STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN A. MARTIN and LINDA MARTIN, husband and wife, *Plaintiffs*, vs. **TWIN LAKES VILLAGE PROPERTY ASSOC., INC., dba TWIN LAKES VILLAGE GOLF CLUB, aka TWIN LAKES VILLIAGE GOLF COURSE,** *Defendant*.	Case No. **CV 2015 6288** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant's Motion for Summary Judgment. Defendant Twin Lakes Village Golf Club is a golf course located in Kootenai County, Idaho. That golf course is owned and operated by Defendant Twin Lakes Village Property Association, Inc. (Defendant entities collectively referred to as "Twin Lakes"). Complaint for Damages and Demand for Jury Trial, p. 2, ¶ 1.2.

On June 12, 2015, plaintiff John A. Martin (Martin) went to the Twin Lakes Village Golf Club to play golf with three other men. *Id.*, p. 3. ¶ 3.3. He paid the public greens fees to use the course. *Id.*, p. 3, ¶ 3.4. He also paid to hit a bucket of balls at the course driving range. Declaration of John A. Martin in Support of Plaintiffs' Opposition to Motion for Summary Judgment, p. 2, ¶ 4. There is a sign on the driving range that sets forth the "Practice Range Rules". *Id.*, p. 2, ¶ 5. One of the "Practice Range Rules" reads, "please hit in-between the ropes". *Id.* The driving range is

designated by one continuous rope, set in the ground by four stakes. Declaration of Michael Paukert in Support of Plaintiffs' Opposition to Motion for Summary Judgment, Exh. 2, p. 25, Ll. 4–19. It is then sub-divided into narrow lanes using ropes. Complaint for Damages and Demand for Jury Trial, p. 3, ¶ 3.7. The driving range hitting area is about eight feet wide. Declaration of Michael Paukert in Support of Plaintiffs' Opposition to Motion for Summary Judgment, Exh. 2, Exh. 2, p. 25, L. 8. There is a dispute about whether the ropes were elevated off the ground. *See* [Second] Declaration of Daniel E. Stowe in Support of Defendant's Motion for Summary Judgment, Exh. 1; Declaration of John A. Martin in Support of Plaintiffs' Opposition to Motion for Summary Judgment, pp. 2–3, ¶ 7.

Martin has a pre-shot routine that he does prior to hitting his ball. Declaration of John A. Martin in Support of Plaintiffs' Opposition to Motion for Summary Judgment, p. 2, ¶ 6. His routine consists of placing the golf ball on the ground, stepping directly behind the ball, looking down the range to locate a target, and taking two or three steps backwards to align his ball and stance for his shot. *Id.* On June 12, 2015, Martin performed this pre-shot routine. *Id.,* pp. 2–3, ¶ 7. Martin attested: "As I backed away from my golf ball to find my target and align my shot, the back of my foot caught the rope that designates the hitting area." *Id.* Martin fell backwards onto the grass and suffered injuries. *Id.*, p. 1, ¶ 2; Complaint for Damages and Demand for Jury Trial, p. 3, ¶ 3.11.

On September 4, 2015, Martin and his wife, Linda, filed the instant action for negligence. On June 2, 2016, Twin Lakes filed Defendant's Motion for Summary Judgment. It is supported by Defendant's Memorandum of Authorities Supporting Summary Judgment, and the Declaration of Daniel E. Stowe in Support of Defendant's

Motion for Summary Judgment. On June 16, 2016, plaintiffs filed Plaintiffs' Opposition to Motion for Summary Judgment. It is supported by the Declaration of Michael Paukert in Support of Plaintiffs' Opposition to Motion for Summary Judgment, the Declaration of Michael "Mick" McGruder in Support of Plaintiffs' Opposition to Motion for Summary Judgment, the Declaration of John A. Martin in Support of Plaintiffs' Opposition to Motion for Summary Judgment, and the Declaration of John M. Stone in Support of Plaintiffs' Opposition to Motion for Summary Judgment.

On June 23, 2016, Twin Lakes filed Defendant's Reply Brief Supporting Summary Judgment and the [Second] Declaration of Daniel E. Stowe in Support of Defendant's Motion for Summary Judgment.

Oral argument on defendant's motion was held June 30, 2016, at the conclusion of which this matter was taken under advisement. For the reasons set forth below, the Court denies defendant's motion for summary judgment.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)).

"Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there

is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)).

III. ANALYSIS

A. A genuine issue of fact exists as to whether Twin Lakes breached its duty of care to Martin.

In order to establish a cause of action for negligence, a plaintiff must establish: "(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 injury; and (4) actual loss or damage." *Turpen v. Granieri,*

133 Idaho 244, 247, 985 P.2d 669, 672 (1999). "The duty owed by owners and possessor of land depends on the status of the person injured on the land–that is, whether he or she is an invitee, licensee, or trespasser". *Robinson v. Mueller*, 156 Idaho 237, 239, 322 P.3d 319, 321 (2014) (citing *Ball v. City of Blackfoot*, 152 Idaho 673, 677, 273 P.3d 1266, 1270 (2012)).

The parties agree Martin was an invitee at Twin Lakes Village Golf Club. "An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner." *Holzheimer v. Johannesen*, 125 Idaho 397, 400, 871 P.2d 814, 817 (1994). "A landowner owes an invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Id.*

Moreover, to establish a *prima facia* case for negligence, an invitee must also demonstrate that the landowner knew or reasonably should have known of the alleged dangerous condition. *Shea v. Kevic Corp.*, 156 Idaho 540, 548, 328 P.3d 520, 528 (2014). "For a recurring or continuing condition, the invitee must show 'that the operating methods of the landowner or possessor are such that dangerous conditions are continuous or easily foreseeable.'" *Id.* (quoting *All v. Smith's Mgmt. Corp.,* 109 Idaho 479, 481, 708 P.2d 884, 886 (1985) (citing *Tommerup v. Albertsons's, Inc.,* 101 Idaho 1, 3–4, 607 P.2d 1055, 1057–58 (1980)). To that end, the invitee is required to "show that the landowner knew or should have known his operating methods caused or were likely to cause a dangerous condition." *Id.* at 549, 328 P.3d at 529.

Twin Lakes does not dispute that it owed a duty to Martin to keep its premises in a reasonably safe condition, or to warn of hidden or concealed dangers. Rather, Twin

Lakes argues that there is no genuine issue of material fact that Twin Lakes breached that duty. The only argument Twin Lakes makes in its opening brief is "there is no dispute that the plaintiff saw the ropes designating the hitting area so there was no hidden or concealed danger which required defendant to warn about. Based on the undisputed facts, the defendant did not breach its duty of ordinary care." Defendant's Memorandum of Authorities Supporting Summary Judgment, p. 5. Not only does that argument fail to shift the burden to Martin, but it also fails to address the actual allegation Martin makes against Twin Lakes.

In his Complaint for Damages and Demand for Jury Trial, Martin alleges:

> 4.2 Twin Lakes owed Mr. Martin a duty of care, including, but not limited to, a duty to take reasonable actions to ensure the golf course's driving range was **safe for use**.
> 4.3 Twin Lakes Breached its duty of care to Mr. Martin by failing to take reasonable actions to ensure the driving range's safety.

Complaint for Damages and Demand for Jury Trial, p. 4, ¶¶ 4.2–4.3 (emphasis added). Martin is not alleging Twin Lakes failed to warn of a hidden or concealed danger. Rather, Martin alleges the driving range was not kept in a safe condition. There is no dispute that Martin saw the rope that designated the driving range. That is not at issue in this case. What is at issue is whether the method of using a rope to designate the driving range creates or is likely to create an unsafe condition.

Martin argues "[n]ot only is Twin Lakes' use of a rope a tripping hazard but the manner in which it was installed—pulling it so tightly that it raised the rope off the ground—clearly demonstrates that Twin Lakes breached its duty of care to Mr. Martin." Plaintiffs' Opposition to Motion for Summary Judgment, p. 19. He further contends that "Twin Lakes should have reasonably anticipated that Mr. Martin, like other golfers, would engage in a pre-shot routine that involved stepping backwards toward the rope at

a time that his eyes were focused down the range and not at the tripping hazard located behind him at ground level." *Id.*

Twin Lakes has the burden of presenting evidence that the method it uses to designate the driving range is consistent with keeping its land in a reasonably safe condition. Relying on the deposition testimony of Kevin Sharrai, the general manager of Twin Lakes Village Golf Club, and Terrance Holt, the superintendent of Twin Lakes Village Golf Club, Twin Lakes argues, "there have [been] no prior incidents similar to the facts of this case in over two decades". Defendant's Reply Brief Supporting Summary Judgment, p. 4. However, the absence of prior incidents is not evidence that the land was kept in a reasonably safe condition. "Reduced to its essence, the 'prior similar incidents' requirement translates into the familiar but fallacious saying in negligence law that every dog gets one free bite before its owner can be held to be negligent for failing to control the dog." *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 301, 96 P.2d 506, 510, (1990). A prior similar incidents rule, "violates the cardinal negligence law principle that only the general risk of harm needed be foreseen, not the specific mechanism of injury." *Id.* (citing *Taco Bell v. Lannon,* 744 P.2d 43 (Colo.1987); *Galloway v. Bankers Trust Co.,* 420 N.W.2d 437 (Iowa 1988); *Duncavage v. Allen,* 147 Ill. App. 3d 88, 100 Ill. Dec. 455, 497 N.E.2d 433 (1986); Prosser & Keeton, The Law of Torts § 43 at 299 (5th ed. 1984); *Knodle v. Waikiki Gateway Hotel, Inc.,* 69 Haw. 376, 742 P.2d 377 (1987); *Small v. McKennan Hosp. (Small I),* 403 N.W.2d 410 (S.D. 1987)).

Twin Lakes has failed to direct the Court to any evidence that supports its position that it did not breach its duty to keep the land in a reasonably safe condition. There is no evidence from Twin Lakes that the method in which it defined the driving

range did not cause or was not likely to cause a dangerous condition. Twin Lakes has not produced any testimony that states the method used by Twin Lakes to define the driving range was reasonably safe. Twin Lakes has only directed the Court to the deposition testimony of Martin, where he admits to seeing the rope defining the driving range, and the deposition testimony of Kevin Sharrai and Terrance Holt, who attest there have been no prior similar incidents. That is not enough to shift the burden to Martin. As the moving party, the burden is on Twin Lakes to show the absence of a genuine issue of material fact that Twin Lakes did not breach its duty to keep the land in a reasonably safe condition. Twin Lakes has failed to do so.

For the reasons set forth above, the Court denies summary judgment to Twin Lakes.

B. Contributory negligence is a question of fact to be decided by the trier of fact.

Twin Lakes also argues that Martin's contributory negligence bars recovery. Defendant's Memorandum of Authorities Supporting Summary Judgment, pp. 5–7. Twin Lakes seeks a determination as a matter of law that Martin is equally negligent or more negligent than Twin Lakes. *Id.*, p. 7. Twin Lakes directs the Court to the following facts to support its position:

> . . . other than his playing partner, there were no other golfers on the driving range at the time so the plaintiff was not limited in his choice of hitting location. He chose to place his golf balls where he did — near the middle of the two ropes. He is the only individual who knew that his pre-shot routine include[ed] taking a certain number of steps backwards and he is the one who failed to adjust his routine to the ground conditions presented.

Id., p. 6.

In response, Martin maintains Twin Lakes is making an "open and obvious" argument, not a comparative negligence argument, and to the extent it is making a

comparative negligence argument, that is a question for the jury and should not be decided by the Court at this time. Plaintiffs' Opposition to Motion for Summary Judgment, p. 21.

"[A] known or obvious danger should be treated as a limitation upon liability, rather than as an excuse of duty." *Keller v. Holiday Inns, Inc.*, 105 Idaho 649, 655, 671 P.2d 1112, 1118 (Ct. App. 1983). An invitee's knowledge of a dangerous condition or the obviousness of that condition does not alleviate a landowner's duty of care owed to an invitee. *Id.* at 656, 671 P.2d at 1119. Rather, the damages that would be awarded to a plaintiff are reduced by his amount of negligence. *Id.* at 655, 671 P.3d at 1118.

Idaho Code § 6-801 governs contributory negligence. It provides:

> Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

I.C. § 6-801. "Contributory negligence, being a defense to be pleaded and proved, is generally a question of fact, but when the established facts and circumstances permit only one possible conclusion to be drawn by a reasonably prudent man, it becomes a matter of law for the court's determination." *Dale v. Jaeger*, 44 Idaho 576, 258 P. 1081, 1082 (1927).

As stated above, Twin Lakes has failed to present any evidence that the driving range was operated in a reasonably safe condition. As there is a question of fact on that issue, it is impossible for this Court to determine as a matter of law that Martin was equally or more negligent than Twin Lakes. Additionally, at this point it is impossible to

make any sort of comparative negligence analysis. Since contributory negligence cannot be decided as a matter of law at this time, the Court denies summary judgment.

IV. CONCLUSION AND ORDER.

For the reasons stated above, defendant's motion for summary judgment must be denied.

IT IS HEREBY ORDERED defendant Twin Lakes' Motion for Summary Judgment is DENIED.

Entered this 28TH day of August, 2016.

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John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of August, 2016, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Kauthleen H. Paukert	509-232-7762	Daniel E. Stowe	866-546-4981

____
Jeanne Clausen, Deputy Clerk