity producing lightning.” Citing its support for an “almost universally agreed view” regarding lightning, the appeals court ruled that “the County, in its capacity as ‘landowner’ or the equivalent, did not have a duty to warn invitees, including beachgoers that there was a risk of being struck by lightning.”

“RED LIGHT” CONDITION?

On the other hand, the appeals court noted that a legal duty to warn might arise “from the County's having undertaken to provide warnings of lightning to beachgoers.” Once the County had “undertaken this responsibility,” the appeals court found the County was obliged to exercise reasonable care in adhering to its established set of procedures. As described by the appeals court, the County’s “established set of procedures” provided as follows:

Florida leads the country annually in the number of people struck by lightning. Lightning is a very dangerous natural phenomenon . Because lightning is impossible to control or predict, it is necessary that no chances are taken with the public's safety.

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As a lightning storm approaches, the officer in charge of the zone will give the order to clear all swimmers out of the water. This condition, referred to as red light, will be relayed by the dispatcher to all lifeguards in the zone by radio transmission. Upon receiving the order to go on red light, all affected tower lifeguards should close their area to all water activity and attempt to direct any remaining beachgoers west of the traffic lane into the soft sand area...

The tower guards are to blow their whistle once or twice a few times in each direction to try to get the attention of beachgoers. Then they are supposed to get off the tower and pull the tower away from the water and up into the soft sand. After pulling up their towers, the lifeguards should use their whistle and flag to keep directing people away from the water and up toward the parked cars, hotels and condominiums and into the soft sand. The whistle can be heard for a couple hundred yards and the flags are bright orange.

In this particular instance, a lifeguard several miles south of Unit 641 at Bethune Beach first reported an approaching storm. In response, the south end supervisor authorized the Bethune Beach lifeguard discretion to declare a "red light" condition. The supervisor testified at trial that when he gave Bethune Beach direction at 3:14 p.m. to go to red light, he also told the south New Smyrna lifeguards to prepare for red light, meaning they were to stow their own gear and get ready to get bathers out of the water if "red light" was called.

The supervisor testified further that the storm that had caused the Bethune Beach red light authorization had barely skirted Bethune and had passed out into the open ocean. According to the south end supervisor, he put the south side lifeguards on red light at 3:26 p.m. because of a different storm moving in from the northwest.

The supervisor of the north end beach was a County beach patrol officer with twenty-five years experience. He testified that he would never call a "red light" based on a storm in the south end at Bethune Beach "because of the distance."

Just prior to the time of the accident, the north end supervisor testified further that "[t]he sky was still clear, and I was watching out west, basically looking west watching for lightning strikes and trying to time them, and I never saw anything worthy of being timed where there was a bright flash and could I look at my watch and time it." However, as conditions changed, he did call a "red light" for his area at 3:24 p.m. In the opinion of the north end supervisor, this provided ample time "to alert the public and close up." Five minutes later (3:29 p.m.), he received the 911 call that Seelbinder had been struck by lightning.

As the storm from the south moved out over open water, the lifeguard at Unit 641 on the north end of New Smyrna Beach testified that he was "also watching some clouds starting to build up far off to the west."

Around 3:20 p.m., he thought the storm was moving in his direction and he was directed to go on red light at 3:24 p.m. He thereafter followed the red light procedure, sounding his whistle to warn people in the water to get out. As he was

blowing his whistle at a couple at the water's edge, the lightning bolt struck Seelbinder. He described a rapid change from clear to sheets of rain around the time Seelbinder was struck.

On appeal, Seelbinder argued that this testimony provided sufficient evidence for a jury to determine “whether the County was negligent in failing to warn Seelbinder of the threat of lightning.” The appeals court rejected this argument. In the opinion of the appeals court, there was “no evidence that the County lifeguards were negligent. “

To say that a jury question of negligence arises *post hoc* [i.e., after the fact] from the fact of a lightning strike would impose an unfair and undue burden on the County akin to strict liability [i.e., liability without any proof of fault or negligence]. Moreover, all the evidence at trial indicates that the lightning that struck Seelbinder was generated from the western storm, not the southern storm, so the causal link based on the failure to exercise discretion to call a red light based on the presence of the southern storm is missing.

The County has undertaken to give beachgoers warnings of the risk of lightning that relies on human observation and weather station monitoring. Once an identified storm risk is deemed sufficient to warrant warnings, the procedure prioritizes those persons in the water.

There was no evidence offered that the County's employees failed to exercise reasonable care in executing the procedure, merely that the procedure failed to protect Seelbinder.

As a result, the appeals court affirmed the judgment of the trial court in favor of the County.

WEATHER CONDITIONS DUTY

As noted above, the court in *Seelbinder* expressed its support for an “almost universally agreed view” that landowners do not generally owe a legal duty to warn invitees (i.e., those authorized to use the premises) that there is “a risk of being struck by lightning.” In reaching this conclusion, the Seelbinder court cited a number of earlier state appellate court opinions in other jurisdictions as precedent, including the *Hames* opinion noted above as well as the case of *Grace v. City of Oklahoma City*, 953 P.2d 69 (Okla.App. 1997). In this particular case, Donald Grace and Jim Andrews were playing golf at Lincoln Park Golf Course when they were hit by lightning. Grace died as a result of his injuries.

Andrews and Grace's widow and children (hereinafter referred to collectively as “Grace”) sued the Oklahoma City Public Property Authority Trust, as owner of the golf course, and Steven Carson, as its golf professional, for negligence (hereinafter referred to collectively as “Golf Course”), claiming they “failed to warn of the approaching lightning and thunder storm; . . . failed to provide proper protection under the circumstances; . . . failed to use ordinary care and breached their duty to their golfing patrons.”

The Golf Course requested the court to grant summary judgment which would effectively dismiss the lawsuit. Grace, however, contended that the case should be allowed to proceed to trial for a jury to consider the following issues:

(1) whether an adequate shelter would have prevented the injury, (2) whether the Golf Course took adequate warning measures, (3) whether the Golf Course used proper storm detection techniques, (4) whether Grace voluntarily and knowingly exposed himself to the risk of lightning, and (5) whether Grace heard Golf Course's "attempts at warning."

In the opinion of the trial court, "the actions or non-actions of each defendant were not the proximate (i.e., legal) cause of Andrews' injuries or Grace's death." As a result, the trial court granted summary judgment in favor of the defendants. Grace appealed.

As cited by the appeals court, the elements of a cause of action for negligence are: "(1) the existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) a violation of that duty; and (3) injury proximately resulting therefrom." In this particular instance, the appeals court summarized the legal duty of a landowner regarding "natural weather conditions" as follows:

The owner or person in charge of the premises has no obligation to warn an invitee, who knew or should have known the condition of a property, against patent and obvious dangers. The invitee assumes all normal or ordinary risks incident to the use of the premises, and the owner or occupant is under no legal duty to reconstruct or alter the premises so as to remove known and obvious hazards, nor is he liable to an invitee for an injury resulting from a danger which was obvious and should have been observed in the exercise of ordinary care.

Where there is no act on the part of the owner or occupant of the premises creating a greater hazard than that brought about by natural causes, dangers created by the elements, such as the forming of ice and the falling of snow, are universally known, and all persons on the property are expected to assume the burden of protecting themselves from them.

Applying these principles to the facts of the case, the court acknowledged that "Lightning is a universally known danger created by the elements." Accordingly, the court concluded that the Golf Course had "no duty to warn its invitees of the patent danger of lightning or to reconstruct or alter its premises to protect against lightning." Moreover, in reaching this determination, the court noted that "Andrews and the Graces did not allege and offered no proof Golf Course created a greater hazard than that brought about by natural causes." As a result, the appeals court affirmed the judgment of the trial court in favor of defendant.