

## TORTS – PREMISES LIABILITY: EXPANDING LIABILITY FOR EMPLOYERS OF INDEPENDENT CONTRACTORS

*Schmidt v. Hess Corp.*, 2024 ND 72, 5 N.W.3d 787.

### ABSTRACT

In *Schmidt v. Hess Corp.*, the North Dakota Supreme Court ruled for the first time on whether employers can be liable to independent contractors and their employees under premises liability. In *Schmidt*, oil company Hess Corporation hired Tesoro Logistics to transport oil. Tesoro employee William Schmidt sustained injuries from tripping on breathing equipment while working on Hess's property. Schmidt sued Hess for negligence and premises liability, claiming Hess breached its duty to provide a safe work environment. Hess denied any such duty as Schmidt was an independent contractor. Schmidt countered that Hess retained control over his work by requiring the use of breathing equipment on its property, so Hess owed such a duty.

Under North Dakota law, employers are not liable for injuries caused by independent contractors. An exception to this rule exists when employers retain control over independent contractors' work. Premises liability requires landowners to keep their property reasonably safe for legal entrants. Prior to *Schmidt*, premises liability was not imposed upon employers failing to protect independent contractors from worksite hazards because every case raising such a claim lacked retained control by the accused employer. *Schmidt* resolved the ambiguity surrounding premises liability for employers when the court *held* that property owners retaining control over work on their property can be held liable to independent contractors and their employees injured by property hazards. *Schmidt* extends the retained control exception to premises liability, thus expanding the scope in which employers can be liable for workplace injuries. *Schmidt's* decision is certain to impact North Dakota with the prevalence of farming and oil industries within the state.

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## I. INTRODUCTION

William Schmidt, a Tesoro Logistics (“Tesoro”) employee, injured his shoulder and arm at work when he tripped on breathing equipment.<sup>1</sup> Oil company Hess Corporation (“Hess”) contracted with Tesoro to transport oil.<sup>2</sup> Under the contract between Hess and Tesoro, no Tesoro employees were to be considered Hess employees “in fact or in law.”<sup>3</sup> Schmidt’s injuries were sustained on a worksite owned by Hess.<sup>4</sup> Schmidt sued Hess for general negligence and premises liability.<sup>5</sup> Schmidt based his negligence claim on alleged duties to create a safe work environment and provide training to handle equipment safely.<sup>6</sup> His premises liability claim also hinged on the alleged duty to keep the worksite reasonably safe.<sup>7</sup> According to Schmidt, the breach of these duties led to his injuries.<sup>8</sup>

Schmidt filed identical claims against Basin Safety (“Basin”).<sup>9</sup> He claimed Basin owed him a duty of care because it had designed and installed the equipment.<sup>10</sup> Basin moved for summary judgment, denying a duty of care because it had neither contracted with Schmidt nor controlled Schmidt or the worksite.<sup>11</sup> The district court found Basin owed no duty of care as it had not offered training or controlled the worksite.<sup>12</sup> Schmidt himself admitted the premises liability claim against Basin was inappropriate.<sup>13</sup> The district court granted judgment in favor of Basin, which was affirmed on appeal due to a lack of evidence showing Basin controlled the worksite.<sup>14</sup>

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1. Schmidt v. Hess Corp., 2024 ND 72, ¶ 2, 5 N.W.3d 787.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* (“Schmidt’s general negligence claim alleged the defendants failed to: ‘(1) provide . . . a safe environment in which to work, equipped with safe respirator equipment; (2) ensure that all safety equipment was in proper working condition and ensuring that all safety measures and monitoring were understood, available and utilized by all personnel employed by the defendants; (3) ensure the proper maintenance and training in the use of personal protective equipment as well as workers demonstrating proficiency in using PPE and in making sure on-site monitoring and detection systems were in use; (4) ensure that the Breathing Air system was designed, installed and procedures were in place that allowed workers to safely travel up and down the stairs; (5) ensure all tanks, lines, equipment, devices and objects were clear of hazardous materials; and (6) ensure all tanks, ladders, lines, equipment, devices and objects are up to industry standards and code.’”).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* ¶ 3.

11. *Id.*

12. *Id.* ¶ 4.

13. *Id.*

14. *Id.* ¶¶ 4, 21-22.

Hess also filed for summary judgment in district court asserting no duty of care was owed to Schmidt as an independent contractor.<sup>15</sup> Schmidt disagreed, claiming his relationship as an independent contractor did not dispel Hess's duty because Hess controlled Schmidt's work by mandating the use of breathing equipment.<sup>16</sup> According to Schmidt, this question of control raised genuine issues of material fact, which meant summary judgment was improper.<sup>17</sup>

The district court granted summary judgment for Hess and found it was undisputed Hess mandated Schmidt use the breathing equipment without enforcing a particular method of use.<sup>18</sup> The district court *held* Hess owed no duty of care to Schmidt because Schmidt could elect to use the breathing equipment as he desired.<sup>19</sup> According to the district court, there was no specific manner of use required, so Hess did not retain control of Schmidt's work.<sup>20</sup> As such, the district court entered judgment in Hess's favor, and Schmidt subsequently appealed to the North Dakota Supreme Court.<sup>21</sup>

## II. LEGAL BACKGROUND

To claim negligence under North Dakota law, a plaintiff must show the defendant owed a duty of care, the defendant breached that duty, and the breach induced the plaintiff's injury.<sup>22</sup> Thus, existence of a duty is the primary inquiry in a negligence claim.<sup>23</sup> Establishing duty is "a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person."<sup>24</sup>

Existence of a duty is a question of law decided by the court upon examination of the facts.<sup>25</sup> If reasonable individuals would reach the same result after examining the facts, then factual issues can become legal issues under the court's discretion.<sup>26</sup> When the facts are unclear or disputed, a jury must

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15. *Id.* ¶ 3.

16. *Id.*

17. *Id.*

18. *Id.* ¶ 4.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Groleau v. Bjornson Oil Co.*, 2004 ND 55, ¶ 6, 676 N.W.2d 763.

23. *See Madler v. McKenzie Cnty.*, 467 N.W.2d 709, 711 (N.D. 1991) (citing *Larson v. Baer*, 418 N.W.2d 282 (N.D. 1988)) ("To establish actionable negligence, the plaintiff must first show the existence of a duty by the defendant to protect the plaintiff from injury.")

24. *Azure v. Belcourt Pub. Sch. Dist.*, 2004 ND 128, ¶ 10, 681 N.W.2d 816 (citing 57A AM. JUR. 2D *Negligence* § 89, Westlaw (database updated October 2024)).

25. *See Groleau*, 2004 ND 55, ¶ 6, 676 N.W.2d 763; *Madler*, 467 N.W.2d at 711.

26. *Groleau*, 2004 ND 55, ¶ 6, 676 N.W.2d 763.

settle factual issues.<sup>27</sup> The prevalence of factual disputes makes summary judgment rarely appropriate for negligence claims.<sup>28</sup>

#### A. PREMISES LIABILITY GENERALLY

Premises liability is rooted in Section 9-10-06 of the North Dakota Century Code, that declares property owners are liable for injuries resulting from their failure to exercise ordinary care in the management of their property.<sup>29</sup> North Dakota caselaw has established premises liability as a theory of negligence regarding the liability of landowners to those who legally enter their property.<sup>30</sup> Premises liability claims are distinct from claims of negligent actions and arise when tortfeasors maintain dangerous conditions on their property.<sup>31</sup>

The North Dakota Supreme Court set the duty standard almost fifty years ago when it required landowners to “maintain[] . . . property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk” for non-trespassing individuals.<sup>32</sup> Even though landowners can enjoy and make money from their land, dangerous actions and conditions must be handled with reasonable caution to protect those “whose presence on the property can reasonably be foreseen.”<sup>33</sup> Control is a prerequisite to duty under premises liability, so it must first be established that the landowner controlled the land where injury occurred.<sup>34</sup> Determining control to establish a

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27. *Id.*

28. *Iglehart v. Iglehart*, 2003 ND 154, ¶ 11, 670 N.W.2d 343.

29. Logan Carpenter, Comment, *Premises Liability Claims Alleging Dangerous Activities Against a Landowner Barred Under Most Circumstances*, 94 N.D. L. REV. 181, 185 (2019); N.D. CENT. CODE § 9-10-06 (1999) (“A person is responsible not only for the result of the person’s willful acts but also for an injury occasioned to another by the person’s want of ordinary care or skill in the management of the person’s property or self.”).

30. *See Schmidt v. Gateway Cmty. Fellowship*, 2010 ND 69, ¶ 8, 781 N.W.2d 200 (“Under North Dakota law for premises liability, general negligence principles govern a landowner’s duty of care to persons who are not trespassers on the premises.”).

31. *Morales v. Weatherford U.S., L.P.*, 2024 ND 155, ¶ 6, 10 N.W.3d 551 (quoting *Hutson v. Pate*, 216 N.E.3d 1085, 1093 (Ill. App. Ct. 2022)).

32. *O’Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977) (citing *Kitto v. Minot Park Dist.*, 224 N.W.2d 795, 804 (N.D. 1974)) (terminating the common law distinction between licensees and invitees).

33. *Id.* at 752 (quoting *Scurti v. City of New York*, 354 N.E.2d 794, 798 (N.Y. 1976)).

34. *Jacobs v. Anderson Bldg. Co.*, 459 N.W.2d 384, 386 (N.D. 1990) (“[C]ontrol over the dangerous area is a prerequisite to imposition of premises liability.”); *Stanley v. Turtle Mountain Gas & Oil, Inc.*, 1997 ND 169, ¶ 9, 567 N.W.2d 345 (citing *Bulman v. Hulstrand Constr. Co.*, 521 N.W.2d 632, 640-41 (N.D. 1994); *Holter v. City of Sheyenne*, 480 N.W.2d 736, 738-40 (N.D. 1992)) (“[B]efore a defendant owes a duty of care, it must be demonstrated the defendant had control of the premises and, therefore, an opportunity to observe any duty.”).

duty under premises liability is analyzed using several factors, as established by the North Dakota Supreme Court.<sup>35</sup>

Despite the duty to legal visitors, landowners are not required to guarantee complete safety or go to unreasonable lengths to protect others.<sup>36</sup> To this end, the open and obvious danger doctrine limits landowner liability to legal entrants if dangerous conditions on the land are known or obvious.<sup>37</sup> There are some exceptions to the doctrine even if dangers are open and obvious; landowners can be liable if they expect injury may occur regardless of the dangers' known or obvious nature.<sup>38</sup> However, if those entering the property are aware of the dangers within and enter regardless, a duty does not exist.<sup>39</sup> On the other hand, a higher duty exists if a hazard is likely to induce injury regardless of its obvious nature, such as when a landowner thinks its visitors could become distracted or if the hazard is so enticing as to make a reasonable visitor behave incautiously.<sup>40</sup>

## B. HISTORY OF EMPLOYER LIABILITY AND THE RETAINED CONTROL EXCEPTION

Another theory of negligence is employer liability. The Second Restatement of Torts Section 409 states, "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants."<sup>41</sup> North Dakota adopted this idea in 1950.<sup>42</sup> In *Newman v. Sears, Roebuck, & Co.*, a landlord hired a carpenter to install a bed in one of his apartments that later broke, injuring a tenant.<sup>43</sup> The tenant sued the landlord for negligence, alleging the bed was installed in an unsafe manner and the landlord knew of the bed's unsafe condition.<sup>44</sup> The court determined the carpenter was an independent contractor and ruled employers

35. Carpenter, *supra* note 29, at 185-87.

36. *O'Leary*, 251 N.W.2d at 752.

37. *Morales v. Weatherford U.S., L.P.*, 2024 ND 155, ¶ 13, 10 N.W.3d 551 (quoting *Groleau v. Bjornson Oil Co., Inc.*, 2004 ND 55, ¶ 17, 676 N.W.2d 763).

38. *Id.* ¶ 21; RESTATEMENT (SECOND) OF TORTS § 343A(1) (AM. L. INST. 1965).

39. *Morales*, 2024 ND 155, ¶ 21, 10 N.W.3d 551; RESTATEMENT (SECOND) OF TORTS § 343A(1) cmt. e (AM. L. INST. 1965).

40. *Morales*, 2024 ND 155, ¶ 22, 10 N.W.3d 551; RESTATEMENT (SECOND) OF TORTS § 343A(1) cmt. f (AM. L. INST. 1965).

41. RESTATEMENT (SECOND) OF TORTS § 409 (AM. L. INST. 1965).

42. *Newman v. Sears, Roebuck, & Co.*, 43 N.W.2d 411, 414 (1950) (citing 27 Am. Jur. § 504; 18 A.L.R. 801 (1922)) ("As a general rule an employer is not liable for the torts of an independent contractor. 'This rule of the nonliability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor.'").

43. *Id.* at 412-13.

44. *Id.* at 413.

are not liable for injuries resulting from independent contractors.<sup>45</sup> The court reasoned that because employers do not control the manner in which work is completed, they should not be responsible for injuries resulting therefrom.<sup>46</sup> Many cases since have followed this rule.<sup>47</sup>

Despite this general rule, it is possible for employers to be liable for the work of independent contractors as Section 409 contains several exceptions.<sup>48</sup> One of the most notable exceptions is found in the Second Restatement of Torts Section 414:

One who entrusts work to an independent contractor, but who *retains the control* of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.<sup>49</sup>

The North Dakota Supreme Court first mentioned the retained control exception in *Peterson v. Golden Valley*.<sup>50</sup> The court explained employers are not liable for the work of independent contractors in a vicarious manner; rather, employers are liable for their own inability to retain control with reasonable care.<sup>51</sup> Later, the North Dakota Supreme Court ruled in *Madler v. McKenzie County* that employees of independent contractors also fit under the exception.<sup>52</sup> Thus, employers retaining control of the work of independent contractors owe a duty to both those independent contractors and their employees.<sup>53</sup>

### C. “CONTROL” DEFINED

To properly analyze and apply the retained control exception, one must ask: what constitutes control? Comment C of Section 414 provides:

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45. *Id.* at 415-16 (making an independent contractor determination because the only direction from the landlord was to use the carpenter’s own best judgment, the landlord did not supervise, and the landlord gave no instruction as to manner or timeline of job completion).

46. *Id.* at 414-15.

47. *See* *Pechtl v. Conoco, Inc.*, 1997 ND 161, ¶ 9, 567 N.W.2d 813; *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 447 (N.D. 1994); *Schlenk v. Nw. Bell Tel. Co.*, 329 N.W.2d 605, 608 (N.D. 1983).

48. *See* RESTATEMENT (SECOND) OF TORTS § 409 (AM. L. INST. 1965) (emphasis added) (“*Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.*”).

49. *Id.* § 414 (emphasis added).

50. 308 N.W.2d 550, 554 (N.D. 1981).

51. *Id.* (“This is an appeal to a well-known exception to the non-liability rule: an employer is liable for an independent contractor’s acts on a job over which he has retained control.”).

52. 467 N.W.2d 709, 711 (N.D. 1991).

53. *See id.*

[T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.<sup>54</sup>

### 1. *Finished Product Concerns*

The bounds of *control* began to form in *Lumpkin v. Streifel* when the court held employers who do not supervise a project or an independent contractor's employees and solely concern themselves with the state of the "finished product" have not retained control and thus, have no duty.<sup>55</sup> The defendant had signed a building permit application, but the parties agreed he held no control over the independent contractor's completion of the construction.<sup>56</sup>

### 2. *Contractual Provisions or Actual Control*

The North Dakota Supreme Court examined retained control through both contractual provisions and actual exercises of control in *Peterson v. Golden Valley*.<sup>57</sup> In this case, an employee of an independent contractor passed away in a worksite trench, and the employee's family sued the employer under the retained control exception.<sup>58</sup> The family claimed the employer retained control through another engineering independent contractor.<sup>59</sup> In analyzing the retained control exception under Section 414, the court first examined if the contract between the employer and the deceased man's independent contractor allowed the employer and engineering contractor to exercise control.<sup>60</sup> The contract allowed the employer and engineering independent contractor to conduct inspections, change details within the work plan, and halt progress that did not align with the contract.<sup>61</sup> The court found these rights did not constitute retained control by the employer; they simply

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54. RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (AM. L. INST. 1965).

55. 308 N.W.2d 878, 883 (N.D. 1981).

56. *See id.* at 879.

57. 308 N.W.2d 550 (N.D. 1981).

58. *Id.* at 551-52.

59. *Id.* at 555.

60. *Id.*

61. *Id.*



allowed the employer to verify the finished product coordinated with the plans.<sup>62</sup> The court reasoned that these contractually retained rights could not amount to retained control because they “did not shift control over the method of construction” to the employer.<sup>63</sup> The court then examined if the employer retained actual control on the work site through the daily presence of the engineering independent contractor.<sup>64</sup> The decedent’s independent contractor maintained discretion over the timeline and pace of work, the methods used, and the equipment used, so the court found the employer did not retain control through either the contract or action.<sup>65</sup> Additional subsequent cases examined retained control through both avenues, but eventually in *Fleck v. ANG Coal Gasification Co.*, the court explicitly held that control can be retained either contractually or via actual control.<sup>66</sup>

### 3. *Ensuring Contract Compliance*

In subsequent cases, the court further established that inspecting and monitoring to ensure independent contractors are complying with contractual requirements does not equate to retained control.<sup>67</sup>

### 4. *Supplying Safety Equipment Unless Its Use is Directed*

In *Fleck v. ANG Coal Gasification Co.*, an employer hired an independent contractor to work on its water cooling towers.<sup>68</sup> The injured plaintiff was an employee of the independent contractor.<sup>69</sup> The employer offered masks, boots, and gloves for safety, and the plaintiff’s injury occurred after breathing in chemicals when he elected not to wear a mask.<sup>70</sup> The plaintiff sued the employer under the theory of retained control and argued that the employer provided safety equipment.<sup>71</sup> The court held that supplying equipment is an insufficient means for establishing control, reasoning that providing equipment *without requiring its use* constitutes a mere recommendation or

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 522 N.W.2d 445, 448 (N.D. 1994) (“We recognized in *Madler* that the duty created by Section 414 may arise in two ways: through express contractual provisions retaining the right to control the operative detail of some part of the work, or through the employer’s actual exercise of such retained control at the jobsite.”).

67. See *Zimprich v. Broekel*, 519 N.W.2d 588, 594 (N.D. 1994); *Schlenk v. Nw. Bell Tel. Co.*, 329 N.W.2d 605, 613 (N.D. 1983).

68. *Fleck*, 522 N.W.2d at 446-47.

69. *Id.* at 447.

70. *Id.*

71. *Id.* at 448.

suggestion.<sup>72</sup> This case also set the standard declaring *control* under Comment C of Section 414 to require “control [over] the method, manner, and operative detail of the work.”<sup>73</sup> *Kristianson v. Flying J Oil and Gas, Inc.* expanded this principle by finding that supplying equipment only establishes control when the employer provides *direct* instructions on its use.<sup>74</sup> *Kristianson* also established that approving “safety expen[ses] d[oes] not constitute retained control over the manner, method, or operative detail of the work.”<sup>75</sup>

### 5. *Hiring Independent Contractors Solely to Promote Safety*

In *Pechtl v. Conoco, Inc.*, an employer hired an independent contractor whose employee was injured at an oil well site.<sup>76</sup> The injured employee sued the employer for breaching an alleged duty to keep the oil well safe.<sup>77</sup> The North Dakota Supreme Court rejected arguments that the employer retained control by hiring the independent contractor to promote safety, supplying equipment without instructing its use, or inspecting work to verify contract compliance.<sup>78</sup> Thus, the court found no retained control and did not examine whether the employer owed a duty to provide a safe worksite, reasoning that such analysis was dependent on a finding of retained control.<sup>79</sup> The court ruled that hiring an independent contractor solely for the purpose of promoting safety is insufficient to create a duty.<sup>80</sup>

## III. ANALYSIS

In *Schmidt*, the court answered whether property owners have a duty to protect independent contractors and their employees from injuries caused by workplace hazards under a premises liability theory.<sup>81</sup> The North Dakota Supreme Court unanimously reversed the district court’s summary judgment for Hess, finding a genuine issue of material fact regarding the duty Hess owed Schmidt.<sup>82</sup> The court held employers may owe a duty to independent contractors and their employees under premises liability when the employer retains control over the work completed.<sup>83</sup>

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72. *See id.*

73. *Id.*

74. *See* *Kristianson v. Flying J Oil & Gas, Inc.*, 553 N.W.2d 186, 190 (N.D. 1996).

75. *Id.* at 189.

76. *Pechtl v. Conoco, Inc.*, 1997 ND 161, ¶¶ 2-4, 567 N.W.2d 813.

77. *Id.* ¶ 4.

78. *Id.* ¶¶ 17-19.

79. *See id.* ¶¶ 20-21.

80. *See id.* ¶¶ 17-19.

81. *Schmidt v. Hess Corp.*, 2024 ND 72, ¶¶ 13-18, 5 N.W.3d 787.

82. *Id.* ¶¶ 1, 18.

83. *Id.* ¶ 18.

### A. SCHMIDT'S ARGUMENT

Schmidt's premises liability claim centered on the argument that Hess had a duty to keep its work site in reasonably safe condition, and Hess's breach of this duty caused Schmidt's injury.<sup>84</sup> Schmidt alleged the district court was incorrect in determining that Hess did not owe him a duty.<sup>85</sup> Schmidt said his injuries were caused by falling over breathing equipment that Hess mandated employees use while working on its oil site.<sup>86</sup> Schmidt argued that, despite his independent contractor status, Hess's breathing equipment requirement constituted retained control over the manner of his work.<sup>87</sup> Schmidt further argued that because Hess retained control, Hess created a duty to practice reasonable care in controlling the worksite.<sup>88</sup> As a result, Schmidt believed he successfully showed the question of Hess's retained control to be a genuine issue of material fact, which made summary judgment improper.<sup>89</sup>

### B. HESS'S ARGUMENT

Hess's primary defense was based on the premise that Schmidt was an independent contractor.<sup>90</sup> Consequentially, Hess argued this status meant it owed no duty to Schmidt, so summary judgment was proper.<sup>91</sup> Hess's second argument was that North Dakota law does not support premises liability claims between independent contractors and employers because there is no duty to provide a hazard-free workplace for independent contractors.<sup>92</sup> Hess cited an array of prior North Dakota Supreme Court cases to support this proposition.<sup>93</sup>

### C. DECISION AND RATIONALE

#### 1. *How the District Court Erred in Assessing Retained Control*

To support its retained control analysis, the court used *Fleck v. ANG Coal Gasification Co.* to explain how supplying equipment is insufficient on

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84. *Id.* ¶ 2.

85. *Id.* ¶ 7.

86. *Id.* ¶ 2.

87. *Id.* ¶ 3.

88. *Id.* ¶ 7.

89. *Id.* ¶¶ 3, 7.

90. *Id.* ¶ 3.

91. *Id.*

92. *Id.* ¶ 13.

93. *Id.*

its own to establish retained control.<sup>94</sup> The court then referenced *Kristianson v. Flying J Oil & Gas* to expand, stating a duty is only created by employers supplying equipment if they “also directly supervise[] or control[] its use, or instruct[] the independent contractor’s employee on use of the equipment.”<sup>95</sup> Next, the court examined the evidence Schmidt offered to prove Hess’s control.<sup>96</sup> Evidence included a handbook Hess distributed to employees, statements from the deposition of Hess’s safety coordinator around the time of injury, and emails exchanged among Tesoro and Hess employees.<sup>97</sup>

The Hess handbook required the use of breathing equipment when air quality made it necessary and “when otherwise required by Hess.”<sup>98</sup> The safety coordinator’s deposition revealed Hess followed a procedure that required breathing equipment.<sup>99</sup> When shown a picture depicting the oil site, the coordinator testified Hess would not allow employees to enter certain areas of the worksite without using breathing equipment.<sup>100</sup> Emails revealed a Tesoro supervisor informed a Hess representative he feared the breathing equipment may pose a danger, employees reported tripping on equipment, and employees requested to “go back to tying the hose off.”<sup>101</sup> The representative replied that Hess supplied the equipment and mandated it be used as intended by the company who had designed and installed it.<sup>102</sup> He directed, “[i]f the hose is snagging and pulling drivers backwards they may consider pulling out excess hose prior to going up the stairs, and if the drivers hang the hose over the stairs when coming down it will not be in front of them to create a tripping hazard.”<sup>103</sup>

Upon examining the evidence, the court found Hess’s potential control of the method, manner, and operative detail of Schmidt’s work to be an issue of fact.<sup>104</sup> The court essentially distinguished the case from *Fleck* and *Kristianson* as Hess not only provided the breathing equipment but also instructed employees on its use.<sup>105</sup> It reasoned that the evidence showed Hess required the use of the equipment to reach some areas of the work site, prevented employees from using equipment as they desired, and required the use of

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94. *Id.* ¶ 10.

95. *Id.* ¶ 10 (citing *Kristianson v. Flying J Oil & Gas*, 553 N.W.2d 186, 190 (N.D. 1996)).

96. *Id.* ¶ 11.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* ¶ 12.

105. *See id.* ¶¶ 11-12.

breathing equipment as instructed by the manufacturer.<sup>106</sup> The court further reasoned Hess's control could be viewed differently by reasonable individuals and emphasized any control retained by Hess was accompanied by a duty of reasonable care.<sup>107</sup>

## 2. *Convergence of Premises Liability and the Retained Control Exception*

The court next addressed Schmidt's premises liability claim.<sup>108</sup> The court disagreed with Hess's argument that a premises liability claim against an employer is impossible under precedent.<sup>109</sup> Justice Crothers disagreed with Hess's argument that the court had established employers owe no duty of care to independent contractors for dangerous worksites; the court reasoned that every case Hess cited was distinguishable because the court found no duty existed *only after* finding those employers *did not retain control*.<sup>110</sup>

The court noted *Schmidt* was a case of first impression because it had never provided an explicit rule regarding an employer's duty to an independent contractor under premises liability.<sup>111</sup> The court illustrated *Pechtl v. Conoco, Inc.* as the most similar North Dakota Supreme Court case.<sup>112</sup> *Pechtl* and *Schmidt* are comparable as both contain arguments by injured employees of independent contractors that landowning employers breached duties to offer safe work sites.<sup>113</sup> However, the two are distinguishable because, as the court pointed out in *Schmidt*, the plaintiff's argument in *Pechtl* was rejected due to the court's initial finding of no retained control.<sup>114</sup> The court disagreed with Hess's argument because it had "not declared a property owner may *never* owe a duty to an independent contractor to maintain a safe worksite."<sup>115</sup>

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106. *Id.* ¶ 12.

107. *Id.*

108. *Id.* ¶ 13.

109. *Id.*

110. *Id.*

111. *Id.* ¶ 14.

112. *Id.* ¶ 16.

113. *See id.* ¶¶ 2, 16; *Pechtl v. Conoco, Inc.*, 1997 ND 161, ¶ 4, 567 N.W.2d 813.

114. *Schmidt*, 2024 ND 72, ¶ 16, 5 N.W.3d 787.

115. *Id.* ¶ 14 (emphasis added).

Before ruling, the court supplied case law from Minnesota, California, and Texas that imposed duties on employers to maintain safe worksites for independent contractors.<sup>116</sup> The opinion did not create an absolute rule absolving landowners from any duty to provide safe worksites on their properties.<sup>117</sup> Rather, the court held property owners who retain control over the work of independent contractors and their employees can be liable when hazards on their property induce injury.<sup>118</sup> Thus, the North Dakota Supreme Court introduced premises liability into the realm of employer liability through the retained control exception of Section 414 of the Second Restatement of Torts.<sup>119</sup> The court clarified its holding was not intended to substitute North Dakota's general premises liability rules, which includes the control requirement and the open and obvious danger doctrine.<sup>120</sup> To conclude, the court reversed the district court's judgment in favor of Hess.<sup>121</sup>

#### IV. IMPACT ON NORTH DAKOTA LAW

When *Schmidt* imposed liability on employers for unsafe worksites upon retained control, North Dakota joined numerous other jurisdictions that impose premises liability on employers. Minnesota, California, Texas, Washington, and Alaska also impose duties to provide safe worksites for independent contractors if control is retained.<sup>122</sup> Thus, North Dakota is not alone in imposing liability for worksite injuries sustained under retained control.

*Schmidt* significantly affects the work of North Dakota attorneys by increasing the scope of employer liability. This expansion influences how practitioners must advise clients, inquire into clients' conduct on worksites, draft

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116. *See id.* ¶¶ 17-18 (quoting *Conover v. N. States Power Co.*, 313 N.W.2d 397, 401 (Minn. 1981)) (“A leading case in Minnesota explained an employer’s ‘personal negligence, in an appropriate case, may consist of breach of a duty to exercise reasonably careful supervision of a jobsite where employees of the independent contractor are working when the employer retains control or some measure of control over the project.’”); *id.* (quoting *Gonzalez v. Mathis*, 493 P.3d 212, 216 (Cal. 2021)) (“The Supreme Court of California has explained: ‘unless a landowner retains control over any part of the contractor’s work and negligently exercises that retained control in a manner that affirmatively contributes to the injury, it will not be liable to an independent contractor or its workers for an injury resulting from a known hazard on the premises.’”); *id.* (quoting *Rosa v. Mestena Operating, LLC*, 461 S.W.3d 181, 184 (Tex. Ct. App. 2014)) (“Texas appears to have codified a version of this principle. . . . (noting under Texas law a property owner is not liable to contractors for injuries unless he exercised control over the work and had actual knowledge of the danger resulting in the injury)”).

117. *Id.* ¶ 18.

118. *Id.*

119. *See id.*

120. *Id.*

121. *Id.*

122. *See Schmidt v. Hess Corp.*, 2024 ND 72, ¶ 17, 5 N.W.3d 787, 795 (citing *Conover v. N. States Power Co.*, 313 N.W.2d 397, 401 (Minn. 1981); *Gonzalez v. Mathis*, 493 P.3d 212, 216 (Cal. 2021); *Rosa v. Mestena Operating, LLC*, 461 S.W.3d 181, 184 (Tex. App. 2014)); *see also Afoa v. Port of Seattle*, 421 P.3d 903, 909 (Wash. 2018); *Martinson v. Arco Alaska, Inc.*, 989 P.2d 733, 735-36 (Alaska 1999).

contracts between independent contractors and employers, and navigate legal claims arising from retained control.

A. *SCHMIDT* WIDENED THE SCOPE OF EMPLOYER LIABILITY AND LEFT UNANSWERED QUESTIONS

Prior to *Schmidt*, whether employers were required to maintain safe worksites was unclear as every prior case resulted in a finding of no retained control.<sup>123</sup> *Schmidt*'s finding of potential retained control laid a foundation for the court to articulate this duty and scope of liability for property-owning employers in North Dakota.<sup>124</sup> If property owners control the manner, method, and operative detail of an independent contractor's work through contractual provisions or actual control, so that the contractor cannot freely work in his own way, then those property owners can now also be held liable for hazards on the worksite.<sup>125</sup> For instance, property owners providing safety equipment and directing independent contractors on its use, as Hess did with its breathing equipment, could potentially be held liable for injuries resulting from worksite hazards.<sup>126</sup> As a result, employers controlling projects on their property not only have a duty to exercise that retained control with reasonable care but also have a duty to furnish a worksite reasonably safe from hazards.<sup>127</sup>

This decision does not offer any new parameters affecting retained control assessment, but it increases the potential claims resulting therefrom to include premises liability.<sup>128</sup> *Schmidt* illustrates the North Dakota Supreme Court's view of the heightened responsibility accompanying employer control retention and the importance of injury protection for independent contractors and their employees. The court declined to eliminate property owner liability to independent contractors "under all circumstances."<sup>129</sup> Such a denial implies the message: the court will not always hold property owners liable for injuries, but if the owner retains control, they must be sure to do so with reasonable care. As such, *Schmidt* has the potential to discourage employers from retaining control over their independent contractors.

The court's opinion states, "[a] *property owner* may be held liable to an independent contractor and its employees for injuries resulting from hazards

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123. *Schmidt*, 2024 ND 72, ¶¶ 13-14, 5 N.W.3d 787.

124. *See id.* ¶ 18.

125. *See id.*

126. *See id.* ¶¶ 11-12, 18.

127. *See id.*

128. *See generally id.*

129. *Id.* ¶ 18.

at a workplace when the property owner retains control over the work.”<sup>130</sup> *Schmidt* examined a property-owning oil company, but the decision did not explain if there is a distinction between property-owning companies with large, profitable operations and small-scale residential property-owners.<sup>131</sup> If this duty can be attributed to all property owners, then *Schmidt* imposes potential liability on every property-owning North Dakotan—even individuals hiring independent contractors to make simple repairs to their homes—if control is retained.

The court’s language raises a vital question for employers: with control of the property as a prerequisite to premises liability claims, can property owners evade premises liability despite retention of control over the work being completed?<sup>132</sup> *Schmidt*’s finding of potential retained control was based in part on Hess’s handbook requiring use of breathing equipment and the emails from a Hess representative specifically directing its use.<sup>133</sup> North Dakota law has established control can be contractually retained.<sup>134</sup> These instances of retained control could arguably be exercised remotely without any exercise of control over the worksite itself. The court’s decision clarifies that its holding “does not displace [its] general premises liability jurisprudence, including rules concerning control of the premises.”<sup>135</sup> Thus, would remote retained control allow employers to control operations without exposing themselves to premises liability? The answer is likely “no.” Under general premises liability law, a duty arises only when there is control over the property.<sup>136</sup> Therefore, a duty under premises liability would likely not apply to property-owning employers retaining control remotely unless they somehow contemporaneously controlled the property.

Another unanswered question post-*Schmidt* involves a property-owning employer’s liability when employing multiple independent contractors within the same worksite. If control is retained over the work of one independent contractor and its employees, creating a duty to provide a reasonably safe worksite, is that duty also imputed to other independent contractors on site, even if non-controlled? If faced with this dilemma, practitioners could propose limiting premises liability only to those independent contractors whose work is *controlled*. The distinction between controlled and non-controlled independent contractors could be analyzed by comparing the rights

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130. *Id.* (emphasis added).

131. *Id.*

132. O’Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977).

133. *Schmidt*, 2024 ND 72, ¶ 12, 5 N.W.3d 787.

134. Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 448 (N.D. 1994).

135. *Schmidt*, 2024 ND 72, ¶ 18, 5 N.W.3d 787.

136. Jacobs v. Anderson Bldg. Co., 459 N.W.2d 384, 386 (N.D. 1990); Stanley v. Turtle Mountain Gas & Oil, Inc., 1997 ND 169, ¶ 9, 567 N.W.2d 345.



retained by the employer within the employment contracts or actual control exercised over each independent contractor on the work site.<sup>137</sup> For example, an employer could provide safety equipment to both independent contractors he or she hired. If the employer specifically directs the use of equipment to one independent contractor, then he or she may be found to have retained control and may be liable under premises liability for injuries caused by work site hazards. However, the employer should not also be held liable to the other whom he or she merely provided equipment, and thus, did not retain control over the manner, method, and operative detail of their work.

## B. *SCHMIDT'S* IMPLICATIONS FOR PRACTITIONERS

*Schmidt* declared property owners may owe a duty to independent contractors to provide work sites reasonably safe from hazards.<sup>138</sup> Property-owning employers may feel the effects of this decision, particularly those engaged in the agricultural and oil industries. In 2023, almost one fourth of employed North Dakotans were farmers or ranchers.<sup>139</sup> In 2022, 86% of North Dakota farms were both owned and operated by families or individuals.<sup>140</sup> The North Dakota Petroleum Foundation reports that in 2021, the oil and gas industry in North Dakota directly employed over fourteen thousand individuals.<sup>141</sup> As of October 2023, Hess Corporation owned over 400,000 acres in the Bakken region.<sup>142</sup> As a result of *Schmidt*, farmers or oil companies retaining control over independent contractors working on their property have a duty to offer protection from hazards on these properties.<sup>143</sup> *Schmidt's* retained control

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137. See generally *Fleck*, 522 N.W.2d at 448 (“[T]he duty created by Section 414 may arise in two ways: through express contractual provisions retaining the right to control the operative detail of some part of the work, or through the employer’s actual exercise of such retained control at the jobsite.”).

138. *Schmidt*, 2024 ND 72, ¶ 18, 5 N.W.3d 787.

139. N.D. DEP’T AGRIC., NORTH DAKOTA AGRICULTURE 2 (2023), <https://www.ndda.nd.gov/sites/www/files/documents/files/2023%20ND%20Ag%20brochure.pdf> [<https://perma.cc/3KHZ-KAQL>].

140. *Top North Dakota Agriculture Facts From the 2024 Census of Agriculture*, FARM FLAVOR (May 9, 2024), <https://farmflavor.com/north-dakota/north-dakota-crops-livestock/top-north-dakota-agriculture-facts-from-the-2024-census-of-agriculture/> [<https://perma.cc/3M5U-XN2C>].

141. *Study: 2021 Economic & Job Contributions of the Oil and Gas Industry*, N.D. PETROLEUM FOUND. (Mar. 7, 2023), <https://ndpetroleumfoundation.org/2021-economic-contributions/> [<https://perma.cc/ZQ6J-DSL3>].

142. *Chevron Announces Agreement to Acquire Hess*, CHEVRON (Oct. 23, 2023), <https://www.chevron.com/newsroom/2023/q4/chevron-announces-agreement-to-acquire-hess> [<https://perma.cc/U6F4-LHB2>].

143. See *Schmidt*, 2024 ND 72, ¶ 18, 5 N.W.3d 787.

discussion cites five North Dakota Supreme Court cases concerning injuries that occurred on the properties of oil and gas companies.<sup>144</sup>

These industries are no strangers to injury. Data provided by the Bureau of Labor Statistics measuring North Dakota's fatal occupational injuries revealed a total of thirty-seven fatal injuries in 2022.<sup>145</sup> The top industry category for these fatalities was agriculture.<sup>146</sup> Only three fewer fatalities occurred that year in the category encompassing oil companies.<sup>147</sup> This data does not include the nonfatal injuries within those industries, which the Bureau of Labor Statistics does not account for.<sup>148</sup>

*Schmidt's* outcome will have important implications for attorneys practicing in North Dakota. *Schmidt* is instructive in understanding the breadth of potential liability for injured independent contractors and their employees. Prior to *Schmidt*, attorneys had to know the actions and contractual provisions that constituted control and the potential legal recourse for failing to retain control with reasonable care. After *Schmidt*, attorneys must now also be cognizant of the potential ramifications for employers failing to offer reasonably safe worksites while retaining control.

The plaintiffs' bar can now add premises liability to the arsenal of pursuable claims.<sup>149</sup> They can question clients on employer conduct to analyze evidence of actual control or review employment contracts for contractual retained control to determine if a basis exists for a negligence claim, which now includes premises liability.

Conversely, the defense bar can use *Schmidt* to advise clients on methods to prevent control retention and avoid potential liabilities, including premises liability. In doing so, they can advise clients on business practices that avoid retaining control. For example, practitioners can use *Schmidt's* facts as examples for clients of ways control may be retained through handbooks, depositions, and email responses.<sup>150</sup> Hess's emails, handbook, and deposition

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144. *Id.* ¶¶ 8-9 (citing *Pechtl v. Conoco, Inc.*, 1997 ND 161, ¶ 9, 567 N.W.2d 813; *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 448 (N.D. 1994); *Devore v. Am. Eagle Energy Corp.*, 2020 ND 23, ¶¶ 13-14, 937 N.W.2d 503; *Kristianson v. Flying J Oil & Gas, Inc.*, 553 N.W.2d 186, 189 (N.D. 1996); *Rogstad v. Dakota Gasification Co.*, 2001 ND 54, ¶ 16, 623 N.W.2d 382).

145. Midwest Info. Off., *Fatal Work Injuries in North Dakota—2022*, U.S. BUREAU LAB. STAT. (Feb. 29, 2024), [https://www.bls.gov/regions/midwest/news-release/fatalworkinjuries\\_northdakota.htm](https://www.bls.gov/regions/midwest/news-release/fatalworkinjuries_northdakota.htm) [<https://perma.cc/DVX7-ZZQ8>].

146. *Id.* (listing the highest industry category as “private agriculture, forestry, fishing, and hunting” with eleven fatalities).

147. *Id.* (listing the “private mining, quarrying, and oil and gas extraction industry” with eight fatalities).

148. *State Occupational Injuries, Illnesses, and Fatalities*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/iif/state-data.htm#ND> [<https://perma.cc/GH8D-RRVT>] (Nov. 15, 2024) (“State [n]onfatal occupational injuries and illnesses data by industry . . . are not available for North Dakota.”).

149. *Schmidt*, 2024 ND 72, ¶ 18, 5 N.W.3d 787.

150. *See id.* ¶¶ 11-12.

revealed that Hess potentially retained control over the method, manner, and operative detail of work by providing breathing equipment and instructing on its use.<sup>151</sup> Practitioners could instruct clients not to take charge of the method, manner, and operative detail of work by declining to specify use requirements when offering safety equipment or avoiding discussion of equipment use requirements in emails and employee handbooks. Practitioners could also carefully draft employment contracts to avoid provisions retaining control over the method, manner, and operative detail of work completed on the employer's property. Additionally, practitioners could use *Schmidt* as guidance to advise clients against ownership of the worksites they operate. Further, attorneys representing employers could use *Schmidt* for preventative risk assessment by inquiring into potential hazards on client worksites and emphasizing the necessity of limiting property hazards to avoid premises liability claims.

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151. *Id.*

## V. CONCLUSION

In *Schmidt*, the North Dakota Supreme Court clarified the liability of property-owning employers to independent contractors under a premises liability theory.<sup>152</sup> Now property owners may have a duty to independent contractors and their employees under a premises liability theory when those property owners retain control under Section 414 of the Second Restatement of Torts.<sup>153</sup>

Employers who retain control are now bound not only by a duty to retain control with reasonable care but also by a duty to provide reasonably safe worksites.<sup>154</sup> This decision will influence how counsel must advise clients by inquiring into worksite conduct, analyzing employment contracts, and assessing potential premises liability claims. *Schmidt* is relevant for North Dakota practitioners due to the state's prominent oil and agriculture industries.<sup>155</sup> With this newly widened scope of liability for property owners, some questions remain regarding the effect of remotely controlled work and the extent of the duty within worksites employing multiple independent contractors. In *Schmidt*, employment liability and premises liability converged which may provide relief to independent contractors and even greater responsibility on property-owning employers.

*Katie Snyder\**

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152. See generally *id.*

153. *Id.* ¶¶ 13-18; RESTATEMENT (SECOND) OF TORTS § 414 (AM. L. INST. 1965).

154. See *Schmidt*, 2024 ND 72, ¶ 18, 5 N.W.3d 787.

155. See N.D. DEP'T AGRIC., *supra* note 139; *Top North Dakota Agriculture Facts From the 2024 Census of Agriculture*, *supra* note 140; *Study: 2021 Economic & Job Contributions of the Oil and Gas Industry*, *supra* note 141; *Chevron Announces Agreement to Acquire Hess*, *supra* note 142.

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