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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1402

Filed: 6 November 2018

North Carolina Industrial Commission, I.C. No. TA-24656

JAMES D. CORE, Plaintiff,

v.

NORTH CAROLINA DIVISION OF PARKS AND RECREATION, Defendant.

Appeal by Plaintiff from decision and order entered 22 August 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 August 2018.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Miller, III and Lauren R. McAndrew, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander G. Walton, for Defendant-Appellee.

McGEE, Chief Judge.

James D. Core ("Plaintiff") appeals a decision and order of the North Carolina Industrial Commission ("the Commission") denying Plaintiff's negligence claim against the North Carolina Division of Parks and Recreation ("Defendant") based on

the Commission's conclusion that Plaintiff was contributorily negligent. We remand to the Commission for additional findings.

I. Factual and Procedural Background

Plaintiff and members of Plaintiff's college fraternity went to Lake Waccamaw State Park ("the park"), a state park located approximately seventy-five miles south of Fayetteville, North Carolina, for a camping trip on the weekend of 3-4 October 2014. Defendant owned and maintained the park, including a portion of the shoreline located in the southern section of Lake Waccamaw ("the lake"). The park's camping site included a picnic area with a pier ("the pier") that extended 375 feet into the middle of the lake. There was a platform located halfway down the pier and another located at the end of the pier, each measuring approximately twenty feet by thirty-two feet. There were metal swim ladders attached to each platform that extended down into the water.

A visitor information kiosk located in the park showed a map of the park and provided information about a number of recreational activities, including swimming. The "swimming" portion of the information available at the kiosk stated the following:

> From the picnic area boardwalk, a pier extends 375 feet into the lake and provides a perfect place for swimming and sunbathing. Swimming is permitted in any area of the lake but be aware that lifeguards are not on duty. Always use caution around water. Be alert for aquatic wildlife and watch out for sharp muscle [sic] shells on the lake bottom.

A sign posted at the entrance to the picnic area boardwalk listed the North Carolina State Park Rules and Regulations but "[made] no reference to swimming, diving, or the depth of the water at the end of the pier."

Plaintiff and several other fraternity members went jogging in the park before sunrise on the morning of 4 October 2014. When they returned to the campsite around 7:00 a.m. Plaintiff and at least one other fraternity member, Nate Middleton ("Middleton"), decided to go swimming from the pier. Plaintiff looked into the water, but the water appeared "very dark" and Plaintiff could not see the bottom. According to the Commission's findings, the lake had a high botanic acid content that could "darken the water, making it difficult to determine its depth." Plaintiff testified he looked for signs around the pier regarding the depth of the water but found none. Plaintiff "recalled seeing boats on the lake and various invitations around the [p]ark . . . to swim from the pier[,]" and "noted the presence of ladders going down into the water from the pier." Based on these and other observations, including the length of the pier, Plaintiff concluded the water around the pier "was deep enough to allow for diving."

Middleton testified that he and other trip attendees "checked the [water's depth] the day of [Plaintiff's injury], right before we jumped in. We watched the sun rise and the water looked pretty clear and we couldn't see the bottom." According to Middleton, before anyone entered the water, they "threw rocks down to the bottom

[of the lake]. We didn't see [the rocks] at the bottom. [The water] must have been deep enough. Because the dock was 200 yards offshore, a mile across the lake. It was safe to assume it was deep." Middleton testified he and others "assumed [the water at the end of the pier] was deep enough not to break anyone's necks." When Plaintiff indicated he planned to perform a shallow dive from the end of the pier, Middleton – an experienced swimmer and certified lifeguard – "almost did the same."

Plaintiff, who was a competitive swimmer in high school and a member of his college club swim team, "took a running start and attempted [to perform] [] a [shallow] dive from the end of the pier." Plaintiff "struck the bottom of the lake with his head and felt a sharp pain in his right arm and stiffness in his torso. Plaintiff thought he had broken his arm and rolled over into a sitting position."

Middleton testified that, initially, he and other fraternity members standing on the pier "all thought [Plaintiff] was fine[]" and "the general mood was laughing and joking." Plaintiff "was propped up on one arm[,]" but did not respond when asked about the water's depth. Middleton "jumped in [feet-first] right after [Plaintiff] . . . [and] landed on [his] tailbone." The water at the end of the pier was approximately eighteen inches deep. After Middleton stood, he "looked over at [Plaintiff] and realized [Plaintiff was] not standing up[]" and that "[there was] probably something bad that happened." Middleton asked if Plaintiff was okay. Although Plaintiff did not lose consciousness, he did not move and "was just not responsive to getting up."

Middleton "assisted [P]laintiff back onto the pier while maintaining the stability of [P]laintiff's neck and spine." A fraternity member called for emergency medical services ten minutes later, and an ambulance arrived within approximately thirty-five minutes.

In an incident report prepared after Plaintiff's accident, a park ranger stated that he

> asked [numerous fraternity members] three separate times if anyone had checked the depth of the water before [Plaintiff] conducted the dive. They responded that no one had checked the depth at the end of the pier. It was stated to me from different members of the group that they thought the depth of the water was deeper than the actual depth of the lake at that location.

The park ranger also noted in the incident report that "[t]he lake's color [was] [] dark due to the tanic acids from the organic matter which makes judging the depth [of the water] very difficult."

Plaintiff was transported to a regional hospital, where diagnostic testing showed Plaintiff had broken his cervical spine in three places. Plaintiff was airlifted to New Hanover Regional Medical Center and underwent spinal surgery. After surgery, Plaintiff spent "six weeks in a halo[] [that was] secured by screws drilled into [P]laintiff's head in four different places." As a result of the surgery and the halo, Plaintiff has a scar measuring one and one-half inches across the front of his neck as well as scarring and bald spots on his head. Plaintiff subsequently underwent

physical therapy and regained many of his physical abilities, but "continues to lack sensation on his right side and right lower extremity, and has weakness in his left hand. . . . It is [also] expected that [P]laintiff will have some pain associated with arthritis in the future." Plaintiff incurred medical expenses totaling $146,083.69.

Plaintiff filed a claim with the Commission seeking damages from Defendant under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* ("Tort Claims Act"), on 9 December 2014. Plaintiff alleged in an affidavit that Defendant and its agents were negligent "in that [they] failed to keep [the park's] premises reasonably safe and failed to warn of shallow water conditions that [Defendant] knew or should have known were dangerous to visitors of the park." Plaintiff further alleged that Defendant's negligence proximately caused Plaintiff's "serious, permanent, and painful bodily injuries[,]" medical and travel expenses, pain and suffering, and future loss of earning capacity. Defendant filed an answer to Plaintiff's affidavit on 5 February 2015 in which it denied Plaintiff's allegations of negligence and further asserted that "Plaintiff's claim should be barred . . . based on [Plaintiff's] own contributory negligence."

Following an evidentiary hearing on 10 August 2016, Deputy Commissioner J. Brad Donovan ("Deputy Commissioner Donovan") filed a decision and order on 20 October 2016 "conclud[ing] as a matter of law that [D]efendant owed [P]laintiff the

duty to warn of the hidden danger of shallow water at the end of the pier." Deputy Commissioner Donovan concluded that

> [t]he greater weight of the evidence show[ed] [the shallow water] was a danger known to the employees of [D]efendant, unknown to [P]laintiff, and subject to being hidden visually by water conditions. . . . Defendant's failure to provide such a warning of a known hidden danger constitute[d] a breach of [Defendant's] duty.

Deputy Commissioner Donovan further concluded Plaintiff was not contributorily negligent because "[t]he greater weight of the evidence . . . fail[ed] to show that a reasonably prudent person would have or should have anticipated a water depth of eighteen inches at the end of the pier." Defendant appealed Deputy Commissioner Donovan's decision and order to the Full Commission.

The Commission filed a decision and order on 22 August 2017 concluding Defendant negligently failed "to warn [Plaintiff] of the hidden danger of shallow water at the end of the pier at the [p]ark." The Commission further concluded, however, that Plaintiff's injuries on 4 October 2014 "were proximately caused by [Plaintiff's] own contributory negligence." After concluding Defendant's conduct was not grossly negligent, the Commission denied Plaintiff's claim. Deputy Commissioner Tyler Younts ("Deputy Commissioner Younts") filed a dissent agreeing with the majority's conclusion that Defendant was negligent, but disagreeing with its conclusion that Plaintiff was contributorily negligent. Deputy Commissioner Younts expressed his view that Plaintiff was not contributorily negligent because Plaintiff

"actively looked for dangers and took reasonable precautions" prior to diving. Plaintiff appeals.

II. Plaintiff's Appeal

A. *Standard of Review*

In an appeal from an opinion and award of the Commission, "[t]his Court's review is limited to a consideration of whether there was *any competent evidence* to support the Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law." *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 682, 474 S.E.2d 793, 794 (1996) (citation omitted) (emphasis in original). The Commission's findings of fact "are conclusive on appeal when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary." *Clawson v. Phil Cline Trucking, Inc.*, 168 N.C. App. 108, 113, 606 S.E.2d 715, 718 (2005) (citation and quotation marks omitted); *see also Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (noting Commission's findings of fact "may be set aside on appeal [only] when there is a complete lack of competent evidence to support them[.]" (citation and quotation marks omitted) (alterations in original)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding[s]." *Lewis v. Craven Reg'l Med. Ctr.*, 134 N.C. App. 438, 444, 518 S.E.2d 1, 5 (1999) (citation and internal quotation marks omitted) (alteration in original). The Commission's conclusions of

law are reviewable *de novo*. *See Coffey v. Weyerhaeuser Co.*, 218 N.C. App. 297, 300, 720 S.E.2d 879, 881 (2012). "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 486, 771 S.E.2d 791, 793-94 (2015) (citation and quotation marks omitted).

B. *Analysis*

Plaintiff contends the Commission's conclusion that Plaintiff was contributorily negligent is "wholly inconsistent" with its conclusion, elsewhere in the order, "that the shallow water beneath the pier constituted a hidden danger." Plaintiff further submits that, "[e]ven if some level of knowledge [of the hazardous condition] were attributable to [Plaintiff], there is still insufficient evidence to show that [Plaintiff] acted unreasonably." For the reasons discussed below, we conclude the Commission's conclusion of law that Plaintiff was contributorily negligent on 4 October 2014 was not supported by sufficient findings of fact.

"Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983). The statute provides in part that

> [c]ontributory negligence on the part of [a] claimant . . . shall be deemed to be a matter of defense on the part of the

> State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant . . . was guilty of contributory negligence.

N.C. Gen. Stat. § 143-299.1 (2017). "It is well-settled law . . . that the [] Tort Claims Act does not authorize recovery unless the claimant is free from contributory negligence." *Crawford v. Board of Education*, 275 N.C. 354, 362-63, 168 S.E.2d 33, 39 (1969) (citation omitted); *see also Oates v. Dept. of Motor Vehicles*, 24 N.C. App. 690, 692, 212 S.E.2d 33, 34 (1975). In actions initiated pursuant to the Tort Claims Act, issues of "negligence, contributory negligence[,] and proximate cause . . . are to be determined under the same rules as those applicable to litigation between private individuals." *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972) (citation omitted). Contributory negligence "is a mixed question of law and fact, [and] this Court must [] determine whether the Commission's findings of fact support its conclusion that [a] plaintiff [was or] was not contributorily negligent." *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 221, 588 S.E.2d 42, 49 (2003) (citation omitted); *see also Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 379-80, 756 S.E.2d 788, 794 (2014) ("As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts." (citation omitted)).

Our Supreme Court has explained the doctrine of contributory negligence as follows:

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of [the] defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965) (citation omitted); *see also Rash v. Waterway Landing Homeowners Assn.*, ___ N.C. App. ___, ___, 801 S.E.2d 375, 377-78 (2017). Thus, "to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Daisy v. Yost*, ___ N.C. App. ___, ___, 794 S.E.2d 364, 366 (2016) (citation and internal quotation marks omitted) (alteration in original). *See also Clary v. Board of Education*, 286 N.C. 525, 532, 212 S.E.2d 160, 165 (1975) ("Contributory negligence is an affirmative defense; therefore, the burden of proof on the contributory negligence issue rests on defendant.").

The failure to exercise ordinary care "is not a fact in itself[,] but is the legal result of certain facts." *Griffin v. Watkins*, 269 N.C. 650, 654, 153 S.E.2d 356, 359 (1967) (citation and quotation marks omitted). A plaintiff's conduct on a particular occasion "must be viewed in light of what a reasonable person would have done" under

the same or similar circumstances. *See Rolan*, 233 N.C. App. at 384, 756 S.E.2d at 796 (citation omitted). The relevant inquiry is whether a plaintiff took some action "when a person of reasonable care and prudence would not have done so," or failed to take some action "when a reasonabl[e], careful[,] and prudent person would have done so[.]" *See Foy v. Bremson*, 30 N.C. App. 662, 666, 228 S.E.2d 88, 91 (1976). "What a reasonably prudent person will or will not do under various circumstances . . . is nearly always a question of fact, not of law." *Hulcher Brothers v. N.C. Dept. of Transportation*, 76 N.C. App. 342, 343, 332 S.E.2d 744, 745 (1985) (affirming Commission's finding that defendant failed to act as a reasonably prudent person would have acted under the same or similar circumstances).

In the present case, Plaintiff argues the Commission erroneously failed to "evaluate [Plaintiff's] actions in light of the circumstances as they existed on [4 October 2014] at Lake Waccamaw State Park[,]" and improperly concluded Plaintiff was contributorily negligent "without regard to the exigencies of the situation[.]" Plaintiff contends that "under the circumstances as they existed on [4 October 2014], a person of ordinary prudence would have concluded that the water was deep enough . . . [to] safely perform a shallow dive . . . [without] verify[ing] [the water's] depth[.]" In response, Defendant asserts that our appellate courts "have repeatedly determined that [a plaintiff's] failure . . . to first determine [] the depth of water prior to diving constitutes contributory negligence." According to Defendant, there is little question

that a reasonably prudent person "would not [] dive[], head first, into a natural body of water without first checking to determine if it was safe . . . to do so." Regardless of the merit of the parties' respective arguments, however, we observe that the Commission made *no* findings as to the reasonableness of Plaintiff's conduct on 4 October 2014 – *i.e.*, how "a reasonably prudent person would [have] [acted] under the same or similar circumstances[.]" *See Brewer v. Harris*, 279 N.C. 288, 298, 182 S.E.2d 345, 351 (1971) (quotation marks omitted). This was error.

In decisions rendered under the Tort Claims Act, "[s]pecific findings of fact by the Industrial Commission are required. These [findings] must cover the crucial questions of fact upon which [a] plaintiff's right to compensation depends. Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the [Commission's] ultimate finding." *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 685, 159 S.E.2d 28, 31 (1968) (citation and quotation marks omitted). *See also Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269-70 (1989) ("The Industrial Commission is not required to make findings as to every detail of the credible evidence. However, the [] Commission must make findings of fact and conclusions of law to determine the issues raised by the evidence in a case before it." (citations and internal quotation marks omitted)); *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 723, 294 S.E.2d 743, 745 (1982) ("Although the Industrial Commission is free to accept or reject any or all of [a] plaintiff's evidence in making

its award, it must make specific findings as to the facts upon which a compensation claim is based[.]"). In the present case, in determining whether Plaintiff's claim was barred by his own contributory negligence, the Commission was required to make specific findings as to whether Plaintiff's conduct on 4 October 2014 did or did not "conform to an *objective* standard of behavior – the care an ordinarily prudent person would [have] exercise[d] under the same or similar circumstances to avoid injury." *Mohr v. Matthews*, 237 N.C. App. 448, 451, 768 S.E.2d 10, 12 (2014) (citation and quotation marks omitted) (emphasis in original).

The Commission stated in Finding of Fact Eleven that

> Plaintiff maintain[ed] [that on 4 October 2014] he looked for warning signs regarding diving into the water at the end of the pier, but saw none. He looked into the water, but was unable to see the bottom. He described the water as "very dark." Plaintiff recalled seeing boats on the lake and various invitations around the [p]ark inviting visitors to swim from the pier. He noted the presence of ladders going down into the water from the pier. As a result, [P]laintiff determined the water was deep enough to allow for diving.

The Commission's findings of fact also included the following:

> 17. As an experienced competitive swimmer, both in high school and with [his] [college] swim club, [P]laintiff received extensive training and coaching in swimming and diving, including the method of "shallow diving." As an Eagle Scout, [P]laintiff received water safety education. Although [P]laintiff had never been to the [p]ark, [P]laintiff's grandfather own[ed] a lake house, and [P]laintiff was comfortable around water, both pools and lakes.

> 18. Despite describing the water at the [p]ark as "very dark," such that he could not see into it, [P]laintiff testified that he *assumed* the water at the end of the pier was deep enough for shallow diving. Plaintiff admitted that neither he nor any of the other fraternity members or pledges inquired with anyone at the [p]ark as to the depth of the water around the pier. Plaintiff saw the ladders on the pier, but elected not to use either ladder to enter the water. Nor did [P]laintiff elect to enter the water feet first, as did [] Middleton.
>
> 19. Plaintiff admitted [in his direct testimony] that he should not have performed a shallow dive into the lake without first confirming the water's depth[.] . . . Plaintiff similarly admitted his error in failing to check the depth of the water at the [p]ark before performing a shallow dive during cross-examination[.]

(emphasis in original). The Commission concluded in Conclusion of Law Ten:

> Despite [P]laintiff's experience as a trained swimmer and diver, his experience in water safety and training as an Eagle Scout, and his experience around various bodies of water, the reasonable or ordinarily prudent person standard applies. Plaintiff admits he took no action to ascertain the depth of the water at the end of the pier on [4 October 2014], and that he "should have checked" the depth of the water before diving in head-first. Further, [P]laintiff did not avoid the danger of the shallow water by entering the lake via the ladders on the pier, or by jumping in feet first instead of diving. Accordingly, [P]laintiff's contributory negligence serves as a bar to his recovery of any damages from [D]efendant.

(citations omitted). The Commission's conclusion that Plaintiff was contributorily negligent on 4 October 2014 was thus ostensibly based on (1) Plaintiff's admitted failure to "ascertain the [actual] depth of the water at the end of the pier[,]" and his

subsequent statement that he "should have checked" the depth of the water before diving; and (2) Plaintiff's failure to "avoid the danger of the shallow water by entering the lake via the ladders on the pier, or by jumping in feet first instead of diving." Despite stating that "the reasonable or ordinarily prudent person standard applie[d][,]" the Commission made no assessment of the reasonableness of Plaintiff's conduct in light of the circumstances that existed on 4 October 2014.

By contrast, in his dissent from the Commission majority, Deputy Commissioner Younts expressed the view that "Plaintiff's assessment of the surrounding circumstances, looking for signs of danger and attempting to ascertain the depth of the water, *was reasonable on his part*[,]" and that Plaintiff "made *reasonable conclusions* that it was safe [to perform a shallow dive] *based on the circumstances*[.]" (emphases added). Deputy Commissioner Younts concluded Defendant failed to establish "that Plaintiff did not exercise due care for his own safety." Similarly, in Deputy Commissioner Donovan's 20 October 2016 decision concluding Plaintiff was not contributorily negligent, and awarding damages to Plaintiff, he stated:

> The greater weight of the evidence in the instant case *fails to show that a reasonably prudent person would have or should have anticipated a water depth of eighteen inches at the end of the pier*. The pier extended a distance greater than a football field in length out into the water, allowing for the *reasonable* conclusion that it was long enough to provide access to a deeper part of the lake. The water contains an acid, known to [D]efendant's employees,

> which often makes the depth of the water indeterminable. There are two platforms, one central and one at the end of the pier, each with a metal ladder leading into the water, indicating an area suitable for swimming. Boats are visible moving in the lake without difficulty. There are numerous notices around the park inviting visitors to swim at the pier in question, without warning of shallow water. There is a complete lack of signs or information warning against diving off the pier.
>
> For these reasons, the undersigned concludes as a matter of law that [P]laintiff was not contributorily negligent in sustaining his injuries.

(emphases added). As reflected in the dissent of Deputy Commissioner Younts and the decision of Deputy Commissioner Donovan, a "pivotal question" in this case was whether Plaintiff "failed to exercise such care for [his] own safety as a reasonably careful and prudent person would have used under similar circumstances." *See Allen v. Pullen*, 82 N.C. App. 61, 65, 345 S.E.2d 469, 472 (1986). Because the failure to exercise due care is an "essential element" of a contributory negligence claim, *see Register v. Administrative Office of the Courts*, 70 N.C. App. 763, 767, 321 S.E.2d 24, 27 (1984), the Commission majority erred by concluding Plaintiff was contributorily negligent without making any explicit findings as to the reasonableness of Plaintiff's conduct on 4 October 2014 in light of the surrounding circumstances.

The Commission cited two cases, *Richardson v. Ritter*, 197 N.C. 108, 147 S.E. 676 (1929), and *Davies v. Lewis*, 133 N.C. App. 167, 514 S.E.2d 742 (1999), as supporting the proposition that our appellate courts have "generally [held] that an

individual who dives head-first into waters of [an] unknown depth, without first making efforts to ascertain the depth of the water, is contributorily negligent in the proximate cause of any injuries sustained by diving therein." We are not persuaded that, as Defendant contends, the mere act of diving into a body of water without knowing or checking its depth and striking the bottom constitutes contributory negligence *per se*. *See Smith v. Fiber Controls Corp.*, 300 N.C. 669, 677, 268 S.E.2d 504, 509 (1980) ("[T]he determination of contributory negligence cannot be predicated on the automatic application of per se rules which do not take into account the particular state of facts presented."). Even in those cases cited favorably by Defendant, in determining the plaintiffs were contributorily negligent in sustaining their diving-related injuries, our appellate courts made observations about certain contemporaneous circumstances surrounding the plaintiffs' conduct. *See*, *e.g.*, *Richardson*, 197 N.C. at 109, 147 S.E. at 676 (holding plaintiff was contributorily negligent by not "inquiri[ng] . . . as to the depth of the water *at the place where he dived*," an area at the edge of a swimming pool that was fifteen or twenty feet away from "a springboard constructed for diving[.]" (emphasis added)); *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 106-07, 479 S.E.2d 259, 262-63 (1997) (noting plaintiff, who had used a waterslide "many times in the past[,]" knew that (1) "the water beneath the slide was shallow[;]" (2) "if he hit his head on the bottom of the

swimming area it would hurt[;]" and (3) another person had been injured after "[going] down the [waterslide] and hit[ting] her head on the bottom of the lake.").

The Commission found *Davies* particularly instructive in the present case. In *Davies*, the fourteen-year-old plaintiff rode her jet ski to visit a friend at a floating dock that was owned by the defendants and situated on the Intracoastal Waterway. The plaintiff allowed her friend to ride the jet ski while the plaintiff remained on the dock. While operating the jet ski, the plaintiff's friend called for the plaintiff to "come on." The plaintiff, "fearing that her mother would take the [jet ski] from her if she found out another person was on it alone, got up from the dock and dove in the water. The water was approximately [twelve] inches deep, and [she] struck her head and broke her neck upon diving." *Davies*, 133 N.C. App. at 168, 514 S.E.2d at 743. This Court held that, even if the defendants were negligent as alleged, the plaintiff

> *failed to use ordinary care* before diving into the water on the date in question. [The plaintiff] knew from her experience as a trained diver that diving into water of an unknown depth was dangerous, but did so by her own choosing and at her own risk. There was a reasonable opportunity for her to avoid this danger by jumping instead of diving into the water, and her decision to dive without attempting to measure the water's depth constitute[d] contributory negligence.

Id. at 170-71, 514 S.E.2d at 744 (emphasis added) (citation omitted).

In the case now before us, the Commission concluded Plaintiff was contributorily negligent because he failed to take the actions the *Davies* plaintiff

failed to take – *i.e.*, not confirming the water's depth before diving and not using a safer available means of entering the water. This reflects a fundamental misunderstanding of the case-by-case approach required to determine whether a *particular* plaintiff was contributorily negligent on a *particular* occasion. *See Ramey v. R. R.*, 262 N.C. 230, 236, 136 S.E.2d 638, 643 (1964) ("No inflexible rule can be laid down as to what constitutes contributory negligence as a matter of law, as each case must be decided on its own facts."). The Commission considered Plaintiff's "experience as a trained swimmer and diver, his experience in water safety and training as an Eagle Scout, and his experience around various bodies of water" inapposite to "the reasonable or ordinarily prudent person standard[.]" This is inconsistent with this Court's reasoning in *Davies*, in which we explicitly noted the plaintiff's "experience as a trained diver[.]" *Davies*, 133 N.C. App. at 170, 514 S.E.2d at 744. We further observed the *Davies* plaintiff (1) had been swimming at her friend's dock several times, "during which she was never able to see more than one or two inches into the water;" (2) had been "instructed at camp not to dive into water when she did not know its depth, and had been told by her mother not to dive off the floating dock behind their own home, where the water was two or three feet deep[;]" and (3) "knew that the water depth changed with the tide, but assumed the tidal conditions at [the] defendants' floating dock would remain constant." *Id.* at 168, 514 S.E.2d at 743. Under these circumstances, we concluded, the *Davies* plaintiff "*failed*

to use ordinary care before diving into the water *on the date in question*." *Id.* at 170, 514 S.E.2d at 744 (emphases added).

In the present case, the Commission's findings detail a number of factual circumstances surrounding Plaintiff's injury on 4 October 2014. For example, the Commission found that the lake's "botanic acid content . . . [could] darken the water, making it difficult to determine its depth[,]" and that there was no "signage [in the park] warning against diving[.]" At the same time, the Commission found, "there [was] no signage at the [p]ark that *encourage[d]* diving, and there [was] no diving board off the pier." (emphasis added). It noted that the pier extended 375 feet into the lake, and that "boat traffic [was] visible" from the pier. It made further findings that Plaintiff: (1) was a first-time visitor to the park; (2) made numerous observations before concluding the water at the end of the pier was deep enough for diving; and (3) had "extensive training and coaching in swimming and diving, including the method of 'shallow diving.'"

In concluding Plaintiff was contributorily negligent, however, the Commission did not indicate which of these or any other circumstances rendered Plaintiff's actions unreasonable. *Compare*, *e.g.*, *Holland v. Malpass*, 255 N.C. 395, 399-400, 121 S.E.2d 576, 579 (1961) ("Any ordinarily prudent person should have reasonably anticipated under the circumstances then and there existing that in . . . jump[ing] to the edge of the street and landing on the mud and gravel he might fall partially on the road in

front of closely approaching vehicular traffic with injurious consequences to himself, and this seems particularly true because pedestrians were standing on either side of [the plaintiff] at the edge of the street evidently waiting for closely approaching vehicular traffic to pass before venturing to cross the street."). The Commission merely observed that (1) Plaintiff "admit[ted] he took no action to ascertain the depth of the water at the end of the pier on [4 October 2014]," and (2) Plaintiff "did not avoid the danger of the shallow water by entering the lake via the ladders on the pier, or by jumping in feet first[,]" before it summarily concluded that Plaintiff was contributorily negligent. *See Griffin*, 269 N.C. at 654, 153 S.E.2d at 359 ("To say that one has failed to use due care or that one has been negligent, without more, is to state a mere unsupported conclusion.").

The Commission's finding that Plaintiff admitted, in retrospect, he "should not have performed a shallow dive into the lake without first confirming the water's depth" did not alone support a conclusion that a reasonable person would have acted differently *in the moment*. The negligence analysis "do[es] not judge people's actions based on '20-20 hindsight.' Rather, [it] ask[s] whether a person's actions were reasonable in light of the circumstances *at the time of the actions*." *Pintacuda v. Zuckeberg*, 159 N.C. App. 617, 623, 583 S.E.2d 348, 352 (2003) (emphasis added), *rev'd on other grounds*, 358 N.C. 211, 593 S.E.2d 776 (2004); *see also Miller v. Miller*, 273 N.C. 228, 231, 160 S.E.2d 65, 68 (1968) ("Obviously, . . . in some accidents, an

after-the-fact appraisal would reveal that [a party's] injuries would probably have been minimized had he been using a seat belt. But whether the occupant of an automobile was contributorily negligent in failing to fasten his seat belt must, of course, be determined *in view of his knowledge of conditions prevailing prior to the accident, and not in the light of hindsight*." (emphasis added)).

Similarly, the Commission's observation that there were alternative means available to Plaintiff for entering the water did not alone demonstrate unreasonableness on Plaintiff's part. *See Everhart v. LeBrun*, 52 N.C. App. 139, 142, 277 S.E.2d 816, 819 (1981) (holding plaintiff's failure to use a safer alternative route was not contributory negligence as a matter of law, and stating that "[w]hile a plaintiff *may* be contributorily negligent by pursuing a dangerous route when a less dangerous one is available, . . . whether [the] plaintiff acted unreasonably in choosing [the more dangerous option] . . . was a question of fact for the jury." (emphasis added)). The mere fact that Middleton jumped into the water feet-first also did not, standing alone, support a conclusion that a reasonable person in Plaintiff's position would have avoided diving from the end of the pier. It is clear from Middleton's testimony that his decision to jump feet-first rather than dive was not a precautionary measure. Middleton repeatedly testified that he and other attendees believed the water at the end of the pier was deep enough for diving, and stated he "almost did the same" as Plaintiff.

We note that, in a separate conclusion of law addressing the negligence of Defendant, the Commission characterized the shallow water surrounding the pier as "a danger . . . *unknown to [P]laintiff*, and subject to being hidden visually by water conditions."[1] (emphasis added). This is relevant to the question of Plaintiff's contributory negligence because our appellate courts have held that a party "cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, *either actual or constructive*, of the danger of injury which his conduct involves." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951) (citation omitted) (emphasis added). Assuming, as the Commission concluded, Plaintiff was not actually aware of the water's shallow depth, he could nevertheless "be contributorily negligent if his conduct ignore[d] unreasonable risks or dangers which *would have been apparent to a prudent person exercising ordinary care for his own safety*." *Fiber Controls Corp.*, 300 N.C. at 673, 268 S.E.2d at 507 (citation omitted) (emphasis added); *see also Thorpe v. TJM Ocean Isle Partners LLC*, 223 N.C. App. 201, 207-08, 733 S.E.2d 185, 190 (2012) ("Where [a] plaintiff is injured by an unsafe condition, [t]he doctrine of contributory negligence will preclude a defendant's liability if the [plaintiff] actually knew of the unsafe condition or if a hazard *should have been obvious to a reasonable person*." (citation and internal quotation marks

[1] Because we conclude the Commission's findings of fact were insufficient to support a conclusion that Plaintiff failed to exercise ordinary care, we do not address the factual or legal accuracy of the Commission's conclusion that the shallow water constituted a "hidden danger," and we express no opinion on that issue.

omitted) (emphasis and first alteration added)); *Phillips v. N.C. Dep't of Transp.*, 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009) (defining "constructive knowledge" as "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." (citation and quotation marks omitted)).

Whether a particular risk or danger *should have been apparent* in the exercise of ordinary care depends on the unique factual circumstances presented in each case. *See, e.g.*, *Dowless v. Kroger Co.*, 148 N.C. App. 168, 172, 557 S.E.2d 607, 610 (2001); *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 241-42, 488 S.E.2d 608, 613 (1997); *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 90, 379 S.E.2d 677, 680 (1989). In *Webb v. North Carolina Dep't of Transp.*, 180 N.C. App. 466, 637 S.E.2d 304 (2006), the plaintiff sued a state agency under the Tort Claims Act for injuries he sustained when he walked through a shrub bed at an interstate rest stop and tripped over metal landscape edging that was concealed by pine straw. The Commission concluded the plaintiff was contributorily negligent, and the plaintiff appealed on the ground that "there was no evidence that [the] plaintiff could reasonably have appreciated the danger he was in while walking across the premises of the rest stop." *Id.* at 468, 637 S.E.2d at 305-06. In affirming the Commission's conclusion that the *Webb* plaintiff was contributorily negligent, this Court held the Commission properly inferred the

plaintiff had constructive knowledge of some danger of injury, based on the Commission's specific findings that the plaintiff

> failed to exercise ordinary care when he stepped into *an area that was a landscaped section for shrubs* . . . and that was *clearly not a walkway*. Plaintiff had a clear, safe route of travel if he walked on the sidewalk. Plaintiff could see the shrub bed, which was bordered by grass on one side and a sidewalk on the other. Given the choice of walking on the sidewalk or stepping into the landscaped shrub bed, plaintiff failed to exercise ordinary care when he stepped into the landscaped bed, and his decision to ignore the safe route constitute[d] contributory negligence. *Even though the edging was covered by the pine straw, it was apparent that pine straw was not a surface intended for foot travel, and, therefore, it was unreasonable for plaintiff to walk on the shrub bed when a clear sidewalk was available specifically for the purpose of pedestrian travel*.

Id. at 468, 637 S.E.2d at 306 (emphases added). In the present case, despite concluding Plaintiff lacked actual knowledge of the dangerous condition of shallow water, the Commission made no specific finding(s) as to whether or why the danger *should have been obvious* to Plaintiff. *Compare Smith v. N.C. Dept. of Nat. Resources*, 112 N.C. App. 739, 745, 436 S.E.2d 878, 882 (1993) (affirming Commission's conclusion that plaintiff's intestate, who died after walking on rocks surrounding the top of a waterfall, was contributorily negligent, where Commission made specific findings "indicat[ing] that the danger of the falls should have been obvious and apparent to [the decedent].").

III. Conclusion

The Commission improperly concluded Plaintiff was contributorily negligent on 4 October 2014 based solely on (1) Plaintiff's admission that he did not "ascertain the depth of the water at the end of the pier" and (2) Plaintiff's failure to enter the water by a using a swim ladder or jumping feet-first. The Commission made no specific finding(s) that Plaintiff's conduct was unreasonable in light of the surrounding circumstances, including no finding(s) that the hazardous condition *should have been obvious* to Plaintiff. Because the existence of contributory negligence "requir[es] a determination of 'reasonableness[]' . . . [that] depends upon the particular facts of each case[,]" *see Fiber Controls Corp.*, 300 N.C. at 677, 268 S.E.2d at 509, we hold the Commission's conclusion that Plaintiff was contributorily negligent was not supported by sufficient findings of fact.

The reasonableness of Plaintiff's conduct under the circumstances involves questions of fact that are for the Commission, not this Court, to determine. *See Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 108, 530 S.E.2d 54, 61 (2000). "[A]n order may be remanded to the Commission for additional findings of fact where the findings are insufficient to determine the rights of the parties." *Priddy*, 58 N.C. App. at 721, 294 S.E.2d at 744 (citation omitted). Accordingly, we remand to the Commission for additional findings consistent with this opinion. *See Bailey v. Dept. of Mental Health*, 272 N.C. 680, 684, 159 S.E.2d 28, 31 (1968) ("[W]here the Commission fails to find facts under a misapprehension of law, [this] [C]ourt will . . .

remand the cause so that the evidence may be considered in its true legal light."); *Weaver v. Dedmon*, ___ N.C. App. ___, ___, 801 S.E.2d 131, 133 (2017) ("A decision by the North Carolina Industrial Commission that . . . misapplies controlling law must be set aside and remanded to the Commission to determine, in light of the correct legal standards, factual and legal issues[.]").

REMANDED.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).