

## FEBRUARY 2019 LAW REVIEW

### SHALLOW WATER DIVING INJURY CONTRIBUTORY NEGLIGENCE DEFENSE

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In the case of *Core v. N.C. Div. of Parks & Rec.*, 2018 N.C. App. LEXIS 1040, the state tort claims commission (the Commission) denied plaintiff's negligence claim against the North Carolina Division of Parks and Recreation based on a determination that plaintiff's "contributory negligence," (i.e., plaintiff's own negligence in failing to look out for his own safety) contributed to his injuries.

Plaintiff James Core and members of his college fraternity went to Lake Waccamaw State 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. The North Carolina Division of Parks and Recreation owned and maintained the park, including a portion of the shoreline located in the southern section of Lake Waccamaw. SEE: <https://vimeo.com/150438538>

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."

Core 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., Core and at least one other fraternity member, Nate Middleton, decided to go swimming from the pier.

Core looked into the water, but the water appeared "very dark" and he 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." Core testified he looked for signs around the pier regarding the depth of the water but found none. Core "recalled seeing boats on the lake and various invitations around the park to swim from the pier." Core further "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, Core 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 Core's injury right before they jumped in. They 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

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threw rocks down to the bottom of the lake. They didn't see the rocks at the bottom and assumed the water must have been deep enough.

Moreover, because the dock was 200 yards offshore, a mile across the lake, they thought 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 Core indicated he planned to perform a shallow dive from the end of the pier, Middleton — an experienced swimmer and certified lifeguard — said he "almost did the same."

Core, 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]." Core struck the bottom of the lake with his head and felt a sharp pain in his right arm and stiffness in his torso. Core thought he had broken his arm and rolled over into a sitting position.

Middleton jumped in feet-first right after Core 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 Core and realized Core was "not standing up" and "probably something bad" had happened. Middleton asked if Core was okay. Although Core did not lose consciousness, he did not move and was just not responsive or getting up. Middleton assisted Core back onto the pier while maintaining the stability of Core's neck and spine. A fraternity member called for emergency medical services ten minutes later, and an ambulance arrived within approximately thirty-five minutes.

Core was airlifted to a regional medical center where he underwent spinal surgery for a broken cervical spine. Core 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 Core will have some pain associated with arthritis in the future. Core incurred medical expenses totaling \$146,083.69.

In an incident report prepared after Core'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 Core conducted the dive. They responded that no one had checked the depth at the end of the pier. According to the park ranger, different members of the group had told him 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 "the lake's color was dark due to the tannic acids from the organic matter which makes judging the depth of the water very difficult."

### REASONABLE PERSON STANDARD

Core filed a claim with the Commission seeking damages from the North Carolina Division of Parks and Recreation (NCDPR) under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* ("Tort Claims Act"). Core alleged NCDPR 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 NCDPR "knew or should have known were dangerous to visitors of the park." NCDPR denied Core's allegations of negligence and further asserted that Core's claim should be "barred" based on his "own contributory negligence."

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The Commission filed a decision and order on 22 August 2017 concluding Defendant NCDRP negligently failed "to warn Plaintiff of the hidden danger of shallow water at the end of the pier at the park." The Commission, however, denied Core's claim after concluding: "Plaintiff's injuries on 4 October 2014 "were "proximately caused by Plaintiff's own contributory negligence." Core appealed.

On appeal, Core claimed "the shallow water beneath the pier constituted a hidden danger." Moreover, Core argued the Commission's conclusion that he was "contributorily negligent" was not supported by the evidence, regardless of "any level of knowledge" of the hazardous condition attributable to Core.

The appeals court acknowledged "well-settled law" that "the Tort Claims Act does not authorize recovery, unless the claimant is free from contributory negligence." As noted by the appeals court, an individual is "guilty of contributory negligence" when the failure to exercise ordinary care concurs with the negligence of the defendant and contributes to the plaintiff's injury.

Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury... 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.

Under the circumstances of this particular case, Core had argued "a person of ordinary prudence would have concluded that the water was deep enough to safely perform a shallow dive without verifying the water's depth."

### WHAT YOU SEE IS WHAT YOU GET?

According to the appeals court, "specific findings of fact" were required before determining that an adequate legal basis existed to conclusively establish contributory negligence. As a result, before determining whether Core's claim was "barred by his own contributory negligence," the appeals court would require the Commission to determine "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 exercised under the same or similar circumstances to avoid injury."

As noted by the appeals court, Core had claimed the following alleged facts indicated he had acted reasonably under the circumstances:

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 park inviting visitors to swim from the pier. He noted the presence of ladders going down into the water from the pier. As a result, Plaintiff determined the water was deep enough to allow for diving.

In response, NCDPR had cited the following facts to indicate Core's failure to act like "a

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"reasonably prudent person" under the same or similar circumstances:

As an experienced competitive swimmer, both in high school and with his college swim club, Plaintiff received extensive training and coaching in swimming and diving, including the method of shallow diving... Despite describing the water at the park as "very dark," such that he could not see into it, Plaintiff testified that he assumed the water at the end of the pier was deep enough for shallow diving... 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.

As characterized by the appeals court, the Commission had determined Core was contributorily negligence based on the following points:

(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.

### REASONABLE OBSERVATIONS?

While recognizing the applicability of the "the reasonable or ordinarily prudent person standard," the appeals court found "the Commission made no assessment of the reasonableness of Plaintiff's conduct in light of the circumstances that existed on 4 October 2014." Moreover, the appeals court noted that one of the commissioners had expressed the following dissenting view regarding the reasonableness of Core's behavior and contributory negligence under the circumstances:

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 Plaintiff made *reasonable conclusions* that it was safe [to perform a shallow dive *based on the circumstances...*

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... 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. (*Emphases added by the Court*).

On appeal, NCDPR cited earlier state courts of appeal decisions which had held a plaintiff's failure to first determine the depth of water prior to diving constitutes contributory negligence." Accordingly NCDPR argued there was "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."

While past state appeals court decisions may have held "plaintiffs were contributorily negligent

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in sustaining their diving-related injuries," the appeals court noted these earlier appellate decisions had included findings of fact, specifically "observations about certain contemporaneous circumstances surrounding the plaintiffs' conduct."

However, in this particular instance, the appeals court found the "pivotal question" in determining contributory negligence was left unresolved by the Commission, i.e., whether Core "failed to exercise such care for his own safety as a reasonably careful and prudent person would have used under similar circumstances."

Accordingly, the appeals court found the Commission had erred in concluding "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*," (i.e., in and of itself, the act alone established contributory negligence)." In reaching this conclusion, the appeals court held: "The 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."

### CASE BY CASE APPROACH

As described by the appeals court, the Commission had concluded Core was contributorily negligent because he failed confirm "the water's depth before diving and not using a safer available means of entering the water." In the opinion of the appeals court, this "*per se*," one size fits all, approach taken by the Commission reflected "a fundamental misunderstanding of the case-by-case approach required to determine whether a *particular* plaintiff was contributorily negligent on a *particular* occasion." (*Emphasis of Court*). According to the appeals court: "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."

While Core was "a first-time visitor to the park" and he had "made numerous observations before concluding the water at the end of the pier was deep enough for diving," the Commission had noted Core had "extensive training and coaching in swimming and diving, including the method of shallow diving." In concluding Core was "contributorily negligent," the appeals court, however, found "the Commission did not indicate which of these or any other circumstances rendered Plaintiff's actions unreasonable." In the opinion of the appeals court: "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."

### 20-20 HINDSIGHT

In this particular instance, Core had admitted to the Commission that, in retrospect, he "should not have performed a shallow dive into the lake without first confirming the water's depth." According to the appeals court, this admission by Core after the fact "did not alone support a conclusion that a reasonable person would have acted differently *in the moment*":

The negligence analysis does not judge people's actions based on 20-20 hindsight. Rather, it asks whether a person's actions were reasonable in light of the circumstances *at the time of the actions*.

The Commission had also observed that there were "alternative means available" to Core for

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entering the water and Middleton had jumped into the water feet-first. In the opinion of the appeals court, these observations, standing alone, would not conclusively support the Commission's determination that a "reasonable person" in Core's position would necessarily have "avoided diving from the end of the pier."

### UNKNOWN OBVIOUS DANGER?

As noted by the appeals court, the Commission had characterized the shallow water surrounding the pier as "a danger *unknown to Plaintiff*, and subject to being hidden visually by water conditions." The appeals court found this point particularly relevant to the question of Core's contributory negligence because state appeals courts had generally 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." (*Emphasis of Court*)

While Core may not have been actually aware of the water's shallow depth, within the context of contributory negligence, the appeals court acknowledged that Core could still be charged with constructive knowledge of the danger "if his conduct ignored unreasonable risks or dangers which *would have been apparent to a prudent person exercising ordinary care for his own safety*":

Where a plaintiff is injured by an unsafe condition, the 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*.

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.

While finding Core "lacked actual knowledge of the dangerous condition of shallow water," the appeals court found the Commission had erred in making "no specific finding(s) as to whether or why the danger *should have been obvious*" to impute Core had constructive knowledge. (*Emphasis of Court*)

### CONCLUSION

Because the existence of contributory negligence required a determination of "reasonableness that depends upon the particular facts of each case," the appeals court found "the Commission's conclusion that Plaintiff was contributorily negligent was not supported by sufficient findings of fact." The appeals court, therefore, remanded (i.e., sent back) Core's negligence claims to the Commission to determine which specific facts would prove whether or not Core had failed to exercise ordinary care for his own safety under the circumstances of this particular case.

SEE ALSO :*Fateful Dive into "Closed" Park Pond Pool*  
*James C. Kozlowski, Parks & Recreation, Dec 2016 Vol. 50, Iss. 12*  
<http://cehdclass.gmu.edu/jkozlows/lawarts/12DEC16.pdf>

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