

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Elkin and K.E., a minor
child, by his nearest friend Tammy
Elkin,

Plaintiffs/Appellants,

v.

Thomas Wehner a/k/a Thomas
Wenger, Sovereign Housing LLC,

Defendants,

and

Hexco, LLC,

Defendant/Appellee.

Supreme Court No. 20190108

Williams County
No. 53-2014-CV-996

Appeal from Judgment
Dated March 28, 2019, and
Order Granting Hexco, LLC's N.D.R.Civ.P. 56
Motion for Summary Judgment
Dated April 30, 2018

District Court, Northwest Judicial District
Williams County, North Dakota

The Honorable Judge Joshua B. Rustad, Presiding

BRIEF OF PLAINTIFFS/APPELLANTS

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Table of Contents p. 3

Table of Authorities p. 4

Statement of Issues ¶ 1

Statement Regarding Oral Argument ¶ 2

Statement of Case ¶ 3

Statement of Facts ¶ 4

 A. The Hexco man camp ¶ 5

 B. The Wehner homebuilt shack ¶ 11

 C. Wehner’s criminal history ¶ 13

 D. Wehner’s lack of qualifications to provide housing ¶ 18

Legal Argument ¶ 23

 A. Standard of Review ¶ 24

 B. The district court erred in finding that Hexco had no control
 over the property at issue in this action ¶ 26

 C. The district court erred in finding that Hexco owed no duty of
 care ¶ 32

Conclusion ¶ 35

Certificate of Compliance ¶ 36

Certificate of Service ¶ 37

TABLE OF AUTHORITIES

CASES

<u>Barsness v. General Diesel & Equipment Co., Inc.</u> , 383 N.W.2d 840 (N.D. 1986)	¶¶ 24, 32 n. 1
<u>Botner v. Bismarck Parks & Recreation Dist.</u> , 2010 ND 95, 782 N.W.2d 662	¶ 24
<u>Brown v. Montana-Dakota Utilities, Co.</u> , 2011 ND 38, 794 N.W.2d 741	¶ 23
<u>Dinger v. Strata Corp.</u> , 2000 ND 41, 607 N.W.2d 886.....	¶ 32
<u>Doan v. City of Bismarck</u> , 2001 ND 152, 632 N.W.2d 815	¶¶ 24, 28
<u>Fast v. State</u> , 2004 ND 111, 680 N.W.2d 265.....	¶¶ 28, 29
<u>Groleau v. Bjornson Oil Co., Inc.</u> , 2004 ND 55, 676 N.W.2d 763.....	¶ 27
<u>O’Leary v. Coenen</u> , 251 N.W.2d 746 (N.D. 1977)	¶ 26
<u>Saltsman v. Sharp</u> , 2011 ND 172, 803 N.W.2d 553 ..	¶¶ 23, 24, 27, 28, 29
<u>Schmidt v. Gateway Community Fellowship</u> , 2010 ND 69, 781 N.W.2d 200	¶ 26
<u>Thompson v. Kaczinski</u> , 774 N.W.2d 829 (Iowa 2009).....	¶ 32

STATUTES

N.D.C.C. § 9-01-06	¶ 32
N.D.C.C. § 9-10-01	¶ 32

RULES

N.D.R.App.P. 25	¶ 37
N.D.R.App.P. 32	¶ 36
N.D.R.Civ.P. 56	¶ 23

TREATISES

<u>Premises Liability Law and Practice</u> (perm ed., rev. vol. 2009).....	¶ 26
<u>Restatement (Third) of Torts: Liability for Physical and Emotional Harm</u> (2010)	¶¶ 32, 33

STATEMENT OF ISSUES

[1] The issues on appeal are:

1. Whether the district court erred in finding that Hexco had no control over the property where the Elkins were injured; and
2. Whether the district court erred in finding that Hexco owed no duty of care to the Elkins.

STATEMENT REGARDING ORAL ARGUMENT

[2] Oral argument would be helpful to the Court in this matter because the dispute touches on where precisely the fine line should be drawn between cases in which the party in control of land owes a duty of care to persons on the land and those in which no duty is owed. The facts in the record are sufficiently complicated that the Court will likely have questions both regarding the facts of this case and regarding which additional facts would need to be present or absent for the case to be decided differently.

STATEMENT OF CASE

[3] This is a personal injury case. James Elkin and his son, K.E., were staying in a housing unit that Sovereign Housing and Thomas Wehner placed at a man camp operated by Hexco on land owned by Wade and Melissa Smith in rural Williams County. Because the appliances in the housing unit were set up to run on natural gas but connected to a source of propane, a fire occurred and caused Mr. Elkin and K.E. to suffer burns. This lawsuit was commenced by the service of a summons and complaint on June 23, 2014. Some defendants filed Rule 12(b)(6) motions to dismiss the complaint, which were denied on December 16, 2016. The plaintiffs and some defendants agreed to dismiss the complaint as to those defendants, leaving this action pending against Wehner, Sovereign Housing, and Hexco. Hexco filed a motion for summary judgment, which was granted on April 30, 2018. The remaining parties stipulated to entry of final judgment against Sovereign Housing, which was entered on March 28, 2019. This appeal follows entry of final judgment, seeking review of the district court's decision to grant summary judgment in favor of Hexco.

STATEMENT OF FACTS

[4] Because this appeal is from summary judgment, the facts on appeal must be viewed in the light most favorable to the plaintiffs and all factual inferences that can logically be drawn in their favor must be. James Elkin and K.E. (hereinafter, the “Elkins”) were injured when the housing unit they were staying in started on fire. The housing unit was owned by Sovereign Housing and it was on land known as the Hexco man camp in Williams County. The Elkins’ injuries resulted in their suffering damages in excess of \$4 million. (Judgment [A. 35].)

A. The Hexco man camp

[5] In 2014, the Bakken oil boom had created a well-known influx of workers and shortage of housing, creating opportunities to make obscene amounts of money by providing workforce housing. The average residential rent in Williston that year was 59% higher than New York City, 70% higher than Los Angeles, and 56% higher than Boston. (Associated Press, Rent in Williston, N.D. tops averages in New York City and Los Angeles, N.Y. Daily News, Feb. 17, 2014 [Dickson Aff., Ex. D; A. 41]; Jerry Burnes, Williston rent highest in nation, Williston Herald, Feb. 15, 2014 [Dickson Aff., Ex. E; A. 45].)

[6] Hexco is a North Dakota limited liability company with its principal office in Bozeman, Montana. (Hexco, LLC Corporation Details [Dickson Aff., Ex. F; A. 47].) Hexco is owned by Kyle Hexom. (Hexco Dep., Ex. 30 [A. 95].) Its business is in the area of “oilfield services & heavy civil construction.” *Id.* Hexco rented land from Wade and Melissa Smith in rural Williams County. (Hexco Dep., Ex. 29 [A. 89].) Hexco and the Smiths had obtained a conditional use permit from Williams County in August, 2011, for “truck parking and temporary housing.” (Moser Dep., Ex. 3 [A. 112].) The facility was for up to twenty housing units, of which three or four could be skid units and the rest had to be mobile homes or recreational vehicles. *Ibid.* A renewal of the conditional use permit for temporary housing was approved in July, 2013, which required the Smiths to provide a copy of policies and procedures and a copy of their safety and security plan. (Moser Dep., Ex. 4 [A. 113].) As part of the renewal request, the Smiths informed Williams County that the property was “professionally managed by Three Rivers,” that it had “rules that are strictly enforced,” and that its 20 lot spaces were “occupied by 13 RVs and 7 single wide trailers.” (Moser Dep., Ex. 5 [A. 114].)

[7] Hexco operated the man camp. The lease agreement between the Smiths and Hexco required Hexco to comply with all obligations of building and housing codes materially affecting health and safety, to keep the premises as reasonably clean and safe as possible, to comply with all local and state laws, and to require everyone on the premises with Hexco's consent to conduct themselves in a manner that will not disturb the residents' peaceful enjoyment of the man camp. (Hexco Dep., Ex. 29, pp. 2-3 [A. 90-91].) Hexco was also required to comply with and ensure others at the man camp complied with all rules and regulations. *Id.*, p. 3.

[8] Hexco actually did hire a professional management company to manage the man camp. Specifically, it hired Shannon Moser, who operated Three Rivers, LLC. (Hexco Dep., 30:4-24 [A. 75]; Moser Dep., Ex. 10 [A. 118].) Moser had previously worked for Hexco or another business that its owner, Kyle Hexom, ran. (Hexco Dep., 29:2-17 [A. 74]; Moser Dep., 9:2-22 [A. 101].) She had done Hexoms' payroll when they both lived in Boise, Idaho. (Moser Dep., 10:2-11 [A. 102].) Moser provided management services to the Hexco man camp until July, 2014, after which she understood that Hexom was taking over that role himself. (Moser Dep., 17:10-20 [A. 103].) During the time that

Moser managed the man camp, rent money initially came to Three Rivers first but later would be paid directly to Hexco or possibly to Keri Hexom, who is Kyle Hexom's wife. (Moser Dep., 81:2-10 [A. 108].)

[9] The rules of the man camp, which were incorporated into the conditional use permit, included "No Sub-letting the Apartments or RV Spaces without approval from the Landlord. All potential tenants must fill out an application and background check form and pay any fees associated with such forms and be approved prior to move in." (Moser Dep., Ex. 6, ¶ 6 [A. 115].) Kyle Hexom, Hexco's owner, helped prepare the rules for the Hexco man camp. (Moser Dep., 70:8-24 [A. 106].)

[10] Despite having a conditional use permit built on the promise of professional management by Three Rivers and strict enforcement of safety rules, Hexco did not actually allow Three Rivers to manage the facility. Hexco's employee, which it could only identify as "Ted," was the on-site manager. (Moser Dep., 73:1-7 [A. 107].) Regardless of nominal management of the man camp, Kyle Hexom regularly took direct control and interfered with management or simply did things at the man camp without going through the professional manager at all. For instance, Hexom told Moser to get rid of some of the

recreational vehicles to make room for FEMA trailers that he wanted to put on the camp. (Moser Dep., 81:25-82:2 [A. 108-109].) Moser did what Hexom told her to do, and Hexom started placing FEMA trailers on the camp. (Moser Dep., 82:2-6 [A. 109].) Hexom's direct actions at the man camp allowed Thomas Wehner and his company, Sovereign Housing, to place a homebuilt shack there and rent it to the Elkins.

B. The Wehner homebuilt shack

[11] The unit in which the Elkins were burned was brought to the Hexco man camp through Kyle Hexom's direct action, bypassing the professional management company, the park rules, and the Williams County regulations. The housing unit was owned by Sovereign Housing, which was in turn owned and operated by Thomas Wehner. (Articles of Organization for Sovereign Housing LLC [Dickson Aff., Ex. G; A. 48].) Hexco and Moser both testified that Three Rivers never managed that unit. (Hexco Dep., 47:23-25 [A. 76]; Moser Dep., 35:2-5 [A. 104].) Moser recalled that it simply showed up:

[I]t just showed up. So we called Kyle. I'm like, "There's a trailer." Because Kyle sometimes will have people just use the man camp. . .

And then [] we called just to say, "There's an odd trailer out here. Is it something you did or is it a squatter?" Because, you know, you never know.

And he said, “Oh, yeah. I made a deal with Thomas [Wehner].”

(Moser Dep., 35:21-36:1 [A. 104-105].) Hexco testified that Three Rivers was not involved because Kyle Hexom knew Wehner and that he would “take over and lease [the lot] to [Wehner].” (Hexco Dep., 48:1-11. [A. 77].)

[12] Wehner himself built the unit where the Elkins were burned. (Sovereign Housing Discovery Responses, p. 4 [A. 37].) The appliances in it were set up to operate on natural gas, but the unit itself was connected to a propane tank. (Jolley Dep., 26:8-13 [A. 122].) Unbeknownst to the Elkins, they moved into the unit before the appliances were modified to operate on propane and tested for leaks. They did not know which appliances might be propane-operated and had no reason to pay attention to the gas connections. (James Elkin Dep., 46:11-19, 47:2-7 [A. 128-129].) Within two days of moving in, the Elkins were burned by a fiery explosion that resulted from a propane leak. (James Elkin Dep., 8:25-9:21 [A. 126-127].)

C. Wehner’s criminal history

[13] Thomas Wehner is a violent criminal, currently in federal prison for causing a person’s death with a prior history classified as

Criminal History III. (Tr. of Sentencing Hrg., p. 39 [Fullerton Aff., Ex. BB; A. 62].) This classification indicates a serious, long-standing, and systemic life of criminal pathological behavior and convictions. Hexco testified that it performed a background check when it employed Wehner. (Hexco Dep., 91:7-9 [A. 82].) In performing that background check, Hexco could not have avoided learning about Wehner's extensive history of violent crime, drug addiction, and drug dealing. Hexco thus knew about the following criminal history for Thomas Wehner, from the time he turned 20 years of age in 1995:

1996

- 1) Gave False ID to Police
- 2) Receiving Stolen Property

1997

- 3) Unlawful intercourse with a Minor

1998

- 4) Possession of Controlled Substance – Methamphetamine
- 5) Manufacturing Controlled Substance – Methamphetamine
- 6) Battery on Police/Emergency Personnel

2000

- 7) Felon Possession of Firearms

2003

- 8) Felony Domestic Violence

2005

9) Felon Possession of a Firearm

(Fullerton Aff., ¶ 13 [A. 53-54].)

[14] A law enforcement affidavit in the 2003 domestic violence case describes Thomas Wehner, the man Hexco deliberately brought to Williston to rent out housing to the Elkins without going through the professional management, park rules, or county regulations:

Samantha stated that they were in the bedroom when Thomas [Wehner] threw her on the ground and began hitting her. Thomas then grabbed a screwdriver and began wrapping it with tape. Thomas had also opened a pocketknife and laid it on the bed next to Samantha. Thomas then began choking Samantha using the butt end of a screwdriver jamming it in her throat. Samantha stated that she was not able to breathe and believed that she was going to die.

...

Approximately fifteen (15) minutes later Julie heard crashing then Samantha start screaming coming from the bedroom[. S]he went into the bedroom and Thomas had Samantha by the face and throat saying “if she can’t breath[e] then she can’t talk. The bitch knows too much.”

...

Julie stated that Samantha told her that Thomas was wanted in California for murder.

...

Thomas Joseph Wehner is a fugitive out of California and is wanted on a Felony parole violation. Thomas is known to be armed and dangerous.

(Marysville Police Department Probable Cause / Booking Form, July 19, 2003 [Fullerton Aff., Ex. P; A. 61].)

[15] The same Thomas Wehner, shortly after renting out the housing unit that caught fire and burned the Elkins, stole multiple firearms, brought them to California to trade them for one pound of pure methamphetamine, and then used that methamphetamine to kill someone in Montana. (Fullerton Aff., ¶ 15 [A. 54].) Wehner's history included not only drug offenses but also violent assaults against police officers and women. (Tr. of Sentencing Hrg., pp. 58-61 [A. 66-69].)

[16] Hexco knew about Wehner's history of violent crime and hard drugs because of the background check it performed when it employed him in 2011 or 2012. Even a simple Google search is enough to find out that Wehner was a violent criminal, through news articles like this one from 2003:

Thomas Wehner, 27, is being held in the Skagit County Jail, north of Seattle, without bail on a California Department of Corrections warrant for parole violation.

Wehner will likely be served with other warrants from Tuolumne and Stanislaus counties for other parole violations, as well as new charges including

fleeing a peace officer and kidnapping, said Tuolumne County Sheriff's Department investigator Chris Harrison.

Wehner is suspected of abducting Samantha Mary Taylor, 23, a former girlfriend missing since May 27, when she failed to return home.

Taylor's mother, Gwen, said yesterday her daughter was abducted after she met with Wehner in Knights Ferry to break off their three-month relationship, but Wehner would not allow it.

“He beat her up all the time,” Gwen Taylor said of what her daughter told her happened after she was abducted. “She thought she was gone three months and she was only gone three weeks. She said there were a few times when she could have gotten away, but that she knew if she got caught, he would kill her. It was a typical battered woman's syndrome.”

(Amy Lindblom, Abducted woman safe, parolee arrested, The Union Democrat, June 27, 2003 [Fullerton Aff., Ex. O; A. 59].)

[17] After the May 23, 2014, explosion that burned the Elkins, Wehner fled to Idaho and applied for a job with Sequel Alliance Family Services. That company's background check resulted in it deciding not to hire Wehner. (Fullerton Aff., ¶¶ 20-21 [A. 55].) The trier of fact may infer—and thus, on summary judgment, we must infer—that Hexco allowed Wehner to put the Sovereign Housing unit on the man camp in full knowledge of his violent criminal tendencies and lack of care for the safety of anyone, as long as there was money to be made.

D. Wehner's lack of qualifications to provide housing to the public

[18] Neither Wehner nor Sovereign Housing has ever been authorized to work as a contractor in North Dakota or to do electrical or plumbing work in North Dakota. (Certificate of Fact [Dickson Aff., Ex. H; A. 49]; North Dakota State Electrical Board Letter [Dickson Aff., Ex. I; A. 50]; North Dakota State Plumbing Board Letter [Dickson Aff., Ex. J; A. 51].) As Wehner's employer, Hexco knew what types of work he was qualified to do. Hexco knew that Wehner was neither licensed nor competent to build housing units.

[19] Despite all that Hexco knew about Wehner's background and incompetence to build or provide housing, it decided to allow him to put the housing unit at the man camp and rent it out to the Elkins. In doing so, Hexco violated the Williams County regulations and the park rules that were part of the conditional use permit for the man camp.

[20] Hexco acknowledged that "it was Hexco's responsibility to be in compliance with the County." (Hexco Dep., 114:1-2 [A. 87].) But the company never did anything to find out if the Wehner unit complied with the County requirements, much less to enforce them. (Hexco Dep., 114:2-7 [A. 87].) Hexco never inspected the unit. (Hexco Dep., 74:12-15,

105:5-7 [A. 83].) Nor did it obtain a third-party inspection, as required by the conditional use permit for the man camp. (Hexco Dep., 81:22-82:10 [A. 80-81].) Hexco testified that, if there had been a third-party inspection, the county would have records of it. The county's complete file on the man camp contains no such inspection record. (Dickson Aff., ¶ 18 [A. 39].)

[21] Hexco knew that Wehner was planning to lease the homebuilt shack to the general public. (Hexco Dep., 59:6-11 [A. 78].) The general public expected county-licensed man camps to follow their own safety regulations that were part of their licensure and professional management, but Hexco duped the general public in general and the Elkins in particular by allowing Wehner to skip past those safety mechanisms.

[22] Hexco had the authority to remove the Wehner trailer if it did not comply with regulations. (Hexco Dep., 113:23-114:23 [A. 86-87].) Hexco and its professional manager Three Rivers occasionally exercised that authority. For example, the exact lot where Hexco allowed Thomas Wehner to put the homebuilt shack was open because "the gal that was renting that RV spot had a trailer there that was very unsafe . . . so we had them leave and take the trailer because we couldn't have stuff like

that out there.” (Moser Dep., 84:2-12 [A. 110].) After the fire, Hexco required Thomas Wehner to remove the homebuilt shack from the land. (Moser Dep., 144:7-10 [A. 111]; Hexco Dep., 107:5-17, 108:8-11 [A. 84-85].) Hexco knew that the Wehner trailer was unsafe and did not comply with regulations. (Hexco Dep., 114:24-115:2 [A. 87-88].) But it chose to exercise its control to keep the trailer there as a favor to Kyle Hexom’s friend, the violent criminal and drug dealer Thomas Wehner.

LEGAL ARGUMENT

A. Standard of Review

[23] The district court's decision was made on Hexco's motion for summary judgment under N.D.R.Civ.P. 56.

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Saltsman v. Sharp, 2011 ND 172, ¶ 4, 803 N.W.2d 553 (quoting Brown v. Montana-Dakota Utilities, Co., 2011 ND 38, ¶ 3, 794 N.W.2d 741).

[24] “Negligence actions are ordinarily inappropriate for summary judgment because they involve issues of fact.” Saltsman, 2011 ND 172 at ¶ 5 (quoting Botner v. Bismarck Parks & Recreation Dist.,

2010 ND 95, ¶ 8, 782 N.W.2d 662). “Even undisputed facts do not justify summary judgment if reasonable differences of opinion exist as to the inferences to be drawn from those facts.” Ibid. (quoting Doan v. City of Bismarck, 2001 ND 152, ¶ 7, 632 N.W.2d 815). “Where questions of negligence are in issue, summary judgment is improper ‘if there is any doubt as to the existence of a genuine issue of material fact, or if differing inferences can be drawn from the undisputed evidence.’” Ibid. (quoting Barsness v. General Diesel & Equipment Co., Inc., 383 N.W.2d 840, 844 (N.D. 1986)).

[25] There are disputed facts and reasonable differences of opinion as to the inferences to be drawn from the facts of this case. The district court erred when it granted Hexco summary judgment despite the evidence of Hexco’s negligence.

B. The district court erred in finding that Hexco had no control over the property at issue in this action

[26] This Court has expressed that “a landowner or occupier of premises generally owes a duty to lawful entrants to exercise reasonable care to maintain the 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.” Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶ 8, 781 N.W.2d 200 (citing O’Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977)). A landlord’s duty of care includes an obligation to “inspect premises to discover hidden dangers.” Id. at ¶ 9 (citing 1 Premises Liability Law and Practice § 4.01[2][a] (perm ed., rev. vol. 2009)).

[27] The district court’s decision to dismiss Hexco from this action was based on the principle that a person who has no control over premises does not owe a duty of care to persons injured there. (Order Granting Hexco Mot. for S.J., ¶¶ 11-13 [A. 31].) It is true that “[c]ontrol is an essential prerequisite for imposition of premises liability.” Saltsman, 2011 ND 172 at ¶ 12 (quoting Groleau v. Bjornson Oil Co., Inc., 2004 ND 55, ¶ 11, 676 N.W.2d 763). However, the district court ignored the abundant evidence that Hexco not only had control over the premises but actively exercised that control to create the hazard that harmed the Elkins.

[28] “If a landowner permits dangerous conditions to exist on the premises the landowner must take reasonable measures to prevent injury to those whose presence on the property reasonably can be foreseen.” Saltsman, 2011 ND 172 at ¶ 11 (quoting Fast v. State, 2004 ND 111, ¶ 8, 680 N.W.2d 265). “The 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.” Ibid. (quoting Doan, 2001 ND 152 at ¶ 25).

[29] The district court made the mistake of finding that, because Hexco did not control the *inside* of the housing shack, it had *no control* over the premises whatsoever. The district court’s decision was based on this finding: “Plaintiffs have provided no material fact showing that Hexco had any ownership, supervision, or control over the housing unit or the dryer.” (Order at ¶ 14 [A. 32].) This was an error, because the evidence shows clearly that Hexco had absolute control over the man camp as a whole and that it actively exercised that control to (a) operate the camp without the professional management that was supposed to be in place, (b) avoid its acknowledged obligation to enforce safety regulations and ensure the man camp was safe for people living there, (c) open up the spot where Wehner placed the housing shack by requiring an unsafe RV be removed, and (d) force Wehner to remove the housing shack immediately after the fire. Because Hexco “permit[ted] dangerous conditions to exist on the premises,” it was obligated to take reasonable measures to prevent injury to those whose presence on the property reasonably can be

foreseen.” Saltsman, 2011 ND 172 at ¶ 11 (quoting Fast, 2004 ND 111 at ¶ 8).

[30] The very hazard that caused the Elkins’ injury came into existence because Kyle Hexom, the owner of Hexco, allowed his friend Thomas Wehner to use the spot without going through any of the safety protections that were supposed to exist. Hexco had control to remove that hazard, as it demonstrated by removing the hazard right after the Elkins were injured by it. And, as discussed above, Hexco had knowledge that letting Wehner put a housing unit at the man camp would pose a hazard to the health and safety of anyone who came near it.

[31] Summary judgment was improper because Hexco had control over the man camp, allowed the dangerous Wehner unit to be placed there, and owed a duty to take reasonable measures to prevent injury to the Elkins.

C. The district court erred in finding that Hexco owed no duty of care

[32] Even without the abundant evidence of Hexco’s control over the premises where the Elkins were burned, Hexco can still be found negligent under the general principles of tort law. Premises liability is

a subset of tort law that gives contours to a person’s duty of care when he owns or controls land. In more general terms, “[e]very person is bound without contract to abstain from injuring the person or property of another or infringing upon any of that person’s rights.” N.D.C.C. §§ 9-10-01, 9-01-06; Dinger v. Strata Corp., 2000 ND 41, ¶ 16, 607 N.W.2d 886 (“A person is responsible . . . 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.”) Cf. Restatement (Third) of Torts: Liability for Physical and Emotional Harm [hereinafter “Third Restatement”] § 6 cmt. b (2010).¹ In particular, “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009) (quoting Third Restatement (proposed Final Draft No. 1, 2005) § 7(a)).

[33] Only when a countervailing policy justifies modifying this default rule (that everyone owes a duty to exercise reasonable care so as not to harm others) can a court find that no duty exists. Third

¹ This Court’s jurisprudence treats the Restatements of the Law as “carefully studied and precisely stated summaries of basic principles of law” and “often relie[s] upon [them] as relevant authority.” Barsness v. General Diesel & Equipment Co., Inc., 383 N.W.2d 840, 842 at n. 1 (N.D. 1986). As an “authoritative and convenient expression[] of principles of law,” the Third Restatement is a valuable guide for the Court’s consideration of the duty of care that Hexco owed to the Elkins. Ibid.

Restatement § 7 cmt. i. Moreover, the lack of duty cannot rely on the facts of an individual case, but rather should address a “particular category of recurring facts.” Ibid. In other words, because the existence of duty is a *question* of law, the determination of duty must come from a consistent and generally applicable *rule* of law.

[34] There is no countervailing policy to justify a general rule of law that persons who violate county zoning permits and allow violent criminals to place dangerous, homebuilt shacks on their land and rent them to the unsuspecting public never owe a duty of care to the people who are injured as a result. If Hexco had allowed Wehner to place a landmine at the man camp and the Elkins stepped on it, Hexco could not escape all responsibility by claiming it had no control over the landmine. Allowing Wehner to place the homebuilt shack on the man camp and rent it to the Elkins poses a danger nearly indistinguishable in character or degree from that posed by a landmine. Hexco owed a general duty to exercise reasonable care in its activities. The Elkins are entitled to a trial of the disputed fact of whether Hexco’s conduct was reasonably careful. There is sufficient evidence in the record for the finder of fact to conclude that Hexco breached its duty to exercise reasonable care. Summary judgment is inappropriate.

CONCLUSION

[35] Hexco clearly had sufficient control over the man camp to exclude the Wehner homebuilt shack from it. Doing so would have prevented the Elkins from being injured. It was the shack itself that was dangerous and Hexco cannot escape all responsibility because it chose not to exercise its control to make the man camp safe for people who, like the Elkins, simply needed a place to stay while they worked in the Williston area. The district court erred when it granted Hexco summary judgment. There are genuine disputes of material fact and the Elkins are entitled to a trial to resolve those issues.

Respectfully submitted this 22nd day of May, 2019.

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CERTIFICATE OF COMPLIANCE

[36] Under N.D.R.App.P. 32(e), I hereby certify that this brief complies with the applicable page limitation and has 29 pages.

Dated this 22nd day of May, 2019.

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CERTIFICATE OF SERVICE

[37] I hereby certify that, on today's date, I served the foregoing document on the following by electronic means, pursuant to N.D.R.App.P. 25(c)(4)(B):

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Dated this 22nd day of May, 2019.

/s/ Ariston E. Johnson
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