# NEGLIGENCE – STANDARDS OF CARE: PREMISES LIABILITY CLAIMS ALLEGING DANGEROUS ACTIVITIES AGAINST A LANDOWNER BARRED UNDER MOST CIRCUMSTANCES

*Bjerk v. Anderson*, 2018 ND 124, 911 N.W.2d 343


## ABSTRACT

In *Bjerk v. Anderson*, the North Dakota Supreme Court *held* under premises liability theory a landowner owed no duty of care related to a dangerous drug activity on his property. The case revolved around a man's death resulting from the consumption of illegal drugs in the basement of the defendant's residential property. The landowner did not engage in the drug activity and was not present when the activity took place. The defendant did not even live at the property. Further, the landowner was not aware of the illegal drug activity. The court concluded premises liability law should not extend to hold landowners liable who are not present and do not engage in dangerous activities unless there is a high degree of foreseeability. Additionally, the court held prior instances of drug usage by a property's occupant alone are not enough to support the requisite level of foreseeability. Referencing the public policy interest of reducing drug addiction and the necessity of living arrangements for those in recovery, the court refused to expand tort liability to landowners for self-inflicted injuries of others without a high degree of foreseeability. The court effectively assured landowners they will not be held liable under premises liability or negligent entrustment claims for actions of a recovering drug addict without this high degree of foreseeability. Further, the court refused to recognize a cause of action for negligent entrustment of real property. This case creates a bright-line test for claims arising out of premises liability for dangerous activities. If the landowner was present and engaging in the activity, the landowner is liable if he or she possesses a reasonable degree of foreseeability. On the other hand, if the landowner is not present or engaged in the activity, the foreseeability standard is high and difficult to meet unless the plaintiff can prove the landowner was willfully blind to the activity. Landowners are therefore likely immune from liability related to dangerous activities on their property if they are not present, do not engage in or facilitate the activity, and are not willfully blind to the activity.

## I. FACTS

Kenton Anderson, the defendant and appellee, owned a residential property in Grand Forks.[1] Anderson allowed Julie Thorsen, her son Nick Thorsen,

1. Bjerk v. Anderson, 2018 ND 124, ¶ 2, 911 N.W.2d 343.

her daughter Megan Thorsen, and the father of Megan's unborn child to occupy the residence.[2] No lease existed between Anderson and Thorsen, and no one paid rent on the property.[3] Nick Thorsen had a criminal history, a fact Anderson was aware of.[4] Anderson previously lived in the residence – he and Julie Thorsen had previously been in a relationship.[5] In 2009, Anderson moved out of the home and permanently relocated to an apartment.[6]

In the early hours of June 11, 2012, Christian Bjerk drove himself, Wesley Sweeney, and a minor referred to as C.J. to a location in Grand Forks.[7] At this location, Sweeney and C.J. purchased acid and ketamine.[8] After the purchase, the three individuals took the illegal drugs to Anderson's property.[9] Here, they met up with Nick Thorsen, Shelby Braaten, and other individuals and went to the basement.[10] Braaten and Nick Thorsen provided money to purchase the acid, but they were unaware Sweeney and C.J. had purchased the ketamine.[11] They also did not know Christian Bjerk and C.J. would come to the house.[12] Although Bjerk, Sweeney, and C.J. did not consume the acid, they did consume the ketamine.[13]

During the illegal drug activity occurring in the basement, Julie Thorsen was sleeping in the upper level of the house.[14] Anderson was not present at the property during the time of the drug consumption as he no longer lived there.[15] He was also unaware of the illegal drug activity.[16] The district court found although Anderson knew of Nick Thorsen's criminal history, he did not know Thorsen was involved in drug trafficking or acid or ketamine use.[17] Further, Anderson did not know the individuals were gathering at his property.[18]

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2. *Id.*
3. *Id.*
4. *Id.* at ¶ 6.
5. Brief of Appellee Kenton G. Anderson at ¶ 1, Bjerk v. Anderson, 2018 ND 124, 911 N.W.2d 343 (No. 20170160), 2017 WL 4236699.
6. *Id.* at ¶ 3.
7. *Bjerk*, 2018 ND 124, ¶ 2, 911 N.W.2d 343.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Bjerk*, 2018 ND 124, ¶ 2, 911 N.W.2d 343.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at ¶ 6.
18. *Id.* at ¶ 2.

Shortly after Christian Bjerk, Sweeney, and C.J. consumed the ketamine, Nick Thorsen asked the three individuals to leave the property because they became loud, obnoxious, and started acting strangely – he also did not want them to wake his mother.[19] The individuals then left the property.[20] While leaving, Christian Bjerk collapsed and died on the sidewalk.[21] After learning about Christian's death and the illegal drug activity, Anderson ordered Nick to leave the residence.[22]

The parents of Christian Bjerk, Keith and Debra Bjerk, filed a wrongful death action against Anderson alleging negligence claims based on premises liability for dangerous activities and negligent entrustment.[23] Anderson moved for summary judgment, arguing he had no control over the residence because he no longer lived there.[24] Anderson asserted no special relationship existed between Christian Bjerk and himself, and Christian was not his guest in the home.[25]

After additional time for discovery, the district court granted summary judgment for Anderson, dismissing the Bjerks' claims.[26] The court found the Bjerks had not provided enough admissible evidence to establish Anderson breached any duty of care owed to Christian Bjerk.[27] Further, the court found Anderson did not owe a duty to or breach any duty of care owed to Christian Bjerk.[28] The Bjerks subsequently appealed the district court's ruling to the North Dakota Supreme Court.

## II. LEGAL BACKGROUND

Under North Dakota law, a person is liable in negligence when a duty exists to protect the plaintiff from injury, the person fails to exercise the duty, and the plaintiff is proximately injured due to the person's breach of the

19. *Bjerk*, 2018 ND 124, ¶ 2, 911 N.W.2d 343.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at ¶¶ 3, 8.
24. *Id.* at ¶ 4.
25. *Bjerk*, 2018 ND 124, ¶ 4, 911 N.W.2d 343.
26. *Id.*
27. *Id.* at ¶ 5.
28. *Id.*

duty.[29] Whether the defendant is bound by a duty to the plaintiff is a preliminary question of law decided by the court.[30] To answer this question, the court must determine the degree of foreseeability of the harm.[31]

### A. IMPOSING A DUTY OF CARE UPON LANDOWNERS

North Dakota Century Code section 9-10-01 requires every person within North Dakota to abstain from injuring a person, his or her property, or infringing upon his or her rights.[32] Premises liability law is established under North Dakota Century Code section 9-10-06, which states a person is liable for injury to another not only through that person's own actions, but also through the "ordinary care or skill in the management of the person's property or self."[33] As a gloss on this rule, the North Dakota Supreme Court has held "[u]nder 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."[34]

The North Dakota Supreme Court has previously interpreted the meaning of sections 9-10-01 and 9-10-06.[35] The court has held "landowners owe a general duty to lawful entrants to maintain their property in a reasonably safe condition[36] 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."[37] The court has further concluded when a landowner permits dangerous conditions to exist on his or her property, the landowner must use reasonable measures to prevent injury to foreseeable entrants.[38] The North

29. Saltsman v. Sharp, 2011 ND 172, ¶ 7, 803 N.W.2d 553 (quoting Botner v. Bismarck Parks & Recreation Dist., 2010 ND 95, ¶ 10, 782 N.W.2d 662).

30. Botner v. Bismarck Parks & Recreation Dist., 2010 ND 95, ¶ 10, 782 N.W.2d 662 (quoting Azure v. Belcourt Pub. Sch. Dist., 2004 ND 128, ¶ 9, 681 N.W.2d 816).

31. *See* Hurt v. Freeland, 1999 ND 12, ¶ 13, 589 N.W.2d 551.

32. N.D. CENT. CODE § 9-10-01 (2017).

33. N.D. CENT. CODE § 9-10-06 (2017).

34. Schmidt v. Gateway Cmty. Fellowship, 2010 ND 69, ¶ 8, 781 N.W.2d 200.

35. *Cf.* Groleau v. Bjornson Oil Co., Inc., 2004 ND 55, ¶ 16, 676 N.W.2d 763 (discussing premises liability based on general principles of negligence).

36. *See Schmidt*, 2010 ND 69, ¶¶ 8–9, 781 N.W.2d 200 (finding "reasonably safe condition" means the same thing as the duty to exercise reasonable care to maintain the property).

37. *Groleau*, 2004 ND 55, ¶ 16, 676 N.W.2d 763 (citing Green v. Mid Dakota Clinic, 2004 ND 12, ¶ 8, 673 N.W.2d 257; Doan v. City of Bismarck, 2001 ND 152, ¶ 13, 632 N.W.2d 815; Sternberger v. City of Williston, 556 N.W.2d 288, 290 (N.D. 1996); RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965)).

38. *Id.*

Dakota Supreme Court has upheld a duty of care for dangerous conditions in multiple circumstances.[39]

### B. FACTORS FOR DETERMINING IF A DUTY IS IMPOSED BY LAW

In *Hurt v. Freeland*,[40] the North Dakota Supreme Court referenced seven factors to determine whether a duty is imposed upon someone in control of a property by law.[41] The seven factors are:

> (1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for the risk involved.[42]

In *Castaneda v. Olsher*,[43] the Supreme Court of California addressed the issue of foreseeability for a claim alleging dangerous conditions.[44] In that case, the defendants owned a mobile home park in which the plaintiff was shot due to a gang confrontation.[45] The confrontation involved a resident who lived across the street from the plaintiff.[46]

The plaintiff sued the defendants, alleging premises liability for dangerous conditions.[47] Prior to the shooting, the plaintiff's grandmother complained to the property manager about people who looked like gang members hanging around the park and breaking lightbulbs from outdoor lights.[48] The manager was aware of these people living in the park, but was told to rent to them by the park owner nonetheless.[49] The plaintiff argued the landowner

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39. *See* Bjerk v. Anderson, 2018 ND 124, ¶ 13, 911 N.W.2d 343 (citing multiple cases where a duty of care for dangerous conditions had been upheld, including instances involving a hotel shower, a hole in a parking lot, and a gas pump island).

40. 1999 ND 12, 589 N.W.2d 551.

41. *Hurt*, 1999 ND 12, ¶ 13, 589 N.W.2d 551.

42. *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 n.24 (5th ed. 1984)).

43. 162 P.3d 610 (Cal. 2007).

44. *Castaneda*, 162 P.3d at 615–26.

45. *Id.* at 613.

46. *Id.*

47. *See id.* at 624.

48. *Id.* at 614.

49. *Id.*

had a duty either to not rent to the gang members, remove them once complaints came in, or take additional security measures.[50]

The court applied the same seven factors as the North Dakota Supreme Court referenced in *Hurt*.[51] The California court noted, "The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord."[52] The court held under certain circumstances a high level of foreseeable danger requires a landowner to take measures to remove the people causing dangerous activities.[53] If not, the landowner risks bearing some of the responsibility for the harm the activities cause.[54] Evidence of previous shooting incidents and other dangerous activities existed; however, the court did not find there was a pattern of incidents that would lead the landlord to see the shooting as highly foreseeable.[55] As a result, the court did not find a high level of foreseeable danger and refused to recognize a duty for the landlord to take measures to prevent harm.[56]

### C. PREMISES LIABILITY LAW FOR DANGEROUS ACTIVITIES: *GROLEAU* AND *FORSMAN*

American Jurisprudence defines premises liability as "a theory of negligence that establishes the duty owed to someone injured on a landowner's premises as a result of conditions or activities on the land."[57] The North Dakota Supreme Court has previously addressed the issue of premises liability for dangerous activities undertaken by a landowner. In *Groleau v. Bjornson Oil Co.*,[58] a gas station customer brought a claim after injuring herself on the property.[59] While the claim was ultimately based upon a dangerous *condition*, the court stated a landowner who conducts dangerous *activities* on his or her property "must take reasonable measures to prevent injury to those

50. *Castaneda*, 162 P.3d at 615.

51. *Id.*

52. *Id.* at 616 (quoting Vasquez v. Residential Invs., Inc., 12 Cal. Rptr. 3d 846, 858 (Cal. Ct. App. 2004)).

53. *Id.* at 613.

54. *Id.*

55. *Id.* at 621.

56. *Castaneda*, 162 P.3d at 613.

57. 62 AM. JUR. 2D *Premises Liability* § 1, Westlaw (database updated Aug. 2018) (noting some authorities indicate premises liability only applies to conditions, but not activities, and other authorities indicate premises liability extends to both conditions and activities).

58. 2004 ND 55, 676 N.W.2d 763.

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

whose presence on the property reasonably can be foreseen."[60] The court therefore indicated North Dakota courts could potentially accept dangerous activities as a basis for a premises liability claim in the future.[61]

The North Dakota Supreme Court did just that eight years later, upholding a premises liability claim related to dangerous activities occurring on real property. In *Forsman v. Blues, Brews, & Bar-B-Ques, Inc.*,[62] the plaintiff alleged the defendants, a bar and its owner, knowingly served alcoholic beverages to an obviously intoxicated person.[63] The intoxicated person then allegedly assaulted the plaintiff and caused injuries to her leg.[64] The plaintiff brought an action under section 9-10-06 of the Century Code, asserting the defendant bar and owner had a duty to exercise ordinary care or skill in the management of the property.[65]

The district court granted judgment as a matter of law to the defendant.[66] It found the plaintiff failed to present evidence the defendant served alcohol to the person who was already obviously intoxicated.[67] The court stated the negligence claim for premises liability was a dram shop claim,[68] and even if the plaintiff alleged negligence under a dram shop claim no duty of care was established by testimony. [69]

The North Dakota Supreme Court reversed the district court, finding the defendant owed the plaintiff a duty of care.[70] The court found "[t]he owner of any property must use it with an ordinary degree of care so as not to damage others, exercising caution and reasonable care under the circumstances."[71] Importantly, the court explained ordinary care meant not participating in dangerous activities.[72] Because the record demonstrated the bar and

60. *Id.* at ¶ 16 (citing Doan v. City of Bismarck, 2001 ND 152, ¶ 13, 632 N.W.2d 815; RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965)).

61. *See id.*

62. 2012 ND 184, 820 N.W.2d 748.

63. *Forsman*, 2012 ND 184, ¶ 1, 820 N.W.2d 748.

64. *Id.* at ¶ 2.

65. *Id.*

66. *Id.* at ¶ 6.

67. *Id.*

68. Dram-shop liability is defined as "[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer." *Dram-Shop Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

69. *Forsman*, 2012 ND 184, ¶ 6, 820 N.W.2d 748.

70. *Id.* at ¶ 13.

71. *Id.* (quoting Saltsman v. Sharp, 2011 ND 172, ¶ 11, 803 N.W.2d 554).

72. *See id.*

its owner had potentially permitted dangerous activity to occur on the property, the court reversed and allowed the plaintiff to proceed on her premises liability claim on remand.[73]

## III. THE COURT'S ANALYSIS

In *Bjerk*, the North Dakota Supreme Court affirmed the district court's dismissal of the Bjerks' premises liability case.[74] Justice Tufte wrote the opinion for the majority.[75] The court concluded Anderson did not owe any duty of care to Christian Bjerk under a premises liability theory.[76] Further, the court rejected the plaintiff's negligent entrustment claim because the property at issue was real property, not a chattel.[77]

Chief Justice VandeWalle concurred in part and dissented in part.[78] In his separate opinion, Chief Justice VandeWalle agreed the negligent entrustment claim was properly dismissed.[79] However, he dissented from the majority's affirmation of the dismissal of the premises liability claim.[80]

### A. THE MAJORITY OPINION

The court determined the balancing factors established in *Hurt* dictated under a premises liability claim a landowner owes no duty to the plaintiff when the landowner is not engaged in the activity that causes harm to the plaintiff as long as the harm is not highly foreseeable to the landowner.[81] Accordingly, the court held a landowner can be held liable under premises liability only when he or she engages in, facilitates, or is willfully blind to an ongoing dangerous activity.[82] Although the court previously recognized negligent entrustment claims for chattels, that claim had not been recognized to include real property.[83] The court stood by this principle and refused to expand negligent entrustment law to include claims arising from real property.[84]

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73. *Id.* at ¶ 14.
74. Bjerk v. Anderson, 2018 ND 124, ¶ 1, 911 N.W.2d 343.
75. *Id.* (The Honorable William A. Neumann, S.J., sitting in place of Jensen, J., disqualified).
76. *Id.*
77. *Id.*
78. *Id.* at ¶ 37 (VandeWalle, C.J., concurring and dissenting).
79. *Id.*
80. *Bjerk*, 2018 ND 124, ¶ 37, 911 N.W.2d 343 (VandeWalle, C.J., concurring and dissenting).
81. *Id.* at ¶ 19 (majority opinion).
82. *Id.* at ¶ 29 (the court also refers to the willfully blind standard as the requirement of a high degree of foreseeability).
83. *Id.* at ¶ 32; *see also* Gillespie v. Nat'l Farmers Union Prop. & Cas. Co., 2016 ND 193, ¶ 14, 885 N.W.2d 771 (citing RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965)) (defining negligent entrustment as requiring the supplying of a chattel).
84. *Bjerk*, 2018 ND 124, ¶ 32, 911 N.W.2d 343.

1. *The* Hurt *Factors Analysis*

The North Dakota Supreme Court found the district court properly weighed the factors established in *Hurt* to determine if a duty existed under premises liability.[85] First, the court noted the injury suffered by Christian Bjerk was not reasonably foreseeable to Anderson from the knowledge he had at the time.[86] Therefore, even the low foreseeability standard for landowners who are present and engaging in the dangerous activity was not met.[87]

In its analysis, the majority compared the facts to California's *Castaneda* case multiple times for the *Hurt* foreseeability factor.[88] The court noted the similarity in the plaintiffs' requests to remove the dangerous persons from the property.[89] The court stated creating a duty to stop the dangerous activity of drug users would impose a significant burden on landowners, regardless of a drug user's tenancy status.[90] The court stated before it would impose a duty on a landowner to protect people from using drugs on his or her property, it would require a higher degree of foreseeability based on specific knowledge of prior instances of drug use on the premises.[91] The court explained imposing a duty without these additional requirements would make a landowner categorically responsible for harm caused by others' criminal actions.[92]

The court did not discuss all of the *Hurt* factors when analyzing whether a duty was imposed in this case.[93] However, the court noted even though Christian Bjerk suffered an injury, the injury was self-inflicted.[94] For the third *Hurt* factor, the court found there was not a close connection between the defendant's conduct and the harm to Christian.[95] The court likely reached this conclusion because Anderson did not engage in the drug conduct leading up to Bjerk's death. The plaintiffs argued Anderson was liable due to his lack of conduct to prevent the harm, not his conduct creating the harm.[96] Finally, the court stated the benefit of preventing future harm by imposing a duty was low in comparison to the large burdens placed on those who manage or own

85. *Id.* at ¶ 19.
86. *Id.*
87. *Id.*
88. *Id.* at ¶ 20.
89. *Id.* at ¶ 21.
90. *Bjerk*, 2018 ND 124, ¶ 21, 911 N.W.2d 343.
91. *Id.* at ¶ 25.
92. *Id.*
93. *Id.*
94. *Id.* at ¶ 19.
95. *Id.*
96. *See Bjerk*, 2018 ND 124, ¶ 3, 911 N.W.2d 343.

property.[97] The court agreed with the district court and held the consideration of the *Hurt* factors weighed against imposing a duty upon Anderson.[98]

### 2. *Landowner's Duty to Not Engage in Dangerous Activity Under Premises Liability Law*

The plaintiffs argued Anderson had a duty to stop the dangerous activity taking place on his property – here, the consumption and possession of illegal drugs.[99] The plaintiff's complaint alleged the defendant:

> (1) failed to exercise reasonable care to keep the areas owned and controlled by him free from illegal and dangerous activity; (2) failed to exercise reasonable care to keep the areas owned and controlled by him free of drugs and illegal substances; and (3) failed to use reasonable care to warn entrants to protect an entrant from an unreasonable risk of harm caused by the activities taking place on the premises.[100]

In responding to this argument, the court pointed to several cases, including *Groleau*, where it held premises liability claims can arise when the landowner directly engages in the dangerous activity.[101] The court held the landowner must be present and engaging in the harmful activities to directly implicate section 9-10-06.[102] In reaching this conclusion, the court distinguished Anderson from the bar owner in *Forsman*.[103] In *Forsman*, the bar owner was present and served the already intoxicated person who ultimately caused the harm.[104] Here, Anderson was not even present on the property when Bjerk engaged in the drug activity.[105]

The court explained a landowner has the duty to maintain his property in a safe condition and has the duty to not engage in dangerous activities that could foreseeably harm others who enter the property.[106] The court stated no case law support existed for an extension of premises liability law in a circumstance like the case at bar.[107] The North Dakota Supreme Court refused to extend premises liability law to dangerous activities for landowners who

97. *Id.*
98. *Id.*
99. *Id.* at ¶ 14.
100. *Id.*
101. *Id.* at ¶ 15.
102. *See Bjerk*, 2018 ND 124, ¶ 16, 911 N.W.2d 343.
103. *Id.*
104. *Id.*
105. *Id.* at ¶ 2.
106. *Id.* at ¶ 17.
107. *Id.*

are not present and engaging in the activity, unless the landowner is willfully blind to the activity.[108]

In support of this decision, the court once again analyzed the *Hurt* foreseeability factor.[109] The court found Christian Bjerk's injury was not reasonably foreseeable to Anderson.[110] The court stated, "[t]he defendant was not himself conducting a dangerous activity—the activity on Anderson's property that harmed Christian Bjerk was Christian's own voluntary consumption of illegal drugs."[111] The court found no connection between the harm suffered by Christian and the conditions of the property.[112] It also found no close connection between Anderson's actions and Christian's consumption of illegal drugs and ultimately his death.[113]

3. *Landowner's Duty to Stop Dangerous Activity Under Premises Liability Law*

The plaintiffs alleged Anderson had a duty to stop criminal activity on his property by removing Nick Thorsen or warning others of the dangers posed by Thorsen's drug activity.[114] The *Hurt* foreseeability factor was once again implicated.[115] The court noted Anderson could have stopped the drug activity by calling the police or directly controlling Thorsen's behavior.[116] However, the court found Anderson would have needed prior knowledge of Thorsen's drug use on the property to foresee the harm suffered by Christian Bjerk.[117] The court also noted this would essentially make Anderson a mandatory reporter of all suspected dangerous activity, converting him into a pseudo police or probation officer for everyone entering his property.[118]

The court stated the plaintiffs believed an attenuated chain of foreseeability created a duty for Anderson.[119] The court found applying such a chain of foreseeability to Nick's drug usage would create a duty for anyone who used drugs on the property or associated with Nick.[120] Further, the court

108. *See Bjerk*, 2018 ND 124, ¶ 17, 911 N.W.2d 343.
109. *Id.* at ¶ 19.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Bjerk*, 2018 ND 124, ¶ 21, 911 N.W.2d 343.
115. *Id.* at ¶ 22.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at ¶ 23.
120. *Bjerk*, 2018 ND 124, ¶ 23, 911 N.W. 2d 343.

found any decision on the proper standard of care for a landowner, or a person who exercises control over property, was best reserved for the legislature.[121] The court stated one implication of imposing the plaintiff's proffered duty of care is that it would incentivize landowners to refuse people with a history of drug use from entering or occupying properties.[122] The court also stated imposing a duty in these circumstances would make the landowner responsible for the criminal actions of others – a significant drawback from a policy standpoint.[123]

#### 4. *Landowner's Duty to Warn of the Dangers of Illegal Dangerous Activities*

The plaintiffs alleged Anderson had a duty to warn people entering the property of the dangers of using illegal drugs.[124] However, the court declined to create such a duty.[125] The court explained the risks of illegal drug usage are obvious, and a landowner should not need to warn entrants of those dangers.[126]

#### 5. *Analysis of Public Policy Interests*

The majority opinion also analyzed the public interest of reducing drug addiction.[127] The court stated if premises liability law was extended to allow for situations in which an occupant was a known drug user, the only recourse the landowner would have would be to evict or remove the known drug user.[128] The court refused to extend a landowner's duty under premises liability law to encompass this without express direction from the legislature.[129]

### B. THE DISSENTING OPINION

In his separate opinion, Chief Justice VandeWalle concluded a defendant does not need to be present for the activity that is causing the harm to be held liable under a premises liability theory.[130] VandeWalle's dissent analyzed the language of section 9-10-06, namely focusing on language stating "[a] person

121. *Id.* at ¶ 24.
122. *Id.*
123. *Id.* at ¶ 25.
124. *Id.* at ¶ 26.
125. *Id.*
126. *Bjerk*, 2018 ND 124, ¶ 26, 911 N.W.2d 343.
127. *Id.* at ¶ 29.
128. *Id.*
129. *Id.*
130. *Id.* at ¶¶ 38–39 (VandeWalle, C.J., concurring and dissenting).

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."[131] Using this language, VandeWalle argued "negligence can result from inaction as well as action."[132]

The dissent pointed to the majority's belief that the legislature would need to extend the premises liability action to hold Anderson liable.[133] The dissent argued legislative action was not necessary given the language of the statute.[134] Chief Justice VandeWalle asserted a landowner should be held responsible for activities on his premises if: (a) the premises had become a haven for the sale and use of opioids or other drugs; or (b) the owner had knowledge of the activities but did nothing to stop them.[135] The Chief Justice argued the legislative branch could limit the statute if it believed its language was too broad.[136] Accordingly, VandeWalle dissented, stating he would have remanded the claim to the district court for trial on the premises liability claim.[137]

## IV. IMPACT OF THE DECISION

*Bjerk* has significant impacts for the tort of premises liability in North Dakota. The precedent set by the North Dakota Supreme Court creates a bright-line test for future premises liability claims alleging dangerous activities. The test effectively bars most premises liability claims alleging dangerous activities when the landowner is not present. Further, negligent entrustment claims involving real property will be dismissed.

### A. LANDOWNERS ARE PROTECTED FROM CLAIMS ALLEGING DANGEROUS ACTIVITIES WHEN NOT PRESENT

Any claim for premises liability alleging dangerous activities likely will not prevail if the court finds the landowner was not present during the activity. A plaintiff bringing a lawsuit will not be able to present a dangerous activity premises liability claim against an absent landowner unless he or she

131. *Id.*
132. *Bjerk*, 2018 ND 124, ¶ 40, 911 N.W.2d 343 (VandeWalle, C.J., concurring and dissenting).
133. *Id.* at ¶ 39.
134. *Id.*
135. *Id.* at ¶ 40.
136. *Id.*
137. *Id.* at ¶ 42.

can prove the landowner was willfully blind to the activity.[138] If the landowner was willfully blind to the dangerous activity, then a duty of care likely exists, and the claim can proceed.

The court's holding adds a layer of protection for landowners renting or lending their property to those who engage in dangerous activities. As the court stated, there is a public policy interest in reducing drug addiction and aiding those who suffer from such conditions.[139] This holding allows landowners to rent their property and help drug users find housing without suffering the consequences of that person's actions. A plaintiff cannot sue the landowner for injuries due to dangerous activities conducted by the renter or occupant without showing the harm was highly foreseeable, meaning the landowner was willfully blind. Further, to establish foreseeability a plaintiff must show the landowner had knowledge going beyond previous instances.[140]

The court stated without the heightened foreseeability requirement the law would discourage people from helping addicts.[141] In recent years, North Dakota has seen an increase in opioid-related overdose deaths.[142] Potential liability for an addict's actions could cause landowners, notably private homeless shelters, to turn people away based on their status as a recovering drug user.[143] Further, the court stated a lowered foreseeability requirement would cause a landowner to evict or remove a drug user from the property at the first sign of use.[144] The public has an interest in helping drug addicts recover. The law should not deter individuals from helping addicts on their path to recovery, especially with North Dakota's recent increase in opioid abuse. The court's holding allows landowners to give recovering addicts a place to live without the fear of a claim being brought against them for the addict's actions.

### B. REAL PROPERTY CONTINUES TO BE EXEMPT FROM CLAIMS OF NEGLIGENT ENTRUSTMENT

With the ruling issued in this case, the North Dakota Supreme Court continues to uphold the chattel requirement of negligent entrustment claims.

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138. *Bjerk*, 2018 ND 124, ¶ 29, 911 N.W.2d 343 (majority opinion).

139. *Id.*

140. Castaneda v. Olsher, 162 P.3d 610, 621 (Cal. 2007).

141. *Bjerk*, 2018 ND 124, ¶ 29, 911 N.W.2d 343.

142. *North Dakota Opioid Summary*, NAT'L INST. ON DRUG ABUSE (Feb. 2018), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/north-dakota-opioid-summary.

143. *See Bjerk*, 2018 ND 124, ¶ 29, 911 N.W.2d 343.

144. *Id.*

Landowners who rent or lend real property to an individual are immune from negligent entrustment claims. Possible plaintiffs need to ensure the property they are alleging caused them harm is a chattel in order to bring a negligent entrustment claim. Therefore, claims alleging negligent entrustment of real property will not proceed successfully in North Dakota and will likely end in summary judgment.[145]

## V. CONCLUSION

In *Bjerk v. Anderson*, the North Dakota Supreme Court clarified when a landowner can be held liable for dangerous activities occurring on his or her property. The court created a bright-line test for the duty a landowner owes concerning dangerous activities on his or her property. If a landowner is not present, he or she must possess a high degree of foreseeability regarding possible harm resulting from that activity. If the landowner is present, he or she must engage in the activity and possess a reasonable degree of foreseeability of harm. Additionally, the court upheld the notion that negligent entrustment claims apply only to chattels, and not to real property.[146] Further, the court ensured landowners can help people recovering from drug addictions without fear of being held liable for those persons' actions.

North Dakota attorneys should look to the decision by the North Dakota Supreme Court in *Bjerk* when deciding whether to bring a claim against a landowner under premises liability law for a dangerous activity. If the landowner was absent, the attorney must prove the landowner was willfully blind, which will be very difficult.

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145. *Id.* at ¶ 33.

146. *Id.* at ¶ 32.

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