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Griffith v. Jumptime Meridian, LLC Respondent's Brief Dckt. 44133

IN THE SUPREME COURT OF THE STATE OF IDAHO

SETH GRIFFITH, Appellant, vs. JUMPTIME MERIDIAN, LLC, an Idaho Limited Liability Company, Respondent.	)	Supreme Court Docket No: 44133 District Court No. CV-PI-1503646

RESPONDENT'S BRIEF

Appeal from the District Court of the
Fourth Judicial District, in and for the County of Ada

Honorable Deborah Bail, District Judge, Presiding

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I.

STATEMENT OF THE CASE

a. Nature of the Case.

This appeal arises from a lawsuit by Appellant Seth Griffith against Respondent JumpTime Meridian, LLC ("JumpTime"), which owns and operates the JumpTime trampoline court in Meridian, Idaho. Griffith alleged that JumpTime was negligent in its supervision of him when he was a customer of the trampoline court in January, 2014, which resulted in Griffith suffering fractures in his C6 and C7 vertebrate. Griffith specifically alleged that JumpTime's supposed in-house rules prohibited customers from landing flips into the facility's foam pits onto one's back. Griffith had been at JumpTime for approximately 45 minutes prior to his accident, and had performed a number of double front flips into the foam pit, which he had landed on his back without incident. Without providing any warning to the trampoline court monitor on duty, Griffith then attempted a triple front flip into the foam pit. Prior to this, Griffith had never before attempted a triple flip. Griffith under rotated his triple flip and landed on his neck, which resulted in his cervical spine injuries. Griffith asserted that JumpTime's failure to enforce an alleged "no back landing" rule caused him to believe he could complete the triple front flip without injury. The District Court granted JumpTime's motion for summary judgment, finding that Griffith had "failed to prove any breach of duty by JumpTime which caused the plaintiff's injury." Griffith then moved for reconsideration of that decision, which the District Court denied.

Griffith has appealed the district court's decision to grant summary judgment. Griffith's sole issues on appeal are whether a triable question of fact existed regarding what JumpTime's rules were on the date of his injury, and whether there is evidence that JumpTime's failure to

enforce any rules caused his injury. However, there exists no evidence (1) that JumpTime failed to comply with industry standards, or (2) that Griffith was injured due to any failure to enforce a "no back landing rule." In this matter, the undisputed evidence before the District Court was that Griffith was injured because he had landed on his neck, not his back.

b. Statement of Facts and Procedural History.

On the afternoon of January 11, 2014, Seth Griffith went to the JumpTime indoor trampoline court in Meridian, Idaho, which was owned and operated by Defendant JumpTime. 9/14/2015 Deposition Transcript for Seth Griffith (hereinafter "Trans.", p. 34, R000063. At the time, Griffith was 17-years-old, and approximately five months short of his 18th birthday. Trans. pp. 6, 107, R 000056, 000081. Griffith had been accompanied by his 18-year-old girlfriend, and her two minor siblings. Trans. pp. 35—36, 43, R. 000063, 000065. Griffith executed a Participation Agreement, Release, and Assumption of Risk form, and had entered his initials where it called for a parent or guardian's signature to indemnify JumpTime and waive any liability for negligence. Trans. pp. 98; Exhibit 2, R. 000079; 0000102—104. Griffith testified at deposition that he had merely skimmed the form's language. Trans. 44, R 000065. Griffith then paid his admission and entered the facility. *Id.* Whether Griffith's waiver had any force or effect was never an issue that JumpTime had raised before the District Court.

The area of JumpTime that Griffith used featured a number of "trampoline runways," as well as a small and large foam pit into which customers could jump or flip. Affidavit of Chad Babcock in Support of Defendant's Motion for Summary Judgment (hereinafter "Babcock Aff."), Exh. B, T 0000127. Griffith spent about 45 minutes showing one of his girlfriend's siblings how to do jumps and flips, and performing handsprings and flips on the trampoline

runway. Trans. p. 58, R00069. Griffith also executed a number of double flips off of trampolines and into the foam pits, all without incident. *Id.* A JumpTime trampoline court monitor had been on duty watching Griffith and his party. Trans. pp. 49-50, R 000066—67.

Griffith testified at deposition that prior to going to JumpTime, he had experience at trampoline courts and gymnastics from several years prior, and also from using his uncle's trampoline. Trans. pp. 19—21, 40, R 000059, 000064. Griffith testified that he spoke with the trampoline court monitor twice before his accident. Trans. p. 61, R 000069. The first time was when he had been doing back flips and handsprings on one of the trampoline runways (and not into a foam pit); the monitor allegedly said the back flips were "cool." *Id.* The second time was when he had been doing double front flips into the foam pit; the monitor asked if Griffith had ever done double front flips before, to which Griffith responded "yes." *Id.* Griffith testified the monitor then commented something along the lines of "[t]hat is pretty sweet." *Id.*

Griffith estimated that he had completed five to eight double front flips into the foam pit before he attempted the triple flip. Trans. p. 108, R 000081. Griffith admitted that he had never before attempted a triple flip. Trans. p. 70, R 000072. Griffith admitted that the triple flip was a "pretty good step up" from doing double flips in terms of the required skill involved. Trans. p. 69, R 000071. However, Griffith also testified that he felt "pretty confident" that he could do the triple flip without hurting himself. Trans. p. 70, R 000072. Griffith did not tell the trampoline court monitor that he was going to attempt a triple flip. Trans. p. 60, R. 000069. Griffith confessed that the trampoline court monitor had not encouraged him to do the triple flip, but he thought it would be alright based on her not saying anything negative about his doing double flips Trans. p. 73, R 000072. Griffith testified that while at JumpTime, he had been pretty

excited, and had not been paying close attention to any safety signs or his surroundings. Trans. pp. 56, 80, R 000068, 000074. Further, Griffith testified that he had landed all of his flips into the foam pit flat on his back, and had attempted to land his triple flip on his back because he felt it was safer than landing on his feet. Trans. p. 64, R 000070. Griffith said that he would "just land flat on the foam pit, because you don't want to land on your feet because you can bash your head against your knees." Trans. pp. 54—55, R 000068.

Griffith testified that he under rotated the third flip of his attempted triple flip, and came down "hard" on his neck, rather than his back as he had intended. Trans. pp. 58, 62, R 000069—70. He immediately got out of the foam pit, and sat beside a wall for several minutes. Trans. p. 59, R 000069. Griffith did not tell the trampoline court monitor that he felt hurt. Trans. p. 68, R 000071. Griffith ultimately went home. Trans. pp. 74—75, R 000073. The next morning, Griffith awoke in pain. Trans. p. 75, R 000073. He went to the hospital, where he was told he had a broken neck, and required surgery. Trans. p. 78, R 000074.

Griffith filed suit on March 6, 2015. Complaint and Demand for Jury Trial (hereinafter "Compl."), R 00009. In his complaint, he alleged theories of premise liability, defective design and maintenance of equipment, and improper employee training. Compl, R 00008. Griffith also alleged that JumpTime breached a duty to enforce its rules. *Id.* On October 15, 2015, JumpTime moved for Summary Judgment, arguing that Griffith had failed to present any admissible evidence on breach and causation. Memorandum in Support of Motion for Summary Judgment (hereinafter "Memo"), R 000105—121. In support of its Motion, JumpTime produced the affidavit of its owner, Chad Babcock, who is an experienced gymnast as well as manager. Babcock Aff., R 000122—124. Babcock testified that "Landing on one's back was not

prohibited pursuant to JumpTime's foam pit rules, and landing in this matter is safe and acceptable practice." Babcock Aff. p. 3, R 000124. Griffith did not depose Mr. Babcock, nor rebut his affidavit testimony.

JumpTime also submitted the affidavit of Marc A. Rabinoff, Ed.D, an expert in gymnastics, human performance, and the trampoline court industry. Affidavit of Dr. Marc A. Rabinoff, Ed.D. in Support of Defendant's Motion for Summary Judgment (hereinafter "Rabinoff Aff."), R 00018—25. Dr. Rabinoff is Professor Emeritus in Human Performance and Sport at Metropolitan State University in Denver, where he has taught and coached gymnastics since 1984. Rabinoff Aff., p. 2, R 00019. Dr. Rabinoff also is a member of the American Society for Testing Materials Committees for Consumer Trampolines, Trampoline Courts, and Fitness, and Exercise Standards of Care, which promulgated the industry-wide standards governing equipment design and specifications, standard operating procedures, industry safety practices, and employee training at trampoline court facilities such as JumpTime. Rabinoff Aff., p. 3, R 00020.

Dr. Rabinoff opined that there were no defects in any of the trampoline court equipment used by Griffith, and that JumpTime's employee training and supervision of Griffith had exceeded trampoline court industry standards. Rabinoff Aff., pp. 6—7, R 000023—00024. Dr. Rabinoff opined that trampoline court industry standards in place at the time of Griffith's injury required customers to land any front flip into a foam pit "on either their feet, on their buttocks, or on their back." Industry standards prohibited customers from landing any front flips into a foam pit on their head, neck, or front. "The constant for any landing in a foam pit is to have one's feet in front of them when they land." Rabinoff Aff., p. 5, R 000022. Dr. Rabinoff opined that it was

within trampoline court industry standards at the time of Griffith's accident to permit customers to do double or triple flips into a foam pit. Dr. Rabinoff also testified that up until Griffith attempted the triple flip without providing any prior warning, he appeared to be jumping within his capabilities. Rabinoff Aff., p. 6, R 00023.

Dr. Rabinoff further opined that the sole cause of Griffith's accident was his attempt to perform a triple flip that was outside of his capabilities, and during which he failed to gain enough rotation to safely land, and landed on his neck. Rabinoff Aff., p. 8, R 00025. Griffith did not object to or rebut any of Dr. Rabinoff's opinions at summary judgment.

In response to summary judgment, Griffith submitted a copy of JumpTime's Pit Safety Rules, which state in no uncertain terms that "[p]articipants must land on their feet[,] seat[,] or back." Declaration of Plaintiff's Counsel Filed in Opposition to Summary Judgment, Exh. 2, R 000149. Griffith also produced the claim file of Dave Moore, an independent adjuster hired by JumpTime's surety to investigate the accident. Declaration of Dave Moore (hereinafter "Decl. Moore"), T 000181—303. Moore's file contained numerous hearsay statements, inadmissible prior settlement offers, and evidence of subsequent remedial measures by JumpTime, such as its posting a sign above the small foam pit after Griffith's accident which prohibited customers from attempting any double or triple flips. Decl. Moore, R 000302.

JumpTime objected to the District Court's consideration of Moore's materials on summary judgment. In its Decision and Order Re: Motion for Summary Judgment, the District Court ruled that the hearsay statements by anyone other than JumpTime which were contained in Moore's claim file were inadmissible, and would not be considered in determining the facts before the Court. Decision and Order RE: Motion for Summary Judgment, p. 3, R 000396. The

District Court also ruled that the settlement offers and evidence of subsequent remedial measures, including a photograph of the "no double or triple flips" sign, in Moore's claim file were inadmissible pursuant to Idaho Rules of Evidence 407 and 408. *Id.*

Griffith inexplicably has included a photograph of this subsequently placed sign prohibiting double and triple flips in his Appellate Brief. He does not argue the District Court impermissibly excluded it, but asks this Court to consider it as evidence on appeal that the District Court's decision on breach and causation was in error, and that Dr. Rabinoff's opinions should be discounted and/or disregarded. Appellate's Brief, p. 8.

In opposition to summary judgment, Griffith did not contend, or offer any evidence that any of JumpTime's equipment was dangerous or defective, that JumpTime failed to warn of any concealed danger, or that any of JumpTime's employees were improperly trained. Griffith also did not contest that allowing double or triple flips was in any way outside of trampoline court industry standards or was created an unreasonable risk of harm. Griffith further did not respond to JumpTime's evidence on summary judgment with any expert evidence that back landings were in violation of trampoline court industry standards, or evidence that back landings created a risk of unreasonable harm.

II.

ATTORNEY FEES ON APPEAL

Under Idaho Code section 12–121, an award of attorney fees on appeal "is appropriate when this Court is left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation." *Karlson v. Harris*, 140 Idaho 561, 571, 97 P.3d 428, 438 (2004). As is explained further below in JumpTime's Response Brief, Griffith's

contention that the District Court erred in granting summary judgment is anchored in naked inferences, unfounded assertions of fact, and pure speculation. Griffith has asserted that a triable question of fact exists regarding whether JumpTime breached its in-house rules. This claim is unsupported. In any event, Griffith has offered nothing that would allow a jury to conclude that any action or inaction by JumpTime created any unreasonable risk of harm that was a proximate cause of his injuries. The law is clear that in order to present a *prima facie* case for negligence sufficient to survive summary judgment, a claimant must demonstrate the existence of admissible evidence showing that a defendant created an unreasonable risk of harm, and that this breach in any way was the mechanism that caused the claimant's injuries. *Brease v. Stinker Stores, Inc.*, 157 Idaho 443, 337 P.3d 602 (2014). Put simply, the alleged failure to enforce any alleged "no back landing rule" could not have caused Griffith's injury, because his injury resulted from his landing on his neck, not on his back.

Griffith's appeal is rooted in the assertion that a jury should have been allowed to blindly infer that, had JumpTime enforced a "no back landing rule," Plaintiff would not have felt "emboldened" and attempted a triple flip that he incorrectly landed on his neck. However, Griffith testified that he had not felt encouraged by the trampoline court monitor to attempt his triple flip. Trans. p. 73, R 000073. Griffith's grounds for appeal completely ignore the well-founded requirement that in order to survive summary judgment, a plaintiff must produce admissible evidence that a particular action or inaction must have actually produced the injurious result. *Coombs v. Curnow*, 148 Idaho 129, 139—40, 219 P.3d 453, 464—65 (2009).

The unreasonableness of Griffith's appeal is further highlighted by the fact that he has asked this Court to consider evidence of subsequent remedial measures, which the District Court

specifically excluded from its consideration on summary judgment, as evidence of negligence. Griffith did not and cannot challenge that well-grounded ruling. Accordingly, attorney fees under I.C. § 12-121 are appropriate

III.

ARGUMENT

a. Standard of Review

"When reviewing an order for summary judgment, this Court applies the same standard of review that was used by the trial court in ruling on the motion for summary judgment." *Vreeken v. Lockwood Eng'g, B.V.,* 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 102, 29 P.3d 936, 938 (2001). The Court must "construe all disputed facts, and draw all reasonable inferences from the record, in favor of the non-moving party." *Nava v. Rivas–Del Toro,* 151 Idaho 853, 857, 264 P.3d 960, 964 (2011). When the party moving for summary judgment will not carry the burden of production or proof at trial, "the genuine issue of material fact" burden is met by establishing the absence of evidence on one or more elements that the nonmoving party will be required to prove at trial. Once such an absence of evidence has been established, the burden shifts to the party opposing the motion to establish, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The non-moving party may not rely on mere speculation to create a genuine issue of

material fact. *Anderson v. Hollingsworth, M.D.*, 136 Idaho 800, 802, 41 P.3d 228, 230 (2001). Rather, the non-moving party must put forth admissible evidence upon which a reasonable jury could rely. *Bromley v. Garey*, 132 Idaho 807, 979 P.2d 1165 (1999). Further, "a mere scintilla of evidence or slight doubt as to facts is not sufficient to create a genuine issue for purposes of summary judgment." *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 88, 996 P.2d 303, 307 (2000); *see also McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003). Summary judgment will be granted if the evidence in opposition to the motion is merely colorable or is not significantly probative. *Nelson v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990).In a negligence action the plaintiff must establish the following elements: "1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; 2) a breach of duty; 3) a causal connection between the defendant's conduct and the resulting injuries; and 4) actual loss or damage." *Hansen v. City of Pocatello*, 145 Idaho 700, 702, 184 P.3d 206, 208 (2008).

b. The District Court's Decision Should Be Upheld Because Griffith Failed to Produce Any Admissible Evidence that JumpTime Created Any Unreasonable Risk of Harm.

Griffith raises the issue on appeal of whether a genuine issue of material fact "appeared to exist as to whether JumpTime had followed its own safety rules or procedures while supervising a minor who ultimately was severely injured. (emphasis added)" Appellant's Brief, pg. 1. Griffith asserts that a triable question of fact existed as to what JumpTime's rules were with respect to customers jumping and landing into the small foam pit in which he was injured. Griffith's position is that, based on the admissible evidence before the District Court, a jury could have concluded that JumpTime's rules prohibited customers from landing into the foam pit

flat on their back, as he had been doing, which should have precluded the District Court's grant of summary judgment as to breach. Appellant's Brief, pg. 10.

To begin, the Pit Safety Rules that Griffith submitted in opposition to summary judgment plainly state that "Participants must land on their feet[,] seat[,] or back." Thus, the factual premise for Griffith's only claim, that JumpTime has a "no back landing rule," is simply wrong.

But regardless of whether there was any admissible evidence before the trial court that JumpTime's rules prohibited customers from landing on their backs in the foam pit, Griffith's argument fails because he did not present any admissible evidence that any action or inaction by JumpTime created an unreasonable risk of harm. In his Appellate Grief, Griffith, without foundation, describes back landings as "improper" and "dangerous." Appellant's Brief, p. 10. However, he makes no attempt to support these assertions with any evidence on why back landings might be considered dangerous, how back landing might be considered dangerous, or that back landings could present any unreasonable dangers that would not have been present when landing in another manner (such as landing sitting down/feet forward, or landing upright on one's feet). In other words, Griffith presented no admissible evidence that back landings created an unreasonable risk of harm. Whether a jury might have been able to conclude that JumpTime's in-house rules did not permit back landings (which JumpTime denies), in-and-of-itself, is not evidence of breach in a negligence claim. In order to establishing a claim for negligence sufficient to withstand summary judgment, a plaintiff must put forth admissible evidence that would show that a defendant's conduct created an unreasonable and foreseeable risk of harm to the claimant. *Brease v. Stinker Stores, Inc.*, 157 Idaho 443, 337 P.3d 602 (2014).

In further defining what can constitute the breach of a duty, this Court has said that

"[e]very person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury." *Stephens v. Stearns*, 106 Idaho 249, 256, 678 P.2d 41, 48 (1984). This standard of ordinary care does not obligate a defendant to provide optimal care or employ the highest degree of skill; rather, a plaintiff must show that the defendant did something which it should not have done, or omitted something that it should have done, which caused an unreasonable risk of harm. *Coombs v. Curnow*, 148 Idaho 129, 139, 219 P.3d 453, 463 (2009); *Brease*, 157 Idaho 443, 337 P.3d 602. As this Court has cautioned, the owner of a business is not an insurer against injury of its customers. *Tommerup v. Albertson's, Inc.*, 101 Idaho 1, 3, 607 P.2d 1055 (1980).

Griffith argues broadly on appeal that JumpTime's rules were in place for customer safety, and therefore any failure to enforce the rules must be considered evidence of negligence. Appellant's Brief, pg. 5. This argument completely ignores Griffith's burden in demonstrating a viable claim for breach. In order to present a viable claim for negligence, it was Griffith's burden to present admissible evidence that JumpTime's conduct was somehow unreasonable , improper, or fell below the standard of ordinary care. *See Western Stockgrowers Ass'n v. Edwards*, 126 Idaho 939, 942, 894 P.2d 172, 175 (Ct. App. 1995) (affirming directed verdict in a negligence claim where, among other things, there was no evidence that defendant's conduct was unreasonable or improper, and thus, there was no substantial evidence upon which a jury could find the defendant's conduct was a breach of any duty owed without engaging in speculation). Again, Griffith made zero effort to develop or introduce evidence that could be used to show that back landings were in any way unsafe or unreasonable. As a result, there was no evidence before

the District Court upon which a jury could find JumpTime's conduct was unreasonable or improper without engaging in speculation.

On summary judgment, the only admissible evidence before the Court regarding the standard of conduct required to prevent JumpTime's customers from being exposed to an unreasonable risk of harm was the expert testimony of Dr. Rabinoff, and the testimony of Chad Babcock, JumpTime's owner. Dr. Rabinoff testified that trampoline court industry standards permitted customers to land flips "on either their feet, on their buttocks, or on their back." Rabinoff Aff. p. 5, R 000023. Dr. Rabinoff also testified that JumpTime complied in all respects with trampoline court industry standards concerning its supervision of Griffith while a customer at JumpTime. Rabinoff Aff., p. 6, T 000023. Babcock testified that Landing on one's back was " a safe and acceptable practice." Babcock Aff., p. 3, R 000124. Griffith did not respond with any expert or other admissible evidence to show why or how landing on one's back was in anyway unsafe, dangerous, or exposed a trampoline court customer to an unreasonable risk of injury that could have been avoided by adhering to some other form of landing. Further, Griffith did not object to any of Dr. Rabinoff's or Babcock's opinions. Dr. Rabinoff's experience in human performance, gymnastics, and trampoline court's, and Babcock's experience in gymnastics, allowed them to opine on these issues.

Understanding acceptable ways to land a flip into a foam pit requires knowledge of gymnastics, human performance, and the forces placed upon on the body in flipping and landing. Based on the record of admissible evidence before the district court, without the aid of expert opinion evidence, or some other evidence which would show that back landings were somehow unreasonably dangerous, a jury would have needed need to engage in pure speculation in order to

arrive at such a result. In other words, no rational jury could conclude that back landing into a foam pit created an unreasonable risk of harm. In fact, when Griffith did land on his back, he was uninjured.

Griffith also arbitrarily asserts on appeal that trampoline court industry standards are irrelevant, and that only JumpTime's in-house rules which allegedly prohibited back landings should have been applied by the District Court in establishing the applicable standard of conduct. Appellant's Brief, pg. 3. Griffith additionally argues that he should have been entitled to a reasonable inference that JumpTime had adopted more stringent safety standards than those required by the trampoline court industry. Appellant's Brief, p.2. Griffith offers no authority to support these positions, nor does he point to any admissible evidence to support such an inference. Griffith also ignores the fact that where industry standards are undisputed, they are the standard of conduct to which a defendant is measured in negligence cases:

> Evidence of the custom and practice of persons engaged in a trade or business similar to the trade or business of a party to a negligence suit is admissible and probative in regard to the requisite standard of care. Industry custom and practice are commonly looked to for an illumination of the appropriate standard of care in a negligence case, as proof of common practice aids in formulating a general expectation as to how individuals will act in the course of their undertaking. Where the evidence is undisputed that the defendant acted in accordance with the uniform custom of persons engaged in a like business, there is no negligence, unless it can be shown that such a custom is itself negligent. . . .

57A Am. Jur. 2d Negligence § 164 (August 2016 Update).

Here, JumpTime offered undisputed testimony by Dr. Rabinoff that the practice of permitting back landings into the foam pit complied with trampoline court industry standards. Moreover, Griffith's own deposition testimony directly contradicts his assertion on appeal that

he should have been required to land on his feet. At deposition, Griffith testified that he would "just land flat on the foam pit, because you don't want to land on your feet because you can bash your head against your knees." Trans. p. 54—55, R. 000068. Without having offered any admissible evidence which could reasonably be viewed as contradicting JumpTime's evidence that back landings were a safe and acceptable method of landing in a foam pit, the District Court's grant of summary judgment in JumpTime's favor was proper.

However, Griffith further argues that "as JumpTime presented no evidence that it subscribed to any standards other than those stated in its Handbook or in JumpTime's warning signs, JumpTime was liable for disregarding [its] own rules and procedures." Appellant's Brief, p. 5. In making this argument, Griffith disregards the fact that it is his burden of proof to present a prima facie case of negligence supported by admissible evidence; thus, it was his duty to show that any actions or inactions by JumpTime created an unreasonable risk of harm which bore a causal connection to his injury. *Sanders*, 125 Idaho at 156, 876 P.2d at 875. He did not.

c. The District Court's Decision Should Be Upheld Because Griffith Has Not Raised Any Triable Question of Material Fact that JumpTime In Any Way Caused His Injuries.

Griffith also asserts on appeal that "[t]here is a reasonable inference that [he] would not have attempted a triple flip if he was not encouraged to continue to improperly land his double flips." Appellant's Brief, pg. 9. Plaintiff's argument as to causation is fundamentally flawed on several levels. First, this argument misconstrues what it means to show proximate or actual cause.

On summary judgment, in addition to providing evidence a person failed to use ordinary care, a plaintiff attempting to establish a viable claim of negligence must provide admissible

evidence that the "failure to use ordinary care was the proximate cause of damage to the plaintiff." *Pearson v. Parsons*, 114 Idaho 334, 339, 757 P.2d 197, 202 (1988). "[T]he mere fact that [an event] does not result in a favorable outcome does not establish—or even constitute evidence of—negligence or proximate causation." *Coombs v. Curnow*, 148 Idaho 129, 139, 219 P.3d 453, 463 (2009) (quoting *Campbell v. United States*, 904 F.2d 118, 1194 (7th Cir. 1990). Actual cause "is a factual question focusing on the antecedent factors producing a particular consequence." *Id.* Here, any rational fact finder could not conclude based on the extant record that JumpTime's allowing Griffith to land on his back in any way produced the particular consequence of him incorrectly landing on his neck. It is undisputed that Griffith did not injure himself because he landed on his back. Griffith's practice of back landings and his neck injury are simply unrelated, and no admissible evidence exists that a jury could use to conclude that Griffith's neck injury had anything to do with his practice of landing on his back. It had everything to do with his under rotating his flip and landing on his neck.

Second, Griffith misconstrues what inferences can be drawn by the District Court on summary judgment. While a trial court on summary judgment must make all reasonable inferences in favor of the nonmoving party, any inferences must be based only on admissible evidence. *See Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (emphasis added). Any inference that Griffith would not have attempted the triple flip if he had previously been warned against landing on his back is not based on any admissible evidence, but is based purely on speculation. Griffith did not point to any such admissible evidence before the District Court, and cannot point to any such admissible evidence now. The only causal connection offered is the naked inference that if Griffith had been instructed to not land on his

back, he would not have attempted the triple flip, and thus would not have injured himself. "Such an implausible inference does not rise to the level of evidence, however." *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 875, 876 P.2d 154, 157 (Ct. App. 1994).

Moreover, the idea that a jury could find that Griffith was "empowered" or "encouraged" to attempt the triple flip from the monitor's conduct is plainly contradicted by Griffith's own testimony at deposition that "I wouldn't say she encouraged me. . . ." Trans. p. 73, R 000072. Griffith further testified that he had not given the monitor any indication that he would attempt a triple flip. Trans. p. 60, R 000069. Griffith's argument essentially is that evidence existed that JumpTime caused his injury by failing to protect him from his own negligence which JumpTime could not reasonably foresee. JumpTime possessed no such duty. Absent unusual circumstances which Griffith has not argued exist, there is no absolute duty to protect another. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999).

Plaintiff has adduced no facts that would support a reasonable inference that his injuries were caused for any reason other than he under rotated his triple flip. His injuries have no bearing on his intended method of landing, but rather have everything to do with his own negligence in carrying out the triple flip. The naked assertion that he would not have attempted the triple flip if required to land in some other fashion has not been demonstrated in the record. In order to survive summary judgment, a plaintiff must demonstrate admissible evidence of a causal link between the alleged breach and his complained of harm; speculation is insufficient. *See Bollinger v. Fall River Rural Elec. Co-op., Inc.* 152 Idaho 632, 642, 272 P.3d 1263, 1273 (2012). Here, Griffith did not and cannot show that his prior back landings produced the consequence of his broken neck, and his argument is precisely the type of post hoc inferential

reasoning that the Idaho Court of Appeals has explicitly ruled is an insufficient basis for upon which a jury could base a verdict. *Sanders*, 125 Idaho at 875, 876 P.2d at 157. Thus, based on the extant record of admissible evidence, no fact finder could rationally find that Plaintiff's injury was in any way caused by any breach by JumpTime.

d. Red Herring Issues Raised by Griffith on Appeal.

Plaintiff inserts a number of red herrings into his arguments that have no bearing on the issues on appeal before this Court. The only pertinent issues on appeal are whether a question of material fact existed before the trial court on the issues of breach and causation. Instead of focusing on these points, Plaintiff has devoted a considerable amount of time in his arguments regarding matters which in no way address the substance of his appeal.

To begin, Griffith attempts to emphasize the fact that he was "not accompanied by an adult nor had any supervisor. . . " when a customer at JumpTime. Appellant's Brief, p. 1. In addition to being irrelevant to this appeal, this argument is misleading. At the trial court, Griffith did not assert that JumpTime had any duty to ensure that he had been accompanied by an adult, or that his lack of a supervisor in any way caused or contributed to his injuries. Also, it is undisputed that Griffith was accompanied at JumpTime by his adult-age girlfriend.

Griffith also expends considerable effort in arguing that the District Court made an impermissible factual finding in describing Plaintiff's prior landings as "successful." Appellant's Brief pgs. 4, 9. It is clear from the District Court's Decision and Order re Motion for Summary Judgment that its comment that Plaintiff's previous jumps were "successful" was simply to note that Plaintiff did not injure himself on any of his previous jumps. However, even if the Court's comment can be considered as a factual finding on the issue of breach—again, the only evidence

before the District Court regarding whether JumpTime's allowing Plaintiff to land on his back was or was not negligent was Dr. Rabinoff's and Babcock's testimony that back landings were a safe and acceptable form of landing. Without evidence that back landings created an unreasonable risk of harm, the District Court was correct in finding that Griffith's prior flips had been successful.

Further, Griffith argues on appeal that JumpTime failed to present any evidence before the trial court that it had subscribed to the trampoline court industry standards to which Dr. Rabinoff opined. Appellant's Brief, pg. 5. Griffith's argument is essentially that it should be deemed negligent if its in-house rules embraced safety standards higher than those reasonably required under the circumstances. Any failure to adhere to standards above and beyond the applicable standard of care is not negligence. *Coombs,* 148 Idaho at 139, 219 P.3d at 463. Griffith argument here is simply one more attempt by him to sidestep the fact that in order to survive summary judgment, he needed to present admissible evidence that JumpTime subjected him to an unreasonable risk of harm, and that this harm proximately caused his injuries.

Moreover, Griffith attempts to place emphasis on the District Court's holding that "Jump Time owed an affirmative duty to [Griffith] to supervise him." Appellant's Brief, pg. 2, 3. This is argument of no consequence to Griffith's appeal. In making this ruling, the District Court merely was attempting to clarify that JumpTime's standard waiver of liability form had no effect in this matter given that Griffith was a minor. JumpTime never argued that it did. The District Court was clear in its Order on summary judgment that JumpTime's duty to its customers was to prevent the unreasonable, foreseeable risk of harm to others. Order, p. 8, R 000401. To the degree that Griffith argues that JumpTime assumed any duty that exceeded ordinary care, this

argument has no basis in law or fact under the circumstances. Even when a party has assumed a duty where none has previously existed, that duty is simply to act in a non-negligent manner. *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001).

Additionally, and perhaps Griffith's most egregious attempt to muddy the waters, Griffith has asked this Court on appeal to consider evidence of subsequent remedial measures as evidence of negligence. R 000396. Griffith states that JumpTime's conduct of prohibiting double and triple flips into the foam pit at some point after his injury is evidence that JumpTime subscribed to a higher standard of conduct than industry standards at the time of Griffith's injury. Appellant's Brief, pg. 8. There simply is no logic to such a statement; and furthermore, there is no question that the evidence of the signs placed above the small foam pit after Griffith's accident prohibiting double and triple flips was specifically excluded from evidence by the District Court. Order, p. 3, R 000396. Griffith has not appealed the District Court's ruling excluding this evidence.

Finally, Griffith appears to argue that a jury should have been allowed to consider JumpTime's subsequent signs as evidence to discredit the testimony of Dr. Rabinoff. Appellant's Brief, p. 8—9. At the District Court, Plaintiff did not object to the admission of Dr. Rabinoff's opinions, and Plaintiff's position on appeal simply has no basis. While a juror may choose to disregard expert evidence, the issues of credibility of an unrebutted expert witness should not be resolved at summary judgment. *Mains v. Cach*, 143 Idaho 221, 225, 141 P.3d 1090, 1094 (2006).

IV.

CONCLUSION

If the trampoline guard had asked Seth to land on top of his feet, sitting upright, or in

some other fashion other than flat on his back, would he have been dissuaded from attempting the triple flip? Or, would he still have attempted the triple flip, under rotated it, and have landed incorrectly on his neck? Based on the admissible evidence before the trial court at the time of summary judgment, any attempt to answer these questions by a fact finder would have been riddled with speculation and conjecture. Also, does landing on one's back into a foam pit present an unreasonable risk of harm? A jury would have no factual basis to conclude that it does.

As a result, the District Court was correct in granting summary judgment in JumpTime's favor. Based on the foregoing, JumpTime respectfully requests that this Court affirm the District Court's holding.

DATED THIS 17 day of August, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of August, 2016, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

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