

7-1-2012

Owner Beware: OSHA's Impact On Tort Litigation By Independent Contractors' Injured Employees Against Business Premises Owners

Jon M. Philipson

Follow this and additional works at: <http://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Jon M. Philipson, *Owner Beware: OSHA's Impact On Tort Litigation By Independent Contractors' Injured Employees Against Business Premises Owners*, 66 U. Miami L. Rev. 987 (2014)

Available at: <http://repository.law.miami.edu/umlr/vol66/iss4/6>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Owner Beware: *OSHA's Impact on Tort Litigation by Independent Contractors' Injured Employees against Business Premises Owners*

JON M. PHILIPSON*

I. INTRODUCTION: THE FLORIDA JUICE CASE	987
II. APPLICATION OF OSHA REGULATIONS AND THE MULTIEMPLOYER DOCTRINE (MED)	992
A. <i>Background on OSHA and Multiemployer Doctrine (MED)</i>	992
B. <i>Use of OSHA to Establish a Duty Owed in Tort Actions</i>	996
C. <i>Use of OSHA Violation as Evidence of Negligence</i>	1000
III. QUESTIONING AND REJECTION OF THE MULTIEMPLOYER DOCTRINE (MED)	1002
A. <i>The Issue of the Ambiguously Defined Employer</i>	1003
B. <i>A Circuit Court's Missed Opportunity to Confront OSHA's Ambiguous Employer and Determine the Legality of MCP</i>	1004
i. THE DEBATE REGARDING <i>Darden's</i> Applicability	1004
ii. THE DEBATE REGARDING THE MCP'S PROCEDURAL LEGALITY UNDER ADMINISTRATIVE LAW	1007
C. <i>A Court's Narrower Reading of OSHA in Tort Actions</i>	1012
D. <i>A State's Approach to Tort Actions by Independent Contractors in Inherently Dangerous Occupations</i>	1014
i. FLORIDA PREMISES LIABILITY AND <i>Florida Power & Light Co. v. Price</i>	1015
ii. THE DEVELOPMENT OF AN OWNER'S LIABILITY IN A STATE'S COMMON LAW	1018
IV. HOW STATES ADDRESS AND SHOULD ADDRESS THE USE OF OSHA IN TORT ACTIONS	1021
A. <i>Application of OSHA in a State's Common Law Tort Actions</i>	1021
B. <i>Florida Juice Revisited: How Courts Should Address Future Cases</i>	1024
V. CONCLUSION	1028

I. INTRODUCTION: THE FLORIDA JUICE CASE

Smoke engulfed the generator¹ as sirens echoed through the Florida

* J.D., University of Florida Levin College of Law; B.A., B.A., Washington & Lee University. I want to express my appreciation to David G. Owen, Joseph W. Little, Brian C. Murchison, Tom C.W. Lin, and Sasha Lohn-McDermott for reading and offering comments on early versions of this Article; Monica L. Wilson, Anne C. McAdams, and Robert W. Davis, Junior for their comments and suggestions; Paul Pakidis for his research assistance; Dennis A. Calfee and Lisa Caldwell for their support during the writing of this Article.

1. See, e.g., *Fla. Power & Light Co. v. Price*, 170 So. 2d 293 (Fla. 1964) (per curiam) (discussing accident involving installation of electrical distribution system by independent contractor). Portions of this hypothetical are adopted from common law tort actions by independent contractors' injured employees against premises owners and from Occupational Safety and Health Administration ("OSHA") review commission proceedings against premises owners or general contractors. This Article cites to several Occupational Safety & Health Review Commission ("OSHRC") proceedings and subsequent appellate decisions for support. OSHRC

Juice and Chemical Company's ("Florida Juice") Deland, Florida compound.² The fire from the accident engulfed Bobby Roberts, an employee of Independent Electric hired by Florida Juice to clean and repair its electrical generator. Eventually, the fire was snuffed,³ and the ambulance, which carried the deceased Bobby Roberts, quietly drove away.⁴

Soon after Bobby's death, the Occupational Safety and Health Administration ("OSHA")⁵ investigated the accident, in which Bobby fell from Independent Electric's unsecured scaffolding⁶ while cleaning and repairing Florida Juice's generator.⁷ Even though Bobby's Independent Electric supervisor warned him that the generator was energized,⁸ Bobby, who lacked protective equipment,⁹ still grabbed the generator's wires¹⁰ to brace his fall,¹¹ causing his electrocution.¹² Dan Alderman, a Florida Juice plant manager and Independent Electric's contact, informed the investigator that he visited the worksite the day of the accident to assess Independent Electric's progress,¹³ but that he did not

proceedings and subsequent appellate court decisions are often cited by courts addressing the use of OSHA in tort litigation. *See, e.g.*, *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984); *Horn v. C.L. Osborne Contracting Co.*, 591 F.2d 318 (5th Cir. 1979). Multiple times, this Article cites to tort cases and OSHRC proceedings in the same footnote; however, it cautions that tort cases and OSHRC proceedings involve different procedural requirements and other nuanced differences. For the purpose of this Article, these differences are not dispositive to the analysis of the Multiemployer Doctrine. As well, for clarity, this Article's evaluation of OSHA's relevance to state tort actions, in particular Florida's, is limited to the non-construction industry context.

2. *See Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975) (discussing accident on owner's premises involving independent contractor's employee).

3. *See Merritt v. Bethlehem Steel Corp.*, 875 F.2d. 603 (7th Cir. 1989) (involving injury to independent contractor's employee during cleaning of electrical equipment).

4. *See Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121 (Fla. Dist. Ct. App. 1976) (involving death of independent contractor's employee from electric shock).

5. For discussion of the history of OSHA, see *infra* Part II.A.

6. *See Horton v. Gulf Power Co.*, 401 So. 2d 1384, 1385 (Fla. Dist. Ct. App. 1981) (involving fall from unsecured scaffolding).

7. *See Merritt*, 875 F.2d. at 604 (involving injury to independent contractor's employee during cleaning of electrical equipment).

8. *See id.* (involving warning of energized electrical system); *Lake Parker Mall, Inc.*, 327 So. 2d at 123-26 (same).

9. *See Calloway v. PPG Indus., Inc.*, 155 F. App'x 450, 452, 455 (11th Cir. 2005) (*per curiam*) (discussing lack of fall protection equipment); *Pearson v. Harris*, 449 So. 2d 339, 340-41 (Fla. Dist. Ct. App. 1984) (discussing duty owed to provide protective equipment).

10. *See Lake Parker Mall, Inc.*, 327 So. 2d 121 (involving death of independent contractor's employee from electrocution); *Fla. Power & Light Co. v. Price*, 170 So. 2d 293 (Fla. 1964) (*per curiam*) (involving electrocution).

11. *See Horton*, 401 So. 2d at 1385 (involving fall from unsecured scaffolding).

12. *See Merritt*, 875 F.2d at 604 (involving electric shock during fall).

13. *See Skow v. Dep't of Transp.*, 468 So. 2d 422, 424 (Fla. Dist. Ct. App. 1985) (involving inspection of progress by owner).

instruct Independent Electric's workers regarding their work¹⁴ or potential electrical hazards.¹⁵ Moreover, Alderman emphasized that he did not notice the hazard because he was unversed in electrical repair.¹⁶ Independent Electric's contract also did not require Florida Juice to monitor or correct Independent Electric's safety violations but did require Independent Electric to comply with OSHA standards.¹⁷ Based on its investigation, OSHA cited Independent Electric for two violations—the failure to supply adequate safety equipment¹⁸ and proper scaffolding.¹⁹ However, OSHA did not cite Florida Juice for any violation.

After OSHA's investigation, Bobby's widow discovered that Independent Electric did not carry workmen's compensation insurance.²⁰ Therefore, Bobby's estate brought, in Florida's Seventh Judicial Circuit, a wrongful death action²¹ against Independent Electric and Florida Juice. The estate alleged that Florida Juice was an employer under OSHA²² and therefore owed a duty to provide Bobby with protective equipment and safe scaffolding.²³ The estate explained that because Florida Juice's Deland compound was a multiemployer worksite,²⁴ Florida Juice could

14. See *id.* (involving instructions given by owner); *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998) (involving instruction and recognition of hazards by owner); *Turner v. Scott Paper Co.*, No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6768, at *3, *11-*12 (S.D. Ala. Mar. 17, 1995), adopted by No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6769, at *2 (S.D. Ala. May 18, 1995) (involving right to inspect).

15. See *Lowe v. United States*, 466 F. Supp. 895 (M.D. Fla. 1979) (discussing owner's duty when recognizing hazard not created by owner).

16. See *Horton*, 401 So. 2d at 1387 (Smith, C.J., concurring) (discussing superior knowledge).

17. See *Skow*, 468 So. 2d at 424 (discussing independent contractor's contractual requirement to comply with federal safety standards).

18. See 29 C.F.R. § 1910.335 (2011) (stating employees working in areas of potential electrical hazards are to be provided electrical protective equipment).

19. See 29 C.F.R. § 1910.28 (2011) (specifying the safety requirements for safe scaffolding).

20. In Florida, an employer, as defined by § 440.02 of the *Florida Statutes*, must carry workmen's compensation insurance to cover damages suffered by an injured employee in the course of his employment. See generally FLA. STAT. ch. 440 (2012) (setting forth applications and limitations of "Florida's Workmen's Compensation Law"). Workmen's compensation insurance is an employee's exclusive remedy, except if the employer does not carry workmen's compensation insurance. See FLA. STAT. § 440.11 (2012). In such a case, the employer is subject to actions at law or admiralty. *Id.*; *Elliott v. S.D. Warren Co.*, 134 F.3d 1 (1st Cir. 1998); *Kane v. J.R. Simplot Co.*, 60 F.3d 688 (10th Cir. 1995); see also Tracy Nichols, Comment, *Florida Workers' Compensation: Does Common Employer Concept Unjustly Limit Employees' Claims against Third-Party Tortfeasors?*, 34 FLA. L. REV. 463, 464-66 (1982) (explaining purpose behind Florida's Workers' Compensation law).

21. See FLA. STAT. §§ 768.16-768.26 (2011) (setting forth the "Florida Wrongful Death Act").

22. 29 U.S.C. § 652(5) (2006) (stating in pertinent part that "'employer' means a person engaged in a business affecting commerce who has employees"). For further discussion regarding OSHA's definition of employer, see *infra* note 52.

23. For discussion of OSHA's purpose, see *infra* Part II.A.

24. A "Multiemployer worksite" is a workplace where multiple employers are working in a

be deemed Bobby's employer under OSHA and thus, owe Bobby a duty of care.²⁵ Moreover, the estate alleged that even if no duty was owed, an OSHA violation could be used as evidence of negligence by Florida Juice.²⁶

In light of previous court opinions, the estate's argument is heretofore questionable.²⁷ In fact, to date, the Court of Appeals for the Eleventh Circuit has not directly addressed in a binding opinion whether OSHA's Multiemployer Doctrine ("MED") or its Multiemployer Citation Policy ("MCP") may be used to impose a duty of care on a business premises owner²⁸ for an independent contractor's injured employee in a non-construction industry tort action.

The genesis of this quandary—whether the MED or the MCP may be used as a basis for imposing a duty of care on a business premises owner—dates back to when OSHA first began to cite employers at multiemployer construction worksites when those employer's employees were not the ones exposed to the harm by the employer's violation of OSHA regulations. At that time, rather than engaging in informal rulemaking to establish a multiemployer citation scheme, OSHA relied on interpretations by the Secretary of Labor and holdings by the Occupational Safety & Health Review Commission ("OSHRC") affirming these citations. As a result, employers have continuously questioned under the Administrative Procedure Act ("APA") the validity of the MED and the MCP scheme. Moreover, an externality of this citation scheme has been plaintiffs in tort actions using these citations and the overarching MED to argue that OSHA may be used to impose a duty of care on a business premises owner with regards to an independent contractor's injured employee or that at the very least, an OSHA violation may be used as evidence of negligence.

This Article attempts to articulate that because OSHA did not engage in informal rulemaking to formulate its current MED and MCP,

common undertaking, typically found in the construction industry. *See generally* John Zebrowski, Comment, *OSHA: Developing Outlines of Liability in Multi-employer Situations*, 62 *Geo. L.J.* 1483 (1974) (discussing multiemployer worksites under OSHA).

25. *See* *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984) (involving argument that premises owner owed duty under OSHA).

26. *See Elliott*, 134 F.3d at 5 (discussing OSHA violation as evidence of negligence); *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 604–05 (7th Cir. 1989) (same).

27. *See* *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998); *Elliott*, 134 F.3d 1; *Kane v. J.R. Simplot Co.*, 60 F.3d 688 (10th Cir. 1995); *Cochran v. Int'l Harvester Co.*, 408 F. Supp. 598, 602 (W.D. Ky. 1975); *Hare v. Fed. Compress & Warehouse Co.*, 359 F. Supp. 214 (N.D. Miss. 1973); *France v. S. Equip. Co.* 689 S.E.2d 1 (W. Va. 2010); *Hall v. Dieffenwierth*, No. 2-07-058-CV, 2008 WL 2404462 (Tex. Ct. App. June 12, 2008); *Vickers v. Hanover Constr. Co.*, 875 P.2d 832 (Idaho 1994); *Tanksley v. Ala. Gas Corp.*, 568 So. 2d 731 (Ala. 1990).

28. In this Article, "premises owner" means a business premises owner and not a residential premises owner.

negative externalities have ensued—an inefficient allocation of resources and responsibilities between business premises owners and independent contractors and costly and needless litigation.²⁹ As a result, the MCP, which emphasizes construction situations in its examples and explanations, and the overarching MED, which traditionally is used in the construction context, are being employed in non-construction settings, preventing business premises owners from proper notice of its applicability.³⁰ This Article further argues that even if OSHA did engage in proper rulemaking, a greater issue would still exist. That issue is one of generality versus reasonable specificity. Although one general rule or regulation for a multiemployer citation scheme would be efficient, this Article argues that OSHA should revisit its MCP scheme and promulgate a more nuanced multiemployer citation scheme, through notice and comment rulemaking, that tailors the MCP to various industries and worksites generally. Therefore, with a more nuanced citation scheme, all parties affected will have greater notice of potential citations and the use of that potential exposure as a source of potential liability in tort litigation. This idea is not unprecedented; in the 1980s and 1990s, OSHA promulgated multiple regulations that specifically addressed multiem-

29. This argument about vagueness is akin to the idea of fair notice; however, this Article uses the idea in a more general sense. See *Gen. Elec. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“[E]lementary fairness compels clarity in the statements and regulations setting forth the actions with which the agency expects the public to comply” (internal quotations and citations omitted)). See generally Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies: General Electric Co. v. EPA*, 49 SMU L. REV. 1561 (1996) (discussing “regulatory confusion” and the use of the fair notice argument in administrative law cases); Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991 (2003) (discussing the fair notice doctrine).

30. See OCC. SAFETY AND HEALTH ADMIN., DEP’T OF LABOR, CPL 02-00-124, OSHA INSTRUCTION: MULTIEMPLOYER CITATION POLICY (Dec. 10, 1999); see also Citation Guidelines in Multi-employer Worksites, 41 Fed. Reg. 17639, 17639–40 (proposed Apr. 7, 1976) (emphasizing construction industry); Gary S. Marx, Note, *The Occupation Safety and Health Act of 1970 as Applied to the Construction Industry: The Multi-employer Worksite Problem*, 35 WASH. & LEE L. REV. 173, 191 n.116 (1978) (noting that although the *Citation Guidelines* are not expressly limited to the construction industry, the limitation seems implied based on the actions of the Secretary of Labor). Regarding the MED’s limited use, one court has even stated, “[t]he duty on one employer to comply with OSHA standards for the benefit of employees of another employer [in upheld OSHRC decisions], however, has *only been expressly recognized* in the multiemployer construction worksite context.” *Am. Petroleum Inst. v. Occ. Safety & Health Admin.*, 581 F.2d 493, 509 (5th Cir. 1978) (emphasis added). *American Petroleum* is binding precedent in the Eleventh Circuit, being decided prior to the Fifth Circuit split. See *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting Fifth Circuit’s body of law as existed on September 30, 1981 as binding precedent).

Again, this Article’s evaluation of OSHA’s relevance to state tort actions, in particular Florida, is limited to the non-construction industry context. For a discussion regarding use of the MED in construction cases, see generally Marx, *supra*, at 173 (discussing use of MED in construction industry violations).

ployer situations involving certain substances or products.³¹ However, as long as the MCP and the overarching MED continue in their current form, this Article argues that costly litigation and inefficient allocation of resources will continue as business premises owners incessantly fight against the use of OSHA in tort proceedings. However, with a clearer and more precise MED and MCP, American workers will be safer.

Using Florida as a model state, this Article explains why, until OSHA addresses its MCP and general MED scheme, states should not use OSHA regulations to impose a duty of care on premises owners, such as Florida Juice,³² in tort actions brought by independent contractors' injured employees. This Article also addresses why, until OSHA addresses its MCP and general MED scheme, states should not permit the use of OSHA violations as evidence of negligence. Part II provides a background on OSHA and the MED and discusses the application of OSHA regulations and the MED in tort actions to date. Part III chronicles recent challenges to the MED and uses Florida as a model state to discuss how Florida common law and statutory law regarding hazardous occupations impose a limited duty of care on business premises owners absent the MED. Then, Part IV, by using Florida and its previous applications of OSHA in tort actions as a model state and by revisiting the Florida Juice hypothetical in light of the prior sections' doctrines, illustrates how the MED's broad application causes confusion. Part V concludes by discussing the policy implications of this Article's analysis and sets forth a charge for regulatory reform.

II. APPLICATION OF OSHA REGULATIONS AND THE MULTIEMPLOYER DOCTRINE ("MED")

A. *Background on OSHA and Multiemployer Doctrine ("MED")*

Under the Occupational Safety and Health Act of 1970 ("Act" or "OSHA"), Congress attempted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" by requiring that: (1) employers "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to employees" and (2) employers "comply with occupational safety and health standards promulgated under [the Act]."³³ To enforce the legislative intent, Congress empowered the Secretary of Labor, through OSHA,

31. Brief for The Nat'l Ass'n of Home Builders et al. at 24–27, as *Amici Curiae* Supporting Respondent, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009) (No. 07-2191) (citing various specific regulations involving multiemployer situations that are clearer and narrower).

32. See *supra* notes 1–26 and accompanying text.

33. 29 U.S.C. §§ 651(b), 654(a) (2006).

to promulgate by rulemaking standards.³⁴ These promulgated standards are enforced through inspections by OSHA personnel that take place prior to an accident during routine visits or during an investigation following a reported accident.³⁵ If OSHA determines a violation is present, the alleged violator may be subject to civil or criminal penalties; penalties may be appealed to an administrative commission and subsequently to a United States Court of Appeals.³⁶

Under OSHA's Multiemployer Doctrine ("MED"), more than one employer at a multiemployer worksite may be cited for a hazardous condition.³⁷ Under the MED, OSHA will cite an employer, regardless of his common law relationship to the injured, if the employer: (1) creates the hazard, (2) exposes the injured to the hazard, (3) fails to correct the hazard when responsible for correcting a hazard, (4) controls the work-site, or (5) has general supervisory authority over the worksite where the injury occurs.³⁸

Traditionally, when a premises owner has been sued in a tort action employing the MED, it is implicitly, if not explicitly, as a controlling

34. See WEX MALONE, MARCUS PLANT & JOSEPH LITTLE, *WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS: CASES AND MATERIALS* 666 (2d ed. 1980).

35. *Id.* at 668. OSHA has two major prongs: promulgation of safety standards and inspections of worksites. For a generalized description of these duties, see OCC. SAFETY & HEALTH ADMIN., AT-A-GLANCE: OSHA (2011), available at <http://www.osha.gov/Publications/3439at-a-glance.pdf>. OSHA's jurisdiction includes: regulating and inspecting private sector employers except for self-employed, family farm workers, and government workers except in state plan states; approving and monitoring twenty-seven State Plan states covering private and public employers; and assisting Federal Agency Programs. See *OSHA Enforcement*, U.S. DEP'T OF LABOR, <http://www.osha.gov/dep/index.html> (last visited Nov. 25, 2011). For more information about OSHA inspections, see OCC. SAFETY & HEALTH ADMIN., OSHA FACT SHEET: OSHA INSPECTIONS, available at http://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf.

36. MALONE, PLANT & LITTLE, *supra* note 34, at 668-70; see also Zebrowski, *supra* note 24, at 1484-85 (explaining OSHA sanctioning procedures); Earl D. Heath, *The Implementation and Philosophy of the Williams-Steiger Occupational Safety and Health Act of 1970*, 25 FLA. L. REV. 249, 249-252 (1973) (detailing the history leading up to the Act and its application). For a detailed explanation of the citation and appellate process, see OCC. SAFETY & HEALTH ADMIN., EMPLOYER RIGHTS AND RESPONSIBILITIES: FOLLOWING A FEDERAL OSHA INSPECTION (2011), available at <http://www.osha.gov/Publications/osha3000.pdf>. The Occupational Safety & Health Review Commission ("OSHRC"), an independent agency separate from the Department of Labor, oversees the contest of an OSHA citation. During a contest of an OSHA citation, the initial "trial" level is a hearing before an administrative law judge ("ALJ") assigned by the OSHRC. From this hearing, a party may appeal for a review by the full OSHRC. An OSHRC decision may be appealed to the Federal circuit court in which the case arose or in the circuit where the employer maintains its principal office. *Id.* If the OSHRC does not exercise its discretionary review of the ALJ decision, the party may appeal directly to the applicable Federal circuit court. *About OSHRC*, OCC. SAFETY & HEALTH REV. COMM'N, <http://www.oshrc.gov/about/how-oshrc.html> (last visited Nov. 25, 2011).

37. See OCC. SAFETY AND HEALTH ADMIN., DEP'T OF LABOR, CPL 02-00-124, OSHA INSTRUCTION: MULTIEMPLOYER CITATION POLICY (Dec. 10, 1999).

38. *Id.*

employer.³⁹ However, the Multiemployer Citation Policy (“MCP”) itself states that “the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is *less than what is required of an employer with respect to protecting its own employees.*”⁴⁰ Further, the MCP is part of OSHA’s Field Inspection Reference Manual and does not have the force or effect of law.⁴¹

In fact, an Occupational Safety & Health Review Commission (“OSHRC”) overruled OSHA’s multiemployer-type citation as beyond its authority the first time OSHA cited an employer for exposing another employer’s employees to a hazardous condition.⁴² OSHA, realizing it lacked the power to enforce the MED citation scheme, issued a Notice of Public Comment for a new regulation establishing the MED.⁴³ The Notice, emphasizing the construction industry, was an early version of the MED citation scheme.⁴⁴ The Notice was retracted after a subsequent OSHRC accepted the MED citation scheme.⁴⁵ As this Article will argue, this retraction was a turning point in the multiemployer citation scheme that has produced negative externalities, such as costly litigation, inefficient allocation of resources among business premises owners and independent contractors, and general confusion.

Since the initial iterations by OSHA, multiple administrative commissions and subsequent appellate courts have adopted OSHA’s MED when imposing a duty of care on a third-party employer for the injury or death of an independent contractor’s employee.⁴⁶ However, its use, par-

39. *See, e.g., Kane v. J.R. Simplot Co.*, 60 F.3d 688, 694–95 (10th Cir. 1995) (attempting, under OSHA, to impose duty on owner based on its control of premises when worker fell from scaffolding).

40. OCC. SAFETY AND HEALTH ADMIN., *supra* note 30 (emphasis added).

41. *See Summit Contractors, Inc. (Summit I)*, 23 BNA OSHC 1769 (No. 05-0839, 2006), 2006 OSAHRC LEXIS 33, at *12, *17; *see also* Arthur G. Sapper, *The Multi-Employer Doctrine: End of the Line or a Chance for a Fresh Start?*, OCCUPATIONAL HAZARDS, June 2007, at 15, 16 (“[T]he rules that emerge from rulemaking tend to be more realistic and clearer, and enjoy the perception of greater legitimacy, than those that emerge from litigation.”).

42. *See Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974).

43. Citation Guidelines in Multi-employer Worksites, *supra* note 30 (proposing regulation to enforce OSHA violations in multiemployer situations, including when owners have safety responsibilities for worksite).

44. *See id.*

45. *See Sapper, supra* note 41; Brief for Sec’y of Labor at 11, 12, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009).

46. *E.g., McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918A, 2000), 2000 OSAHRC LEXIS 89, at *2 (upholding OSHA sanctioning of general contractor when subcontractor’s scaffolding posed hazard, though general contractor’s employees were not exposed); *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718 (No. 95-1449, 1999), 1999 OSAHRC LEXIS 38, at *1–*2 (upholding OSHA sanctioning of scaffolding lessor when construction site subcontractor injured by the collapse of the scaffolding).

McDevitt and *Access* represent the MED’s traditional application to construction industry

ticularly in tort actions, is debatable,⁴⁷ checkered,⁴⁸ and frequently questioned.⁴⁹ Further, whether plaintiffs may use OSHA in Florida tort actions to establish a duty of care is particularly questionable in light of Florida case law. This Article attempts to bring clarity by explaining that OSHA's failure to engage in notice and comment rulemaking for its current MCP and its precursors is the source for the current confusion. As well, this Article argues that a proper rulemaking process focused on precise rules, rather than general rules, will mitigate existing negative externalities highlighted by the Florida Juice hypothetical.⁵⁰

This Article emphasizes that the MCP and the MED, generally, in their current forms, are problematic because of the uncertainty surround-

worksites. This application is logical because OSHA's MCP emphasizes construction situations in its examples and explanations. See *supra* note 30 and accompanying text.

47. Evidencing the confusion surrounding the use of the MED in tort actions, United States appellate courts and district courts have been inconsistent in applying the MED, especially in non-construction tort actions. See *Calloway v. PPG Indus., Inc.*, 155 F. App'x 450, 455 (11th Cir. 2005) (per curiam) (stating that in the Eleventh Circuit, the MED has not been extended to premises owner when owner is not general contractor); *Maddox v. Ford Motor Co.*, No. 94-4153, 1996 WL 272385, at *3-4 (6th Cir. May 21, 1996) (stating once no duty established under state common law, OSHA cannot then create a duty); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711-12 (5th Cir. Unit A Oct. 1981) (refusing to extend duty owed under OSHA beyond employer's own employees in tort action); *Barrera v. E.I. DuPont de Nemours & Co.*, 653 F.2d 915, 920 (5th Cir. Unit A Aug. 1981) (stating in tort action against owner by independent contractor's employee that it is long settled in circuit that "OSHA does not create duties between employers and invitees, only between employers and their employees" (citations omitted)); *Cota v. Chiplin Enters., Inc.*, No. 1:04CV297, 2006 WL 2475770, at *3 (D. Vt. Aug. 25, 2006) (holding on summary judgment that "[t]he short answer is that OSHA does not impose liability on a property owner when a worker for an independent contractor is injured." (emphasis added)). But see *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (holding owner owed duty under OSHA in tort action when furnishing ladder because owner controlled workplace and had opportunity to comply with OSHA). The Fifth Circuit is the only circuit squarely to reject the MED. *IBP, Inc. v. Herman*, 144 F.3d 861, 865 n.3 (D.C. Cir. 1998). Since the Fifth Circuit split, the Eleventh Circuit has yet to address directly the MED. *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718 (No. 95-1449, 1999), 1999 OSAHRC LEXIS 38, at *31 n.12.

48. *IBP*, 144 F.3d at 865 n.3 (elaborating how MED "has somewhat of a checkered history" going through multiple iterations and challenges). As early as 1972, the problem of how to address multiemployer worksites under OSHA was being debated. See *Zebrowski*, *supra* note 24, at 1483.

49. See *Summit Contractors, Inc. (Summit II)*, 21 BNA OSHC 2020 (No. 03-1622, 2007), 2007 OSAHRC LEXIS 34, at *4, *8, *15-16, *18-19, *vacated*, 558 F.3d 815 (8th Cir. 2009), *remanded*, 22 BNA OSHC 1777 (No. 03-1622, 2009), 2009 WL 2857148, at *3; see also *Summit Contractors, Inc. (Summit I)*, 23 BNA OSHC 1769 (No. 05-0839, 2006), 2006 OSAHRC LEXIS 33, at *15 (stating that based on Supreme Court precedent, it is "no longer permissible to define 'employer' and 'employee' expansively in order to further the 'purpose' of the statute."); *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, (Nos. 97-1631 and 97-1727HA, 2005), 2005 OSAHRC LEXIS 16, at *4-6 (explaining that before OSHA may cite an entity as employer, OSHA must first satisfy *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992)'s agency test). This Article explains the *Darden* test further in Part III.B. But see *Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397 (3d Cir. 2007) (refusing to extend *Summit II*'s application when specific OSHA regulation explicitly referenced building owner's liability for asbestos hazards).

50. See *supra* note 29 and accompanying text.

ing whether a business premises owner may or may not be cited by OSHA, under its broad interpretations of the MCP and MED. This uncertainty as to a business premises owner's liability spurs the argument in tort proceedings that the business premises owner may be deemed an employer under OSHA and therefore owe a duty of care to comply with OSHA with respect to an independent contractor's employee. If the MCP were to be promulgated by informal rulemaking so as to be more nuanced, then all parties involved would have a clearer idea of potential liability and would plan accordingly.

B. *Use of OSHA to Establish a Duty Owed in Tort Actions*

Although the Act does not create a private cause of action,⁵¹ OSHA standards have been used to establish a duty of care in actions by an independent contractor's employee against a premises owner.⁵² An example of such use⁵³ is *Teal v. E.I. DuPont de Nemours and Co.*,⁵⁴ which arguably sets forth the prerequisites for applying the MED to premises owners in tort.⁵⁵

In *Teal*, the premises owner furnished a defective ladder to an independent contractor hired to dismantle and repair hydraulic bailers.⁵⁶ After falling from the ladder, the independent contractor's employee brought a negligence action against the owner alleging that it breached a duty of care under OSHA to furnish the employee with safe equipment and proper safety devices.⁵⁷ The employee's allegations of fault against the premises owner implied that the MED applied to his cause of

51. OSHA regulations do not create a private right of action. See *Jeter v. St. Regis Paper Co.*, 507 F.2d 973, 975 (5th Cir. 1975); MALONE, PLANT & LITTLE, *supra* note 34, at 670; see also *Minichello v. U.S. Indus., Inc.* 756 F.2d 26, 29 (6th Cir. 1985) ("OSHA regulations can never provide a basis for liability because Congress has specified that they should not.").

52. See, e.g., *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984). However, use of OSHA to establish a duty or standard of care has been criticized. See Richard S. Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROBS. 612, 635 (1974) (arguing Act's statutory language, in conjunction with workers' compensation law, supports the contention that OSHA only applies to direct employers). Miller, however, limited his assertion, citing an OSHRC commissioner who explained, "[T]he definition of employer and employee under the Act should be expanded to cover an employer who has the ability to control the work environment with respect to the hazards affecting the employer's employees." *Id.* at 635 n.137. But see *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (adopting assumption that where Congress defines employee circuitously, court must infer Congress intended to describe conventional master-servant relationship understood by common-law agency doctrine).

53. Cf. *Kane v. J.R. Simplot Co.*, 60 F.3d 688, 694-95 (10th Cir. 1995) (relying on *Teal* test to find no duty). For discussion of "*Teal* test," see *infra* text accompanying notes 61-70.

54. *Teal*, 728 F.2d at 804.

55. *Id.*

56. *Id.* at 801.

57. *Id.*

action.⁵⁸ Although the owner admitted to violating OSHA,⁵⁹ it argued that the plaintiff was not within the regulation's protected class.⁶⁰

Finding for the employee, the Court of Appeals for the Sixth Circuit held that under OSHA's specific duty clause,⁶¹ "[t]he class of employers who owe a duty to comply with the OSHA regulations is defined with reference to *control* of the workplace⁶² and opportunity to *comply* with the OSHA regulations."⁶³ Therefore, the *Teal* test states

58. *Id.* at 803–04.

59. *Id.* at 803.

60. *Id.*

61. The "specific duty" clause refers to 29 U.S.C § 654(a) (2006) titled "Duty of Employers and Employees," which sets out an employer's duty:

- (a) Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter.

Section 654(a)(1) is referred to as the "general duty" clause and arises when there is an alleged serious violation and no standard exists and the specific and stringent requirements of the general duty definition are met. *See* Heath, *supra* note 36, at 251–52. The Secretary of Labor has interpreted the "general duty" clause to run only to one's own employees and the "specific duty" clause, § 654(a)(2), to run to all employees that could be exposed on a common worksite. *IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C. Cir. 1998).

The "specific duty" clause argument is one of two justifications for applying the MED to premises owners. *See* Brennan v. Occupational Safety & Health Review Comm'n (*Underhill*), 513 F.2d 1032, 1038 (2d Cir. 1975) ("[S]pecific duty to comply with Act is not limited to situations where violation is linked to exposure of *his* employees to the hazard."). Proponents of the expansive interpretation of the specific duty clause argue that because the clause is ambiguous and lacks limiting language, the court should grant deference to the Secretary of Labor's expansive interpretation, which "furthers rather than frustrates the policy underlying the Act." *See* Universal Constr. Co. v. Occupational Health & Safety Review Comm'n, 182 F.3d 726, 729–30 (10th Cir. 1999). For discussion of the policy underlying the Act, see *supra* Part II.A.

However, Brennan's interpretation of the clause has been distinguished to state that OSHA is limited to exposure by the violating employer or those engaged in a common undertaking and excludes a third party or passerby. *United States v. Pitt Des Moines, Inc.*, 168 F.3d 976, 985 (7th Cir. 1999).

62. *Teal's* emphasis on the workplace is consistent with the second justification for the MED, the legislative intent argument. *See, e.g., Universal Constr. Co.*, 182 F.3d at 728, 730 (upholding OSHA citation against construction site's general contractor for subcontractor's violation based on specific duty clause and legislative intent of OSHA). The legislative intent argument focuses on the premises. *See Brennan*, 513 F.2d at 1038. The basis for the legislative intent argument is that "death and disability prevention" is the principal objective of the Act. H.R. REP. NO. 91-1291, at 23 (1970), reprinted in 6 LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT, 1970, at 853; *see also* MALONE, PLANT & LITTLE, *supra* note 34, at 666 (discussing OSHA's purpose as preventing industrial accidents). Brennan illustrates the application of this principle, reasoning that "it was the intention of Congress to encourage reduction of safety hazards to employees 'at their places of employment.'" 513 F.2d at 1038–39 (citations omitted). Therefore, even if the contractor's own employees were not exposed to a hazard, *someone's employee* was exposed to a hazard at *his* place of employment, thus making OSHA applicable. *Id.*

63. This will henceforth be referred to as the "*Teal* test." *Teal*, 728 F.2d at 804 (emphasis added). *But see* Davenport v. Summit Contractors, Inc., 612 S.E.2d 239, 243 n.8 (Va. Ct. App. 2005) (explaining courts upholding the MED against general contractors "overlook the fact that,

that for OSHA to be applicable, an independent contractor's injured employee must establish that: (1) the owner controlled the workplace and (2) the owner had an opportunity to comply with OSHA regulations.⁶⁴ Many courts overlook these prerequisites.⁶⁵

Under OSHA, to control the worksite means to determine the manner in which the work is to be done.⁶⁶ This is consistent with the common law definition of control, which is used to determine whether a worker is an employee or an independent contractor.⁶⁷ Therefore, the control factor under the *Teal* test is actually asking whether the owner, by exercising control, destroyed the independent contractor relationship.⁶⁸ Thus, viewing *Teal* from this perspective, even if an owner such as Florida Juice⁶⁹ violates OSHA standards, the owner would not be subject to the MED as long as the owner does not exercise such a degree of control as to destroy the independent contractor relationship.⁷⁰ However, because the MED and the MCP are applied so broadly, this limitation is not a definitive one and may possibly be read out by a court interpreting OSHA's broad MED and citation scheme; thus, creating greater uncertainty among participants at multiemployer worksites.

In fact, in *Ellis v. Chase Communications, Inc.*, the Sixth Circuit distinguished *Teal*: finding that *Teal* applies when an OSHA violation may be conclusive evidence of negligence but also finding that *Teal* does not allow conversion of an OSHA violation into a private cause of action by an independent contractor's employee against a premises owner.⁷¹ This intra-circuit confusion demonstrates the uncertainty sur-

in their cases, the party held liable *actually created* the worksite hazard, e.g., *Teal*, 728 F.2d at 801, *Brennan*, 513 F.2d at 1039.").

64. *Teal*, 728 F.2d at 804. Arguably, *Teal* involves more than an employer creating the hazard.

65. See, e.g., *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718 (No. 95-1449, 1999), 1999 OSAHRC LEXIS 38, at *23-*31 (upholding scaffolding lessor's OSHA violation citation when construction subcontractor was injured when the scaffolding collapsed).

66. See OCC. SAFETY AND HEALTH ADMIN., *supra* note 30 (a controlling employer is "an employer who has general supervisory authority over the worksite.").

67. See, e.g., *Cantor v. Cochran*, 184 So. 2d 173, 174-75 (Fla. 1966) (listing control as factor in determining whether independent contractor relationship destroyed); see also *infra* note 185 (discussing Florida law regarding employer-independent contractor relationship).

68. See, e.g., *Cantor*, 184 So. 2d at 174-75; see also *infra* note 185 (discussing Florida law regarding employer-independent contractor relationship).

69. See *supra* Part I.

70. See *Trowell v. Brunswick Pulp and Paper Co.*, 522 F. Supp. 782, 784 (D.S.C. 1981) (stating that OSHA does not create a duty of compliance with OSHA standards for a non-employee's benefit); see also *Schwab v. United States*, 649 F. Supp. 1319, 1330 (M.D. Fla. 1986) ("[A]s a general rule, 'there is no common law duty on the part of an owner to provide a safe place to work for employees of contractors engaged in the performance of work on the owner's premises.' The exception to this maxim is where an owner or general contractor actively supervises daily operations." (internal citations omitted)).

71. *Ellis v. Chase Commc'ns, Inc.*, 63 F.3d 473, 477-78 (6th Cir. 1995). But See *Ellis*, 63

rounding the use of OSHA in tort litigation, which results from the MED and its citation scheme being so broad due to its lack of notice and comment rulemaking.

For example, notwithstanding *Ellis*' limitation of *Teal*, business premises owners are still exposed to potential liability for the injuries to independent contractors' employees by the *Teal* court's reliance on the control factor and the subsequent interpretations of the MED and MCP by Occupational Safety & Health Review Commissions ("OSHRCs") and the appellate courts. As well, the control factor in *Teal* that this Article highlights may still be determinative regardless of *Teal*'s future applicability because if the premises owner exercises sufficient control over the worksite, it vitiates the independent contractor relationship and thus owes a duty under the common law. Thus, OSHA would not be creating a new duty that did not exist under the common law nor would it be expanding an existing duty under the common law.⁷²

However, the control factor in *Teal* was never fully addressed because the owner conceded that it owed a duty to comply with the OSHA regulations.⁷³ The control factor's importance, however, is clearer in *IBP, Inc. v. Herman*,⁷⁴ in which the court ruled in favor of the owner because the owner lacked the requisite control.⁷⁵ Moreover, illustrating how control remains the determinative factor, courts have held that, absent control, there is no duty owed by an owner even when it knows the independent contractor's method of repair, it inspects the pro-

F.3d at 478, 483 (Wellford, J., concurring) (noting that the majority failed to reconcile the Sixth Circuit case law of *Teal* and *Minichello v. United States Industries, Inc.*, 756 F.2d 26 (6th Cir. 1985), and that the concurring judge would limit *Teal* to its facts).

72. 29 U.S.C. § 653(b)(4) (2006) states:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

73. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 805 (6th Cir. 1984).

74. 144 F.3d 861, 865–66 (D.C. Cir. 1998) (involving a commission proceeding against premises owner who hired independent contractor); *see also* *Kane v. J.R. Simplot Co.*, 60 F.3d 688, 694–95 (10th Cir. 1995) (stating OSHA's specific duty clause does not apply to owner when independent contractor is hired and employer has no control over worksite); *France v. S. Equip. Co.*, 689 S.E.2d 1, 15 (W. Va. 2010) ("Courts appear to be nearly unanimous in holding that the owner of premises on which work is being done—whether by one contractor or by more than one independent contractor—is not a responsible 'employer' under OSHA" and citing various cases to support argument that where owner lacked control and limited inspections to those ensuring compliance with the contract, no duty was owed).

75. *IBP*, 144 F.3d at 865–66. *But see* *Barrera v. E.I. DuPont de Nemours & Co.*, 653 F.2d 915, 920–21 (5th Cir. Unit A Aug. 1981) (stating that "OSHA does not create duties between employers and [independent contractor's employees], only between employers and their employees" but finding for worker because owner committed an affirmative act of negligence).

gress of the job,⁷⁶ or it retains the right to ensure its independent contractor's compliance with OSHA standards.⁷⁷ Thus, until OSHA addresses its MED and current MCP, scholars and courts, before using OSHA to establish a duty of care or before using an OSHA violation as evidence of negligence, should read *Teal* and similar cases with a focus towards whether the owner exercised the requisite control over the independent contractor.

C. Use of OSHA Violation as Evidence of Negligence

While *Teal* interprets OSHA to construct its test for imposing a duty on an owner for an independent contractor's injured employee,⁷⁸ other courts, avoiding a broad reading of OSHA, permit proof of an OSHA violation⁷⁹ only as evidence of negligence.⁸⁰ In *Elliott v. S.D. Warren Co.*, the Court of Appeals for the First Circuit, citing sister courts, explained that because OSHA does not create a private right of action, a violation of an OSHA regulation can never be equated with negligence per se.⁸¹ Further, according to *Elliott*, an OSHA regulation is at best the equivalent of a safety statute—violation of which is merely

76. See *Calloway v. PPG Indus., Inc.*, 155 F. App'x 450, 452, 455 (11th Cir. 2005) (per curiam) (holding no duty owed by owner to independent contractor's employee who fell from rafters while installing a water line); *Kaczmarek v. Bethlehem Steel Corp.*, 884 F. Supp. 768, 778 (W.D.N.Y. 1995) (holding owner owed no duty to independent contractor's employee for ammonia gas exposure during repair because owner lacked requisite control).

77. See *Calloway*, 155 F. App'x at 453, 455.

78. *Teal*, 728 F.2d at 804.

79. In this Article, "proof of an OSHA violation," means to prove a violation under tort standards. Multiple courts have ruled that an OSHA citation, itself, cannot be used as evidence of negligence in a tort action. See, e.g., *Minichello v. U.S. Indus.*, 756 F.2d 26, 30 (6th Cir. 1985); *Miller*, *supra* note 52, at 633.

80. *Elliott v. S.D. Warren Co.*, 134 F.3d 1, 5 (1st Cir. 1998) (permitting OSHA violation as evidence of negligence in an action by subcontractor's employee against mill owner for injury incurred while constructing mill); see also *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238-39 (5th Cir. Unit B 1982) (permitting the use of OSHA violation as evidence of negligence; however, questioning whether OSHA regulations are even relevant in a claim against a non-employer but not reaching the question because it was not raised). *Rabon* is Eleventh Circuit precedent. See *infra* note 166-67 (discussing the Eleventh Circuit's adoption of Fifth Circuit case law).

However, compliance with OSHA standards cannot be used as evidence to absolve oneself of negligence. See *Minichello*, 756 F.2d at 30 (holding that in addition to OSHA standards not altering the civil rule of liability, compliance with OSHA standards cannot be used to absolve oneself from product liability action). But see *Martin v. MAPCO Ammonia Pipeline, Inc.*, 866 F. Supp. 1304, 1307-08 (D. Kan. 1994) (analogizing from OSHA admissibility cases, which held OSHA violation as not being conclusive proof of negligence or the absence of negligence, when admitting compliance with state safety standard as non-conclusive evidence of the absence of negligence).

81. *Elliott*, 134 F.3d at 4.

evidence of negligence.⁸² Elaborating further,⁸³ other courts have ruled that prior to admitting an OSHA violation as evidence of negligence, the court must first find that the owner owed the worker a duty under state law.⁸⁴ If no duty is owed under state law, then an OSHA violation cannot be used as evidence of negligence.⁸⁵

While some courts permit the admission of an OSHA violation as evidence of negligence in actions against a premises owner,⁸⁶ other courts have held that OSHA and similar private standards⁸⁷ cannot even be admitted.⁸⁸ In *Merritt v. Bethlehem Steel Corporation*, the Court of Appeals for the Seventh Circuit explained that even if OSHA and private standards⁸⁹ applied to the owner in an action by an independent contractor's employee, "the regulations could not be used to expand or otherwise affect [the owner's] common law duties or liabilities under a negligence per se theory, or as evidence of an expanded standard of care."⁹⁰ *Merritt* further elaborated that to consider an owner to be an employer under OSHA would be inconsistent because the same owner would not be afforded a similar status under state workmen's compensation laws.⁹¹ Furthermore, contrary to criticism,⁹² multiple courts have

82. *Id.* at 5 (applying Maine law).

83. *Id.*; see *McCarthy v. Weathervane Seafoods*, No. 10-cv-395-JD, 2011 WL 2174036, at *6 (D.N.H. June 1, 2011) (limiting *Elliott* as not allowing OSHA to be used to establish a basis for negligence per se claim).

84. *Rollick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3d Cir. 1992).

85. *Cf. id.* at 1014 (admitting OSHA as evidence of a standard of care after determining that a duty was owed under state law).

86. *E.g.*, *Elliott*, 134 F.3d at 5.

87. Private standards include National Electric Safety Code or National Electric Code. *See, e.g.*, *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 608 (7th Cir. 1989) (holding private standards inadmissible as evidence of negligence in action against an owner by independent contractor's employee who was electrocuted during a fall).

88. *See, e.g., id.* at 604–05 (holding OSHA violation inadmissible as evidence of negligence in action against owner by independent contractor's employee who was electrocuted during fall). *But see* *Wendland v. AdobeAir, Inc.*, 221 P.3d 390, 395, 395 n.8 (Ariz. Ct. App. 2009) (citing cases providing that OSHA rules may be relevant to establishing an applicable standard of care in a tort action).

89. *See supra* note 87.

90. *Merritt*, 875 F.2d at 604–05, 608 (citations omitted). *Merritt* went onto to explain that even as evidence of negligence, there was no question for a jury since the owner satisfied his duty by warning that the lines were energized. *Id.* at 605.

91. *Id.* at 608–09. In fact, if one of the owner's own workers performed the act, the worker would have no additional compensation under common law. *Id.* *Merritt* also cited the superior knowledge of the independent contractor as a reason for not extending OSHA to the premises owner. *Id.* at 605 ("Where an invitee is possessing of knowledge equal or superior to that of the landowner of the hazard causing the injury, the landowner is relieved of any duty which might have otherwise been imposed." (citation omitted)); *see also* *Trowell v. Brunswick Pulp and Paper Co.*, 522 F. Supp 782, 784 (D.S.C. 1981) (stating owner cannot be held to a higher standard of care than common law and that the admission of an OSHA violation is highly prejudicial).

92. *See generally* *Nichols*, *supra* note 20 (arguing workmen's compensation insurance may enrich third-parties unjustly).

concurred with *Merritt*⁹³ and held that the owners do not escape liability under workmen's compensation laws because they pay premiums for the independent contractor's workmen's compensation coverage.⁹⁴ Therefore, to hold the owner liable for the injury to an independent contractor's employee would mean to subject the owner to greater liability and expense than if the owner hired his own employee to perform the work.⁹⁵ However, workers like Bobby in the Florida Juice hypothetical, who work for uninsured independent contractors, may be without recourse absent a state safety net. Because of a lack of proper notice and comment rulemaking, OSHA's MED and its citation scheme do not account for this potential impact on the cost allocation between employers and independent contractors and the possible effects on workmen's compensation scenarios like Bobby's.

III. QUESTIONING AND REJECTION OF THE MULTIEMPLOYER DOCTRINE (MED)

While *Merritt*⁹⁶ and other courts⁹⁷ refused to extend the use of OSHA to establish evidence of negligence, other courts simply rejected OSHA's MED⁹⁸ or the MED's underlying rationale.⁹⁹ In the past decade, Occupational Safety & Health Review Commissions ("OSHRCs")¹⁰⁰ and Congress¹⁰¹ have criticized the MED. The follow-

93. *Merritt*, 875 F.2d at 608–09.

94. *New Mexico Elec. Serv. Co. v. Montanez*, 551 P.2d 634, 637–38 (N.M. 1976).

95. *Id.* The court added that the employer generally hires an independent contractor to perform work that the owner is not equipped or trained to do. *Id.* However, again, if the owner was actually negligent, the owner would be liable based on a breach of a common law duty to commit no harm against another.

96. *Merritt*, 875 F.2d at 608–09.

97. *See, e.g., Trowell v. Brunswick Pulp and Paper Co.*, 522 F. Supp. 782, 784 (D.S.C. 1981) (admitting OSHA violations would have a prejudicial effect).

98. *E.g., Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A Oct. 1981).

99. *E.g., Summit Contractors, Inc. (Summit I)*, 23 BNA OSHC 1769 (No. 05-0839, 2006), 2006 OSAHRC LEXIS 33, at *15 n.2 (explaining that the legal foundation for multiemployer liability has been swept away by *Darden*). For discussion of *Darden*, see *infra* Part III.A.

100. *See Summit Contractors, Inc. (Summit II)*, 21 BNA OSHC 2020 (No. 03-1622, 2007), 2007 OSAHRC LEXIS 34, at *8–*16, *vacated*, 558 F.3d 815 (8th Cir. 2009), *remanded*, 22 BNA OSHC 1777 (No. 03-1622, 2009), 2009 WL 2857148, at *3.

101. During the writing of this Article, Congress was debating legislation that would have strengthened OSHA's enforcement powers and reach. *See Protecting America's Worker Act*, S. 1166, 112th Cong. (2011). Although, at the time of publication, Congress has not voted on this legislation, Congress may still propose similar legislation in the next session as it has done in past ones. *See Press Release, U.S. Senator Patty Murray, Murray Introduces Major Legislation to Protect Workers Across America* (June 9, 2011), available at <http://murray.senate.gov/public/index.cfm/2011/6/murray-introduces-major-legislation-to-protect-workers-across-america> (announcing that Senator Murray, Chairwoman of the Health, Education, Labor, & Pensions Subcommittee on Employment and Workplace Safety, is currently calling for more effective OSHA penalties to protect workers).

ing sections focus on three cases that influenced the current analysis of OSHA's MED and illustrate how one state has approached the business premises owner situation, absent OSHA's MED.

A. *The Issue of the Ambiguously-Defined Employer*

In *Nationwide Mutual Insurance Co. v. Darden*,¹⁰² the United States Supreme Court addressed whether an individual was an employee or independent contractor under the Employment Retirement Income Security Act ("ERISA").¹⁰³ In its ruling, the Court adopted the assumption that where Congress defines an employee circuitously, the court must infer that Congress intended to describe the conventional master-servant relationship understood by the common-law agency doctrine.¹⁰⁴ Therefore, an individual's employment status would be determined by the adopted *Darden* test.¹⁰⁵

Since *Darden*, OSHRCs have applied the *Darden* test rather than the MED to determine if an individual is an employee because, similar to ERISA, the OSH Act circuitously defines employee¹⁰⁶ and employer.¹⁰⁷ For example, in *Allstate Painting and Contracting, Inc.*,¹⁰⁸ a commission stated that before an entity is cited as an employer, the Secretary of Labor must first satisfy the *Darden* test rather than simply prove whether the entity had control over the person.¹⁰⁹ Later, in *Summit Contractors, Inc. (Summit I)*,¹¹⁰ an OSHRC stated that the *Darden* test must be applied because the "multi-employer citation policy . . . cannot

102. 503 U.S. 318 (1992).

103. *Id.* at 319–21.

104. *Id.* at 322–23. The Court's holding was based on a similarly vague definition of employee in a case involving the Copyright Act of 1976. *Id.*

105. *Id.* at 323–24 (setting forth the *Darden* test).

106. 29 U.S.C. § 652(6) (2006) ("'[E]mployee' means a person of an employer who is employed in a business of his employer which affects commerce.").

107. 29 U.S.C. § 652(5) (2006) (stating in pertinent part, "'[E]mployer' means a person engaged in a business affecting commerce who has employees . . ."). For further discussion regarding OSHA's definition of employer, see *supra* Part II.A & note 52.

For application of the *Darden* test to OSHA, see *Summit Contractors, Inc. (Summit I)*, 23 BNA OSHC 1769 (No. 05-0839, 2006), 2006 OSAHRC LEXIS 33, at *11–*16. *But see* Sec'y of Labor v. Trinity Indus., Inc., 504 F.3d 397, 402 (3d Cir. 2007) (limiting *Darden* to ERISA but stating OSHA asbestos regulation at issue specifically addressed premises owner's duty); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 260–61 (2006) (stating that "[t]he Supreme Court has not yet directly ruled on what the definition of an employment relationship is under OSHA," but emphasizing OSHRCs have explicitly stated that they will follow *Darden*).

108. *Allstate Painting and Contracting Co.*, 21 BNA OSHC 1033 (Nos. 97-1631 and 97-1727, 2005), 2005 OSAHRC LEXIS 16.

109. *Id.* at *4–*6.

110. *Summit I*, 23 BNA OSHC 1769, 2006 OSAHRC LEXIS 33; *see also* AAA Delivery Servs., Inc., 21 BNA OSHC 1577 (No. 02-0923, 2006), 2006 OSAHRC LEXIS 14, at *10–*13

confer authority to cite [a general contractor] It is well settled that the [MCP as a part of the Field Inspection Reference Manual] does not have the force or effect of law.”¹¹¹ Thus, if the MCP is a defective citing mechanism, the use of an OSHA citation or potential citation to establish a duty of care on a business premises owner or the use of an OSHA citation or potential citation as evidence of negligence presents a quandary that cannot be resolved without proper notice and comment rulemaking. *Summit I* further emphasized that after *Darden*, employer and employee could no longer be defined expansively based on the legislative intent of the Act,¹¹² but rather must be defined by the traditional “common-law sense.”¹¹³ Therefore, based on *Darden* and *Summit I*, if the MED cannot define who is an employer in OSHRC proceedings, then it is questionable whether OSHA can define who is an employer in tort actions. This uncertainty of who is an employer under OSHA’s MED is at the crux of the negative externalities of the current MED and multiemployer citation scheme.

B. A Circuit Court’s Missed Opportunity to Confront OSHA’s Ambiguous Employer and Determine the Legality of MCP

I. THE DEBATE REGARDING *DARDEN*’S APPLICABILITY

In *Summit Contractors, Inc. (Summit II)*,¹¹⁴ an OSHRC held that the MED could not be used to sanction a controlling employer¹¹⁵ for failing to ensure that other employers comply with safety and health standards when the controlling employer neither created the alleged hazard nor had employees exposed to the alleged hazard.¹¹⁶

Reviewing on appeal the OSHRC’s holding, the Eighth Circuit

(applying *Darden* test to determine employment relationship). *But see Trinity Indus., Inc.*, 504 F.3d at 402.

111. *Summit I*, 23 BNA OSHC 1769, 2006 OSAHRC LEXIS 33, at *12.

112. *Id.* To further the purpose of the statute is one of OSHA’s major arguments for expanding the MED’s definition of employer. *See supra* notes 61–62.

113. *Summit I*, 23 BNA OSHC 1769, 2006 OSAHRC LEXIS 33, at *15, *15 n.2 (explaining that legal foundation for multiemployer liability has been swept away by *Darden*). *But see Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010), 2010 WL 3341872, at *7–*9 (acknowledging that *Darden* is used to determine whether “the cited entity has any employees” when statutory applicability is in question and to determine whether a “particular statutory employer has an employment relationship with a particular worker,” but claiming that these *Darden*-relevant inquiries were irrelevant to a multi-employer construction worksite case in which the “lack of an employment relationship is presumed.”).

114. *Summit Contractors, Inc. (Summit II)*, 21 BNA OSHC 2020 (No. 03-1622, 2007), 2007 OSAHRC LEXIS 34, at *1, *2–*4 (involving sanctions against general contractor for subcontractor’s violations).

115. The term, controlling employer, comes from OSHA’s Multiemployer Citation Policy. *See* OCC. SAFETY AND HEALTH ADMIN., *supra* note 30.

116. *Summit II*, 21 BNA OSHC 2020, 2007 OSAHRC LEXIS 34, at *4–*5.

addressed the argument of whether the MCP provides a more expansive definition of employer and employee than permitted by Supreme Court precedent, *Nationwide Mutual Insurance v. Darden*.¹¹⁷ The Supreme Court held in *Darden* that if Congress leaves the definition of “employee” unclear, then the courts should construe the term according to common law agency doctrine.¹¹⁸ The court explained that previous OSHRCs premised the MCP on 29 U.S.C. § 654(a)(2), the specific duty clause, which “does not base an employer’s liability on the existence of an employer-employee relationship.”¹¹⁹ However, the court relied heavily on its own circuit precedent for this finding. Thus, its conclusion should be limited to the Eighth Circuit because its rationale for supporting the current multiemployer citation scheme is questionable under *Darden* and the case facts of *Summit*.¹²⁰

Subsequent to the Eighth Circuit ruling, a later OSHRC addressed, *inter alia*, whether *Darden* precluded the imposition of the OSHA in the multiemployer context.¹²¹ The majority of the commission acknowledged that *Darden* is used to determine whether “the cited entity has any employees” when statutory applicability is questioned and is used to determine whether a “particular statutory employer has an employment relationship with a particular worker.”¹²² However, the majority claimed that these *Darden*-relevant inquiries were irrelevant to a multiemployer construction worksite case in which the “lack of an employment relationship is presumed.” As a basis for this conclusion, the majority also relies on the specific duty clause of the Act.¹²³

However, this expansive reasoning may be limited to the facts of the case. First, the citation occurred in the construction context and the majority used the construction context as a reason for not applying *Darden*. Therefore, *Darden* may still be applicable when determining the employer in a multiemployer situation involving a premises owner in a non-construction context.

The dissenting commissioner in this commission proceeding explained in detail the perceived errors in the majority’s reasoning with

117. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 827–28 (8th Cir. 2009); *see also infra* Part III.A (discussing *Darden*); *supra* Part II.A (discussing why the MCP is relevant to this Article’s analysis of a business premises owner’s tort liability).

118. 558 F.3d at 827.

119. *Id.* at 828.

120. *Id.* (citing *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599 (8th Cir.1977)). However, the dissent questions whether *Knutson* is binding precedent in the circuit. *See id.* at 829 n.8 (Beam, J., dissenting).

121. *Summit Contractors, Inc.*, 21 BNA OSHC 1196 (No. 05-0839, 2010), 2010 WL 3341872, at *2.

122. *Id.* at *8.

123. *Id.*

respect to its interpretation of the MCP and *Darden*. Elaborating, the dissenting commissioner explained that the *Darden* Court expressly rejected the rationale used by the majority to justify the MCP—i.e., that the MCP and its expansive definition of the employer-employee relationship achieve the Act's remedial objective.¹²⁴ Moreover, the dissenting commissioner noted that the conflict between the MCP and the Act has yet to be addressed by the Eleventh Circuit. Specifically, the commissioner explained how the MCP contradicts § 4(b)(4).¹²⁵ As well, to further his reasoning that the Act did not intend an expansive definition of employer, the dissenting commissioner cites to failed proposed legislation in the 1990s that sought to amend the Act in order to make general contractors responsible for subcontractors' violations.¹²⁶ Finally, the dissenting commissioner noted previous court opinions citing how *Darden* contradicts OSHA's attempts to justify the MCP and how the commission has previously adopted *Darden*, explaining that under *Darden*, it is not enough that the employer controls the overall worksite; instead, the employer must control the workers.¹²⁷

Second, in *Summit*, the cited employer's employees were exercising "overall authority regarding safety related matters at the worksite;" situations like Florida Juice are the polar opposite. In fact, the OSHRC previously addressed a similar issue in *Sasser Electric & Manufacturing Company*, a case involving a violation by a subcontractor at a premises owner's property. The commission concluded that absent the exercise of control by the owner, "when some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise so long as . . . reliance is reasonable and the [owner] has no reason to foresee that the work will be performed unsafely."¹²⁸ Moreover, the *Sasser* commission elaborated that "it is natural for an employer to rely upon the specialist to perform work related to that specialty safely in accordance with OSHA standards."¹²⁹ Therefore, in light of these unresolved issues,

124. *Id.* at *12 (Commissioner Thompson, dissenting).

125. *Id.* at *14; *see also infra* Part III.C (making a similar argument regarding 29 U.S.C. § 653(b)(4)). 29 U.S.C. § 653(b)(4) (2006) states:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

126. *Summit*, 21 BNA OSHC 1196, 2010 WL 3341872, at *16.

127. *Id.* at 18.

128. *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133 (No. 82 178, 1984), 1984 WL 34886, at *3 (involving a subcontractor crane operator crashing crane into electrical wires on premises owner's property).

129. *Id.*

Darden and its relevance to the Multiemployer Citation Policy (“MCP”)¹³⁰ should be explored further.¹³¹

II. THE DEBATE REGARDING THE MCP’S PROCEDURAL LEGALITY UNDER ADMINISTRATIVE LAW

Besides addressing *Darden*’s applicability, the Eighth Circuit also was confronted with the questioned legitimacy of the MCP. In the commission proceeding appealed to the Eighth Circuit, the commission stated that the MCP was inconsistent with construction safety regulations¹³² and that the major support for using the MED to extend liability to a general contractor¹³³ was based on commission dictum that took on a life of its own.¹³⁴ Therefore, OSHA’s only relevant argument for extending the MED was its MCP, which the commission found unpersuasive.¹³⁵ The commission reiterated that policy statements are not given the same deference as promulgated standards.¹³⁶

130. OCC. SAFETY AND HEALTH ADMIN., *supra* note 30.

131. Additionally, some may argue that *Summit* might be of limited application. One, the decision only applies to the construction industry. See Steven G. Biddle, “Controlling Employer” No Longer Liable Under Multi-Employer Worksites Doctrine, ASAP: A Littler Mendelson Time Sensitive Newsletter, June 2007, at 1–2, available at <http://www.littler.com/files/press/pdf/16730.pdf>; Jackson Lewis, *Federal OSHA Review Commission Overturns Enforcement Policy for Multi-Employer Construction Job Sites*, May 9, 2007, available at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1113> (last visited Nov. 27, 2011). Two, general contractors may still be cited for safety and health hazards if they expose their own employees to a hazard or create a hazard. *Id.* Three, *Summit* should be limited to its facts because Summit Contractors assumed significant control over the operations, inspected the worksite daily, actively corrected previous violations, and reserved the right to remove subcontractors’ employees from the jobsite. See Summit Contractors, Inc., 22 BNA OSHC 1777 (No. 03-1622, 2009), 2009 WL 2857148, at *2. In essence, Summit Contractors retained the requisite control under the *Teal* test. See *supra* notes 63–64 and accompanying text. These responsibilities exercised by Summit Contractors are distinct from those of a premises owner, such as Florida Juice, and should be treated differently. See also Sasser Elec. & Manuf’g, Co., 11 BNA OSHC 2133, 1984 WL 34886, at *3 (“[W]hen some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist’s expertise so long as . . . reliance is reasonable and the [owner] has no reason to foresee that the work will be performed unsafely.”). However, the current MED leaves open the possibility that these distinct situations can be potentially treated the same, causing greater confusion for parties and courts.

132. Summit Contractors, Inc. (*Summit II*), 21 BNA OSHC 2020 (No. 03-1622, 2007), 2007 OSAHRC LEXIS 34, at *13–*19.

133. See Grossman Steel & Aluminum Corp., 4 BNA OSHC 1185 (No. 12775, 1976), 1976 OSAHRC LEXIS 528, at *11, *11 n.6.

134. *Summit II*, 21 BNA OSHC 2020, 2007 OSAHRC LEXIS 34, at *6–*7.

135. *Id.* at *8–*9, *15–*16.

136. *Id.* at *15 (citing “*cf. Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (policy statements while ‘entitled to respect’ are not given *Chevron* deference like promulgated standards”). The commission also reiterated that OSHRCs are not a policy-setting agency. *Id.*; see also Marx, *supra* note 30, at 177 n.17 (“There is no reference to multi-employer worksites in the Act or its legislative history.”).

Pursuant to 5 U.S.C. § 553, OSHA may promulgate standards, or informal rules, through a

On appeal, the Court of Appeals for the Eighth Circuit reversed the OSHRC's ruling, holding that the MCP was consistent with construction safety regulations.¹³⁷ The Eighth Circuit relied heavily on an interpretation of the construction-specific regulations and on its binding circuit precedent to find a duty owed by Summit. The court also highlighted that Summit maintained four supervisors on site at all times. Importantly, these supervisors also inserted themselves in the supervising of the safety techniques of the subcontractor's employees.¹³⁸ In its reasoning, the court explained the confusion surrounding the multiemployer worksite dilemma, noting how the Court of Appeals for the D.C. Circuit has questioned whether the MCP's controlling employer citation policy violates OSHA's regulatory framework.¹³⁹

Additionally, the court noted an amicus argument that the Secretary of Labor lacked the legal capacity to enforce the MCP because the policy was not adopted pursuant to the informal rulemaking procedures.¹⁴⁰

process known as "Notice and Comment Rulemaking." See 5 U.S.C. § 553 (2006). These legislative rules have the same force as statutes. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.1 (3d ed. 1994). The major procedural requirements are:

Notice of the 'legal authority under which rule is proposed'; notice of the 'terms or substance of the proposed rule or a description of the subjects and issues involved'; a comment period during which 'interested persons [shall have] an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation'; and production, after 'consideration of the relevant matter presented [of a] concise general statement of [the rules'] basis and purpose.

RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASE AND MATERIALS 337 (5th ed. 2006). Notice and Comment Rulemaking, however, is not required for general statements of policy. 5 U.S.C. § 553(b)(3)(A). That said, general statements of policy lack the binding force of law; otherwise, the policy statements are rules and must be promulgated as rules consistent with the procedures of 5 U.S.C. § 553. See DAVIS & PIERCE, *supra*, at § 6.2.

According to Professors Davis and Pierce, Notice and Comment Rulemaking and general statements of policy differ in three major respects: their procedures, their binding effect, and their reviewability. *Id.* First, an agency, with certain exceptions, cannot promulgate a rule without following notice and comment procedures while an agency's creation of a policy statement is exempted from notice and comment procedures. *Id.* Second, while a rule can bind the public, a general statement of policy cannot. *Id.* Third, reviewability varies between rules and general statements of policy depending on ripeness, exhaustion, and finality. *Id.*

137. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 825 (8th Cir. 2009).

138. *Id.* at 824. Similar to the *Teal* test, control is a major factor in this opinion.

139. *Id.* at 821; see also *supra* Part II.A (explaining why the MCP is important to this Article's analysis of a business premises owner's liability in tort actions).

140. *Id.* at 826–27 n.6 (noting that the Supreme Court has explained that "Congress did not intend for [the] OSHRC to use its 'adjudicatory power to play a policymaking role' Therefore, the Secretary may be required to submit its multi-employer worksite policy to the informal rulemaking process, unless the multi-employer citation policy is an interpretive rule or a statement of policy."); see also 5 U.S.C. § 551(4) (2006) ("'[R]ule' means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or

However, the court did not reach the argument because it was raised by an amicus brief.¹⁴¹

On remand, an OSHRC panel, relying in part on an earlier OSHRC panel's decision, held that the MCP did not require informal rulemaking because the MCP allegedly does not create in fact or law a liability on the employer.¹⁴²

This Article argues that the OSHRC is misguided in its conclusion and its reliance on a 1977 commission precedent and that OSHA's failure to engage in notice and comment rulemaking is the genesis for the current state of confusion surrounding business premises owner tort liability with respect to an independent contractor's employees. The MCP does create a duty that would not exist otherwise. As explained previously, an OSHRC panel vacated an OSHA's multiemployer citation as beyond its authority the first time OSHA cited an employer for exposing another employer's employees to a hazardous condition.¹⁴³ Following the proper course set forth in the APA, OSHA began the rulemaking process by issuing a notice of public comment for a new regulation establishing the MED citation scheme.¹⁴⁴ The notice, emphasizing the construction industry, was an early version of the MCP.¹⁴⁵ The notice, however, was retracted after a subsequent OSHRC accepted the MED in 1976.¹⁴⁶ In fact, the case¹⁴⁷ relied on by the commission to support the MED citation scheme's extension to a general contractor cites to *Grossman Steel & Aluminum Corporation*, which did not even involve a gen-

practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.”).

141. Because the Eleventh Circuit has yet to address the validity of the MED, it is in an ideal position to resolve the conflict and spur OSHA to engage in overdue notice and comment rulemaking with regards to the MCP and MED, preventing future confusion in commission proceedings and tort cases.

142. *Summit Contractors, Inc.*, 22 BNA OSHC 1777 (No. 03-1622, 2009), 2009 WL 2857148, at *3 (citing *Limbach Co.*, 6 BNA OSHC 1244, 1246 (No. 14302, 1977), 1977 WL 7916).

143. *See Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974).

144. Citation Guidelines in Multi-employer Worksites, *supra* note 30 (proposing regulation to enforce OSHA violations in multiemployer situations, including when owners have safety responsibilities for worksite); *see also* 5 U.S.C. § 553(b) (2006) (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with the law.”).

145. *See* Citation Guidelines in Multi-employer Worksites, *supra* note 30 (proposing regulation to enforce OSHA violations in multiemployer situations, including when owners have safety responsibilities for worksite); *see also* 5 U.S.C. § 553(b) (2006).

146. *See Sapper*, *supra* note 41, at 16; Brief for Sec’y of Labor at 11–12, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009) (No. 07-2191); *see also Limbach Co.*, 6 BNA OSHC 1244, 1977 WL 7916, at *3 (noting that OSHA retracted proposed rules after subsequent decision found a citation that was a precursor to the current MCP a valid action).

147. *Limbach Co.*, 6 BNA OSHC 1244, 1977 WL 7916, at *2–*3.

eral contractor. Further, the *Grossman Steel & Aluminum Corporation* commission acknowledged that it was performing quasi-rulemaking in an adjudication—or, at best, an advisory opinion—explaining:

The instant case does not involve an employer who created a hazard to which employees other than his own were exposed, nor does it involve a general contractor. *Our discussion of the responsibilities of such employers is therefore dictum.* We cannot, however, consider the liability of one particular class of construction employer in a vacuum. The responsibilities of all contractors on a construction site are intertwined, and must be determined in a coherent fashion. *Therefore, although some of the rules set forth herein do not apply to this particular case, we fully expect to follow them in appropriate cases.*¹⁴⁸

Thus, the basis for the current substantive change in an employer's duty is based on an advisory opinion or, at the very least, a commission acting beyond its substantive limitations. What makes this analysis even more perplexing is that the OSHRC is not a policy-setting agency, yet OSHA has cited to this commission's opinion for support.¹⁴⁹ OSHA, itself, promulgates regulations and enforces the regulations while the OSHRC adjudicates challenges to OSHA citations. In fact, during the legislative process, some senators raised concerns about giving OSHA all three typical administrative tools—prosecuting, rulemaking, and adjudicating.¹⁵⁰ Therefore, stating that an OSHRC panel expanded OSHA's citation enforcement power by an adjudication presents a quandary.¹⁵¹ However, it was this adjudication which fortified the Secretary of Labor's current MCP and the then-nascent version of the MED which led to the MCP's present form that does affect substantive rights. Moreover, the lack of rulemaking creates greater confusion at the worksite. With how fungible the MED and its MCP are, a business premises

148. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976), 1976 OSAHRC LEXIS 528, at *11 n.6 (emphasis added). Furthermore, as the dissenting commissioner notes, the majority relies on a National Labor Relations Board opinion in order to distinguish a circuit court opinion that was factually indistinguishable. *Id.* at *19 n.11 (Commissioner Moran, dissenting). *But see* Reply Brief for Sec'y of Labor at 6–7, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009) (citing the rationale in *Brennan v. Occupational Safety & Health Review Comm'n*, 513 F.2d 1032 (2d Cir. 1975), for MED).

149. *See* Reply Brief for Sec'y of Labor at 33–35, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009).

150. *See* *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 65 (1st Cir. 1985) (discussing legislative history of OSHA).

151. *Id.* (noting that Congress specifically did not place rulemaking powers in a body independent of OSHA); *see also* *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153–54 (1991) (noting that Congress did not “expect the Commission to possess authoritative interpretative powers” and that the Court could not “infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role”) (emphasis in original). *But see* *Limbach Co.*, 6 BNA OSHC 1244, 1977 WL 7916, at *3 (rejecting the claim that the *Grossman Steel* commission acted in a prosecutorial manner).

owner, absent the owner asserting control over the worksite, may arguably not be on notice of the extent of its liability to an independent contractor's employees under OSHA and its exposure to a possible subsequent tort action.¹⁵² Additionally, one may question whether the MCP is truly a policy statement and not a substantive rule cloaked in a policy statement's dress.

The 1977 OSHA review commission's decision, which the *Summit II* commission on remand relied upon, explained that MED is merely a policy statement, and thus, was exempted from the notice and comment requirements of rulemaking.¹⁵³ The APA does not define policy statements; however, a 1947 Attorney General Manual defined general statements of policy to mean agency "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."¹⁵⁴ The manual also explained that the statement is not binding and is more a statement of intent.

To determine if a policy statement affects substantive rights and thus must be categorized as a rule subject to APA rulemaking procedures, courts often apply the legal effect test.¹⁵⁵ When evaluating the

152. See *supra* note 29.

153. *Limbach Co.*, 6 BNA OSHC 1244, 1977 WL 7916, at *2-*3; see also 5 U.S.C. § 553 ("Except when notice or hearing is required by statute, [the subsection regarding notice and comment rulemaking] does not apply (A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . .").

154. U.S. DEP'T OF JUSTICE, ATTORNEY GEN.'S MANUAL ON THE ADMIN. PROCEDURE ACT 30 n.3 (1947), available at http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE_WORKS/AG03.HTM#RF3 (last visited Aug. 9, 2010). The Attorney General's Manual is given substantial weight because the Attorney General was actively involved in the promulgation of the APA. See *Pacific Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974).

In his lengthy dissent to the ruling in *Summit*, Commissioner Thompson explained that the Tenth Circuit's *Universal Construction* opinion, which upheld an OSHA citation against a construction site's general contractor for a subcontractor's violation based on the specific duty clause and legislative intent of the Act, gave *Chevron*-style deference to the MCP. *Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010), 2010 WL 3341872, at *17 n.18 (Commissioner Thompson, dissenting); *Universal Constr. Co. v. Occupational Health & Safety Review Comm'n*, 182 F.3d 726 (10th Cir. 1999). However, as Commissioner Thompson elaborated, the *Universal* holding was prior to the Supreme Court holding in *Christensen* that "interpretations . . . in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Summit*, 23 BNA OSHC 1196, 2010 WL 3341872, at *17 n.18 (Commissioner Thompson, dissenting) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). Commissioner Thompson also notes that the Secretary of Labor has "never supplied any analysis whatsoever of the legal authority supporting the [MCP], let alone the multiple changes of course in her guidelines." *Id.* at *34 (Commissioner Thompson, dissenting). However, the majority of the commission reasoned that the Secretary of Labor did not need to engage in notice and comment rulemaking because the MCP "imposes no new duties on employers, and is, therefore not a standard or substantive rule." *Id.* at *2 n.5 (majority opinion). However, the majority may be mistaken because under the MCP, a premises owner such as Florida Juice presumptively now owes a duty to an independent contractor's employee that it did not previously owe under the Act, OSHA regulations, or common law.

155. *CASS ET AL.*, *supra* note 136, at 448.

legal effect, courts evaluate: “[1] the language of the statement, [2] the circumstances of its promulgation, and [3] [the] way in which the agency itself characterizes it.”¹⁵⁶ Describing this legal distinction between a policy statement exception and an agency policy requiring rulemaking, the Court of Appeals for the D.C. Circuit emphasized that a policy statement does not establish a “binding norm” and is not “determinative of [] issues or rights.”¹⁵⁷ However, OSHA’s MCP directly conflicts with this definition of a policy statement. Although the MCP began as mere guidance, it has become a de facto law of OSHA, affecting the substantive rights of employers at multiemployer worksites well beyond the construction industry and causing inefficient allocation of resources and costly litigation as evidenced by the Florida Juice hypothetical. The language of the MCP provides how to evaluate reasonable care, defines exposing, creating, controlling, and correcting employers, and goes beyond mere explanation of policy.¹⁵⁸ Therefore, it should be subject to notice and comment rulemaking. More succinctly, “[t]o impose the Secretary’s rule on these employers [may be] absurd as a matter of rational policy.”¹⁵⁹

C. A Court’s Narrower Reading of OSHA in Tort Actions

Prior to *Summit I*,¹⁶⁰ one court had already rejected the MED in tort actions.¹⁶¹ In *Melerine v. Avondale Shipyards, Inc.*,¹⁶² the Court of Appeals for the Fifth Circuit determined that no employment relationship existed between the injured and the general contractor; therefore, no duty was owed because “[w]hile [OSHA regulations] are evidence of a

156. *Id.* at 449.

157. *Pacific Gas & Elec. Co.*, 506 F.2d at 38, 39 (“When the agency states that in subsequent proceedings it will thoroughly consider not only the policy’s applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy” (citations omitted)).

158. See OCC. SAFETY AND HEALTH ADMIN., *supra* note 30.

159. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 833 (8th Cir. 2009) (Beam, J., dissenting). An Arkansas Supreme Court opinion analogized an employer’s duty to those obligations between a husband and wife:

A law that defines the rights and duties of husbands and wives has reference to the obligations of each husband to his own wife, not to the wife of another. Similarly, the duty of an employer to employees clearly means to his own employees and not those of some other employer, unless the language permits no other conclusion.

Horn v. Shirley, 441 S.W.2d 468, 471 (Ark. 1969).

160. *Summit Contractors, Inc. (Summit I)*, 23 BNA OSHC 1769 (No. 05-0839, 2006), 2006 OSAHRC LEXIS 33, at *15, *15 n.2 (explaining that the legal foundation for multiemployer liability has been swept away by *Darden*).

161. See *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 707, 710–11, 711, 712 (5th Cir. Unit A Oct. 1981)

162. *Id.* (involving tort action by independent contractor’s employee against general contractor for injuries sustained during ship conversion).

general standard of care due employees, *they establish no standard of care due third persons.*”¹⁶³ With no duty being owed, OSHA could not create one because OSHA “neither enlarges nor diminishes ‘common law or statutory rights, duties, or liabilities.’”¹⁶⁴

Eleventh Circuit defendants have relied on *Melerine*¹⁶⁵ because the decision was rendered around the time of the Fifth Circuit split,¹⁶⁶ and the decision relied upon Fifth Circuit precedent, which is part of the Eleventh Circuit’s *corpus juris*.¹⁶⁷ Specifically, *Melerine* cited *South-eastern Contractors, Inc. v. Dunlop*,¹⁶⁸ in which the court adopted Chairman Moran of the Occupational Safety and Health Review Commission’s argument that “there can be no violation of the Act by a

163. *Id.* at 707 (emphasis added). To support its conclusion, *Melerine* cited Fifth Circuit precedent that “OSHA regulations protect only an employer’s own employees.” *Id.* at 710–11; *see also* *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 985 (7th Cir. 1999) (limiting the applicability of the specific duty clause under OSHA); *deJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198, 201 (Fla. 1973) (stating plaintiff must establish that he is of the class the statute intended to protect).

164. *Melerine*, 659 F.2d at 709, 710–11 (citing 29 U.S.C. § 653(b)(4) (2006)). Specifically, § 653(b)(4) states:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Id.; *see also* *Int’l Ship Repair & Marine Servs. v. Estate of Morales-Montalvo*, No. 8:08-cv-1617-T-23AEP, 2010 U.S. Dist. LEXIS 2219, at *13–*14 (M.D. Fla. Jan. 12, 2010) (finding that independent contractor’s employee was not a ship owner’s employee in tort and thus not within the class sought to be protected under OSHA regulations and holding, while citing *Melerine*, that ship owner’s violation of an OSHA regulation “fails to establish negligence as a matter of law”). *But see* *Miller*, *supra* note 52, at 637 n.144 (arguing Congress only may have intended § 653(b)(4) to avoid upsetting rights between employers and employees in situations usually covered by workmen’s compensation, and thus, not affecting a third party being deemed employer in tort).

165. *See, e.g.*, *Turner v. Scott Paper Co.*, No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6769, at *1 (S.D. Ala. May 18, 1995) (relying on *Melerine* and Fifth Circuit precedent in refusing to permit in tort action the use of OSHA to impose a duty on an owner for independent contractor’s employee).

166. *Melerine*, 659 F.2d at 709 (relying on Fifth Circuit Unit A decision). *But see* *Access Equipment Systems Inc.*, 18 BNA OSHC 1718 (No. 95-1449, 1999), 1999 OSAHRC LEXIS 38, at *31, *31 n.12 (stating Eleventh Circuit has yet to address MED, citing rule that only Fifth Circuit Unit B, not Unit A, decisions are binding on Eleventh Circuit). However, *Access* relies on *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), which has been distinguished to state that the Eleventh Circuit meant to adopt all Fifth Circuit cases as of September 30, 1981 as binding precedent. *See* *Patrick v. City of Florala*, 793 F. Supp. 301, 305 n.11 (M.D. Ala. 1992).

167. *See* *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting Fifth Circuit’s body of law as it existed on September 30, 1981 as binding precedent).

168. 512 F.2d 675 (5th Cir. 1975). *But see* *Access Equipment Systems Inc.*, 18 BNA OSHC 1718, 1999 OSAHRC LEXIS 38, at *31, *31 n.12 (arguing original OSHA citation against Southeastern Contractors was prior to adoption of MED). However, OSHA’s treatment of multiemployer worksites was already at issue as early as 1972. *See generally* *Zebrowski*, *supra* note 24 (explaining OSHA’s treatment of liability at multiemployer worksites).

respondent for failure to comply with a *standard which charges some other employer with the duty* of implementing the standard.”¹⁶⁹ *Melerine* also cited *Barrera v. E.I. DuPont de Nemours and Co.*¹⁷⁰ and *Jeter v. St. Regis Paper Co.*,¹⁷¹ in which the court held that OSHA does not create duties between employers and independent contractors’ employees.¹⁷² To date, no Eleventh Circuit court has specifically addressed the MED.¹⁷³ Nonetheless, the Eleventh Circuit and state courts such as Florida’s may rely on *Melerine* as persuasive precedent.¹⁷⁴ Moreover, notwithstanding *Melerine*, based on state law like Florida’s¹⁷⁵ and the reasoning behind the MED,¹⁷⁶ states should not permit OSHA, under its current MED, to be used to establish a duty of care or evidence of negligence in tort actions against premises owners such as Florida Juice.¹⁷⁷

D. *A State’s Approach to Tort Actions by Independent Contractors in Inherently Dangerous Occupations*

In many jurisdictions, whether an owner exercised control is the determinative factor driving the application of the Multiemployer Doctrine (“MED”) in a tort action.¹⁷⁸ The same holds true in Florida tort

169. *Melerine*, 659 F.2d at 711 (emphasis added and citations omitted).

170. 653 F.2d 915, 920 (5th Cir. Unit A Aug. 1981) (stating in a tort action against an owner by independent contractor’s employee that it is long settled in the circuit that “OSHA does not create duties between employers and invitees, only between employers and their employees.”).

171. 507 F.2d 973, 977 (5th Cir. 1975) (holding that owner owed no duty under OSHA to independent contractor’s employee when painter fell while painting owner’s silo).

172. *Melerine*, 659 F.2d. at 709.

173. See *Access Equipment Systems Inc.*, 18 BNA OSHC 1718, 1999 OSAHRC LEXIS 38, at 31 n.12. *But see* *Calloway v. PPG Indus., Inc.*, 155 F. App’x 450, 455 (11th Cir. 2005) (per curiam) (stating that in the Eleventh Circuit, the MED has not been extended to premises owner when owner is not general contractor (citations omitted)); *Turner v. Scott Paper Co.*, No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6769, at *1 (S.D. Ala. May 18, 1995) (relying on *Melerine* and Fifth Circuit precedent in refusing to permit OSHA to be used in a tort action to impose a duty on an owner with respect to an independent contractor’s employee (citations omitted)).

174. *Int’l Ship Repair & Marine Servs., Inc., v. Estate of Morales-Montalvo*, No. 8:08-cv-1617-T-23AEP, 2010 U.S. Dist. LEXIS 2219, at *13–*14 (M.D. Fla. Jan. 12, 2010) (citing *Melerine* when holding that ship owner’s violation of an OSHA regulation “fails to establish negligence as a matter of law” in action brought by independent contractor’s employee); *Turner v. Scott Paper Co.*, No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6769, at *1 (S.D. Ala. May 18, 1995) (relying on *Melerine* and Fifth Circuit precedent in refusing to permit in tort action the use of OSHA to impose duty on owner with respect to an independent contractor’s employee).

175. See *infra* Parts III.D and IV.A.

176. See *supra* Part II.A.

177. See *supra* Part I.

178. See *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (emphasizing control as part of *Teal* test); see also *supra* notes 71–72 and accompanying text (explaining *Teal* in light of *Ellis*).

actions.¹⁷⁹ Therefore, OSHA, by definition,¹⁸⁰ cannot create a duty absent a duty owed under Florida common law, which requires proof that the owner exercised control or committed an affirmative act of negligence under Florida law.¹⁸¹ Additionally, an OSHA violation arguably may not be used as evidence of negligence in tort actions.¹⁸² This conflicting state law issue is another unresolved externality of OSHA's current MED and multiemployer citation scheme.

I. FLORIDA PREMISES LIABILITY AND *FLORIDA POWER & LIGHT CO. v. PRICE*

Under Florida law, a premises owner owes a business invitee¹⁸³ a duty to keep his property reasonably safe and to protect the invitee from dangers of which he is or should be aware.¹⁸⁴ However, in Florida, there is an independent contractor¹⁸⁵ exception to the business invitee rule.¹⁸⁶ The "primary factor" in determining independent contractor status is "the degree of control exercised [by the contractee] over the details of the work."¹⁸⁷ This emphasis on control parallels other jurisdictions requiring control before applying OSHA to a premises owner.¹⁸⁸ Therefore, similar to other jurisdictions, Florida courts have held that a contractee is not ordinarily liable for injuries sustained by an independent contractor. Notwithstanding this exception, Chapter 769 of the *Florida*

179. See *Fla. Power & Light Co. v. Price*, 170 So. 2d 293, 298 (Fla. 1964) (per curiam) (emphasizing independent contractor's employees are not under owner's control).

180. See 29 U.S.C. § 653(b)(4) (2006).

181. See *Maddox v. Ford Motor Co.*, No. 94-4153, 1996 WL 272385, at *3-*4 (6th Cir. May 21, 1996) (stating once no duty established under state common law, OSHA cannot then create a duty); *supra* notes 61-77 and accompanying text (discussing *Teal* test); see also *Teal*, 728 F.2d at 804 (emphasizing control as part of *Teal* test for extending OSHA duty to premises owner).

182. See *supra* notes 84-85 and accompanying text (explaining that if no duty owed under state law then OSHA cannot be used as evidence of negligence).

183. In *Post v. Lunney*, the Florida Supreme Court adopted § 332 of the Restatement (Second) of Torts' definition of business invitee: "a person who is invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of the land." 261 So. 2d 146, 148 (Fla. 1972).

184. *Id.* at 147.

185. The Florida Supreme Court in *Cantor v. Cochran* established Florida's adoption of § 220 of the Restatement (Second) of Agency to determine an independent contractor relationship. 184 So. 2d 173, 174-75 (Fla. 1966).

186. See *Fla. Publ'g Co. v. Lourcey*, 193 So. 847 (Fla. 1940). *But see* *Strickland v. Timco Aviation Servs., Inc.*, 66 So. 3d 1002, 1007 (Fla. Dist. Ct. App. 2011) (noting that courts will apply the business visitors analysis to the claim of an injured independent contractor's employee against a premises owner if the employee is injured not in the course of the work he is hired to perform but rather while he is attempting to access the premises to perform that work).

187. *Paul N. Howard Co. v. Affholder, Inc.*, 701 So. 2d 402, 404 (Fla. Dist. Ct. App. 1997); see also *4139 Mgmt., Inc. v. Dep't of Labor & Emp't*, 763 So. 2d 514, 517 (Fla. Dist. Ct. App. 2000) ("The first element of the *Cantor* test, control, is a primary indicator of status.").

188. See *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984).

Statutes provides that entities involved in hazardous occupations¹⁸⁹ are liable for injuries to and deaths of their agents and employees¹⁹⁰ and cannot contract away liability.¹⁹¹ Specifically, Chapter 769 addresses those issues that arise from an employer's common law defenses to employee's injuries arising out of employment.¹⁹² In *Florida Power & Light Co. v. Price*, the seminal case for hazardous occupation tort actions by independent contractors' employees against premises owners, the Florida Supreme Court attempted to clarify a premises owner's liability when the owner hires an independent contractor and the independent contractor's employee is injured, absent the owner's affirmative act of negligence.¹⁹³

In *Price*, an independent contractor's employee was working on the construction of the owner's electrical distribution system when a fellow employee of the independent contractor caused the plaintiff to be electrocuted.¹⁹⁴ The plaintiff alleged under the inherently dangerous work doctrine and Chapter 769 that Florida Power owed him a duty of not permitting the distribution system to be energized without proper supervision and control by the owner itself. In the alternative, the Plaintiff alleged that Florida Power was vicariously liable for the independent contractor's negligence.¹⁹⁵

Price rejected the plaintiff's contention and emphasized the exception to the inherently dangerous work doctrine, stating that the inherently dangerous work doctrine does not *ipso facto* render the owner liable and that § 769.01 does not have the effect of automatically waiving recognized exceptions to the doctrine.¹⁹⁶ Emphasizing the importance of preserving the exceptions to the inherently dangerous work doctrine and dangerous instrumentality doctrine, the court clarified that the exceptions "grow [] out of the relationship created by the independent contract and the assumption of risks that are necessarily concomi-

189. FLA. STAT. § 769.01 (2012) ("This chapter shall apply to persons engaged in the following hazardous occupations in this state; namely, railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas or electricity.") Florida Juice would be an entity under this chapter. *See supra* Part I.

190. FLA. STAT. § 769.02 (2012).

191. FLA. STAT. § 769.06 (2012).

192. FLA. STAT. § 769.04 (2012) (eliminating the doctrine of "assumption of risk" in cases arising under Chapter 769).

193. 170 So. 2d 293, 297 (Fla. 1964) (per curiam) (reiterating that "the duties which a contractee owes to employees of the independent contractor are *less than* those owing to third persons" (emphasis added)).

194. *Id.* at 294-95 (stating worker shocked by energized wire on power pole).

195. *Id.*

196. *Id.* at 297.

tant.”¹⁹⁷ The court’s refusal to permit the statute to impose strict liability on the owner parallels other courts that have held that the existence of OSHA regulations does not equate to strict liability unless the individual is within the class to be protected and there is a violation of the Act.¹⁹⁸

The court further reasoned that being an entity under § 769.01 alone “does not render [owner] liable for injuries to an employee of its independent contractor caused by the negligence of a fellow employee of the independent contractor unless it can be shown [that the owner] in some way contributed or concurred in the act of negligence.”¹⁹⁹ Further, the court reasoned that if any duty was owed, it was limited, surmising that a contractee/owner only owed an independent contractor’s employee a duty to warn of “‘latent or potential dangers on the premises’” or use ordinary care to furnish protection against such dangers to employees “‘who are without actual or constructive notice of the dangers.’”²⁰⁰

Price reasoned that an owner has a limited duty because “[t]he independent contractor is usually placed in charge of the work site and is responsible for all incidental contingencies and is aware or presumed to be aware of the usual hazards incident to the performance of his contract.”²⁰¹ This reasoning is consistent with the Seventh Circuit’s decision in *Merritt*, which rejected extending OSHA to impose a duty on an owner or to permit admission of OSHA violation as evidence of negligence.²⁰²

197. *Id.* at 298–99 (distinguishing the situation from one involving members of the general public).

198. *Cf. supra* notes 84–85 and accompanying text (discussing requirement of common law duty before admitting OSHA); *see also* *Trowell v. Brunswick Pulp and Paper Co.*, 522 F. Supp. 782, 784 (D.S.C. 1981) (stating OSHA does not create a duty of compliance with OSHA standards for non-employee’s benefit).

199. *Price*, 170 So. 2d at 297. Based on this phrase, some courts have argued that *Price* is limited to cases involving negligence by a fellow employee of an independent contractor. *See* *Maule Indus., Inc. v. Watson*, 201 So. 2d 631, 633 (Fla. Dist. Ct. App. 1967) (distinguishing *Price* based on negligence of owner as basis of action; however, the court in *Maule Industries* questioned whether the owner was the actual employer). However, the more prevalent interpretation expands *Price*, exempting the owner from liability even absent negligence by a fellow employee of an independent contractor so long as the owner was not negligent by action or omission. *See* *Skow v. Dep’t of Transp.*, 468 So. 2d 422, 424 (Fla. Dist. Ct. App. 1985).

200. *Price*, 170 So. 2d at 296 (quoting *Florida Power & Light Co. v. Robinson*, 68 So. 2d 406, 411 (Fla. 1953) (citations omitted)). However, if the employee has actual or constructive notice of the danger, the contractee owes no duty to warn the independent contractor’s employee. *But see* *Atl. Coast Dev. Corp. v. Napoleon Steel Contractors, Inc.*, 385 So. 2d 676, 679 n.1 (Fla. Dist. Ct. App. 1980) (stating that owner who is duly a general contractor owes a duty, but “[a]bsent active participation or the dual capacity of owner/general contractor[,] . . . an owner will not normally be held responsible for providing a safe work area when he has turned control and oversight of the project over to a general contractor.” (emphasis added)).

201. *Price*, 170 So. 2d at 298.

202. *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 605 (7th Cir. 1989) (“Where an invitee is

Emphasizing further an independent contractor's responsibility, the Florida Supreme Court explained that Chapter 769 does not make the independent contractor's employees the owner's employees and that these employees are not under the owner's direction or control.²⁰³ Because of this limited duty, an owner's liability to an independent contractor's employee does not arise "[u]nless and until it is shown the contracting owner by positive act of negligence or negligent omission on his part causes injury to the independent contractor or to the latter's employee or employees."²⁰⁴ However, as in *Teal*, if the owner engages in an affirmative act of negligence by controlling the work, the owner is directly liable for breach of a common law duty of care and the exceptions to the inherently dangerous work doctrine and dangerous instrumentality doctrine no longer apply. Thus, the exceptions to the rule are not without bounds.²⁰⁵

II. THE DEVELOPMENT OF AN OWNER'S LIABILITY IN A STATE'S COMMON LAW

Price set forth the exception to inherently dangerous work doctrine and dangerous instrumentality doctrine—absent an affirmative act or omission of negligence, an owner owes no duty to an independent contractor's injured employee working in a hazardous occupation. Moreover, this exception is consistent with the application of the MED in tort actions in which an owner was held liable for OSHA violations only

possessing of knowledge equal or superior to that of the landowner of the hazard causing the injury, the landowner is relieved of any duty which might have otherwise been imposed." (citation omitted)).

203. *Price*, 170 So. 2d at 298 ("[T]he exception to the doctrines grows out of the relationship created by the independent contract and the assumption of risks that are necessarily concomitant."). Though not mentioned expressly, it is understood that if the owner controlled the project or committed an affirmative act of negligence, the *Price* exception would not be applicable because the employer-independent contractor relationship would be vitiated. See *supra* text accompanying notes 187–88 (discussing the importance of control in the independent contractor relationship); see also *supra* text accompanying notes 66–70 (emphasizing control as part of the *Teal* test for extending an OSHA duty to premises owner). Thus, ultimately control is the critical factor in one's analysis.

204. *Price*, 170 So. 2d at 298; see also *St. Lucie Harvesting & Caretaking Corp. v. Cervantes*, 639 So. 2d 37, 38–39 (Fla. Dist. Ct. App. 1994) (stating rule that for owner to be liable for injuries sustained by independent contractors' employees, owner must actively participate "'to the extent that he directly influences the manner in which the work is performed' and negligently creates or allows a dangerous condition to exist") (citations omitted)).

205. The Florida Supreme Court explained the difficulty of establishing a firm rule for all occasions:

[I]t is difficult to state the exception or exceptions to said rules with overall particularity, the reason being that each case presents its own peculiar factual situation and the best that may be done is to eschew a blanket rule which allows no exceptions and permit the latitude of recognizing exceptions . . .

Price, 170 So. 2d at 298.

when it committed an affirmative act of negligence with regards to the employee.²⁰⁶

Since the Florida Supreme Court's ruling, subsequent courts have explained and expanded this basic exception.²⁰⁷ In *Lake Parker Mall, Inc. v. Carson*, the court held that an owner satisfied a duty to warn of latent dangers by notifying a worker's supervisor.²⁰⁸ Moreover, *Skow v. Department of Transportation*, similar to *Calloway v. PPG Industries'* treatment of OSHA,²⁰⁹ held that requiring an independent contractor to comply with federal safety regulations while still reserving the right to inspect does not impose a duty on the premises owner.²¹⁰ In *Skow*, the court reiterated the importance of control, which is the focal point of the *Teal* test.²¹¹ Additionally, it limited an owner's duty, stating that although the contract required the independent contractor to comply with safety regulations, it "did not impose an explicit duty on [the owner] to monitor, inspect, and correct violations by [the independent contractor]" and that absent negligence, "no duty, delegable or nondele-

206. See *Barrera v. E.I. DuPont de Nemours & Co.*, 653 F.2d 915 (5th Cir. Unit A Aug. 1981); *Davenport v. Summit Contractors, Inc.*, 612 S.E.2d 239, 243 n.8 (Va. Ct. App. 2005) (stating that courts upholding the MED against general contractors "overlook the fact that, in their cases, the party held liable *actually created* the worksite hazard, e.g., *Teal*, 728 F.2d at 801, *Brennan*, 513 F.2d at 1039." (emphasis in original)).

207. See, e.g., *Johnson v. Boca Raton Cmty. Hosp., Inc.*, 985 So. 2d 593, 596, 597 (Fla. Dist. Ct. App. 2008) ("[T]he owner's duty to warn depends upon whether the dangerous condition was known to the owner but unknown to the independent contractor" . . . [and] "an abnormally dangerous condition does not include the work product of the contractor after he or she takes control of the premises or conditions which arise after and as a result of the independent contract."); *Skow v. Dep't of Transp.*, 468 So. 2d 422, 424 (Fla. Dist. Ct. App. 1985) (following *Price*).

208. *Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121, 123 (Fla. Dist. Ct. App. 1976) (citations omitted) (holding premises owner satisfied duty to warn in wrongful death action involving independent contractor's employee). *But see* *Fla. Power & Light Co. v. Robinson*, 68 So. 2d 406, 412-13 (Fla. 1953) (holding for independent contractor's employee when owner failed to adequately inform independent contractor of latent, subterranean rotten condition of poles to be removed). *Robinson* further shows the importance that an owner not commit an affirmative act of negligence by failing to warn when it has superior knowledge.

209. See *supra* notes 76-77 and accompanying text.

210. *Skow*, 468 So. 2d at 423-24 (holding owner of bridge owed no duty when independent contractor's employee, not wearing safety belt, slipped and grabbed a pile driver, which crushed his hand).

211. *Id.* at 424 ("[A]lthough DOT actively participated in the inspection of work done by [the independent contractor], this was done only to ascertain the results of the work and not to control the method of performance or to insure [the independent contractor's] compliance with safety regulations."); see *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984). *Indian River Foods, Inc. v. Braswell*, 660 So. 2d 1093, 1098 (Fla. Dist. Ct. App. 1995), reiterated this limitation by quoting *City of Miami v. Perez*, 509 So. 2d 343, 346 (Fla. Dist. Ct. App. 1987), which stated that the owner may maintain the independent contractor relationship while retaining "the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work."

gable, was owed."²¹² Thus, even if OSHA requires owners to correct an independent contractor's violation, Florida law appears not to impose the same requirement.²¹³ And, as previously stated, OSHA cannot enlarge a duty that does not exist under Florida law.²¹⁴ Again, this illustrates the unresolved externality of applying OSHA's MED broadly in tort proceedings as much as in commission proceedings.

In addition to these limitations on an owner's duty, courts have held that an owner may owe: (1) no duty to provide a safe place to work or to insure that the work was performed with appropriate safety equip-

212. *Skow*, 468 So. 2d at 424; *see also* *Baxley v. Dixie Land & Timber Co.*, 521 So. 2d 170, 172-73 (Fla. Dist. Ct. App. 1988) (interpreting the *Price* exception to relieve owner of nondelegable duty as to independent contractor's employee injured while performing inherently dangerous work based on the independent contractor relationship and the risks necessarily assumed by such contractor and its employees). *But see* *Orr v. United States*, 486 F.2d 270, 277, 277 n.8 (5th Cir. 1973) (limiting *Price* to cases involving negligent fellow employee of independent contractor and arguing non-delegable duty owed by owner in a Federal Tort Claims Act case involving no warning of danger). Although *Orr* follows a MED philosophy, it is contrary to Fifth Circuit precedent. *See Corban v. Skelly Oil Co.*, 256 F.2d 775, 780 (5th Cir. 1958) (finding that the inherently dangerous doctrine has never been extended to permit independent contractor's employee to recover from principal for breach of a nondelegable duty). *Orr* also was decided prior to Florida's interpretations of *Price* in *Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121, 124 (Fla. Dist. Ct. App. 1976) and *Skow*, 468 So. 2d at 424.

Another, less-often used critique of *Price*, is that a duty is owed based on § 413 of the *Restatement (Second) of Torts*, which states, in pertinent part, that

[o]ne who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions

RESTATEMENT (SECOND) OF TORTS § 413 (1965). However, Florida follows *Price* rather than the Restatement. *See Scofi v. McKeon Constr. Co.*, 666 F.2d 170, 172-73 (5th Cir. 1982) (stating in a case originating in the Middle District of Florida that "Price sets forth the law of Florida" and therefore, independent contractors' employees are not considered part of the "others" protected under the Restatement). The Special Note to Chapter 15 of Tentative Draft No. 7 of the *Restatement (Second) of Torts* specifically excluded independent contractors' employees from coverage by this whole family of sections (§§ 410-429). RESTATEMENT (SECOND) OF TORTS CH. 15 (Tentative Draft No. 7, 1962). Although the Special Note was not adopted by the final version, multiple courts have found it persuasive and have employed it to exclude independent contractors' employees. *See, e.g., King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 662-63 (Ky. 1973) (reasoning that the owner already pays the premium for workmen's compensation coverage and that owner should not be exposed to greater liability than if he hired his own employee to perform the same work).

213. *Lowe v. United States*, 466 F. Supp. 895, 899 (M.D. Fla. 1979) (stating that an owner is not "liable merely because it gained knowledge of a dangerous condition on the jobsite, yet failed to affirmatively rectify it"; however, an owner is possibly liable if it "affirmatively acts and helps to create the dangerous condition" (citations omitted)).

214. *Cf. 29 U.S.C. § 653(b)(4)* (2006) (stating OSHA does not enlarge common law duties).

ment,²¹⁵ (2) no duty even if it gains knowledge of a safety violation,²¹⁶ and (3) no duty if an independent contractor has superior knowledge.²¹⁷ While Florida courts have delineated the parameters of *Price*,²¹⁸ they have yet to address fully the similar issues surrounding OSHA's impact on the duty owed by a business premises owner.

IV. HOW STATES ADDRESS AND SHOULD ADDRESS THE USE OF OSHA IN TORT ACTIONS

To illustrate the confusion that has ensued in light of the MED's broad application and the effect of OSHA using the MCP to cite a large swath of employers, unaware of their duty, this Article shows the potential impacts of OSHA's application in state common law torts actions in Florida and specifically in the Florida Juice hypothetical.²¹⁹

A. *Application of OSHA in a State's Common Law Tort Actions*

Although no Florida appellate court has yet to address whether in tort actions OSHA imposes a duty of care on premises owners at multiemployer worksites,²²⁰ some Florida appellate courts, in dicta, have discussed OSHA and its relevance regarding premises owners and gen-

215. See *Pearson v. Harris*, 449 So. 2d 339, 340–41 (Fla. Dist. Ct. App. 1984) (affirming summary judgment for owner of the tower and contractee when employee of independent contractor hired to install an antenna on tower fell from tower upon allegedly hearing sniper fire). While emphasizing the owner's lack of control and supervision, *Pearson* explained that if the owner did "provide . . . assistance and did so negligently, causing Pearson's injuries, then liability could attach." *Id.* at 344 (citations omitted).

216. See *Lowe*, 466 F. Supp. at 899 (stating that an owner is not "liable merely because it gained knowledge of a dangerous condition on the job site, yet failed to affirmatively rectify it"; however, an owner is possibly liable if it "affirmatively acts and helps to create the dangerous condition." (citations omitted)).

217. See *Horton v. Gulf Power Co.*, 401 So. 2d 1384, 1385 (Fla. Dist. Ct. App. 1981) (holding owner not liable when scaffolding furnished by owner altered unsafely by independent contractor and independent contractor had superior knowledge of the unsafe condition). Gulf Power supposedly disposed of any duty to warn by warning the independent contractor, *id.*; however, Gulf Power's agent said he never warned the independent contractor's superintendent. *Id.* at 1387 (Smith, C.J., concurring.). Thus, based on the court's rationale, the summary judgment for the owner was because the independent contractor was in control of the scaffold, was aware of the danger of overloading the scaffold, and had knowledge that was equal, if not superior, to that of the owner. *Id.* at 1386 (majority opinion). Regarding superior knowledge, the court cited case law supporting the principle that "[s]uperior knowledge of the owner/contractee is [the] basis of his duty to warn." *Id.* at 1386 n.1 (citations omitted).

218. See *supra* notes 206–217 and accompanying text.

219. See *supra* Part II.A (explaining the importance of MCP to this Article's analysis of a business premises owner's liability in tort actions).

220. A case in the U.S. District Court for the Middle District of Florida touched on the issue. See *Int'l Ship Repair & Marine Servs. v. Estate of Morales-Montalvo*, No. 8:08-cv-1617-T-23AEP, 2010 U.S. Dist. LEXIS 2219, at *13–*14 (M.D. Fla. Jan. 12, 2010) (finding that independent contractor's employee was not a ship owner's employee in tort and thus not within the class sought to be protected under an OSHA regulation and holding, while citing *Melerine v.*

eral contractors.²²¹

Similar to other jurisdictions,²²² Florida has ruled that OSHA does not provide the basis for an independent cause of action against employers or third parties.²²³ Florida also has reiterated the rule that OSHA does not “enlarge or diminish common law or statutory rights, duties, or liabilities.”²²⁴ *Jimenez v. Gulf Western Manufacturing Company* further emphasized that “simply because OSHA is a federal law, it is not dispositive on state law questions of negligence.”²²⁵ This reasoning has led Florida courts to declare, “Because OSHA neither enlarges nor diminishes any statutory or common law rights, its definition” of who may be deemed an employer is likely irrelevant.²²⁶ And if the Act’s definition of employer is likely irrelevant, so too is likely the definition of employer under Multiemployer Citation Policy (“MCP”), which explicates the Multiemployer Doctrine (“MED”).²²⁷ Thus, based on Florida’s interpretation of OSHA and consistent with other courts’ treatment of OSHA admissibility,²²⁸ if an owner owes no duty under Florida law, then OSHA may not create one. Therefore, if an owner hires an independent contractor to perform a hazardous occupation, it owes no duty to the

Avondale Shipyards, Inc., 659 F.2d 706, 707 (5th Cir. Unit A Oct. 1981), that ship owner’s violation of an OSHA regulation “fails to establish negligence as a matter of law”).

221. See *infra* notes 222–233 and accompanying text.

222. See *supra* note 51 and accompanying text.

223. See *Cadillac Fairview of Fla., Inc. v. Cespedes*, 468 So. 2d 417, 421 (Fla. Dist. Ct. App. 1985) (reiterating prior holdings regarding OSHA’s inability to create independent causes of action); see also *Jimenez v. Gulf & W. Mfg. Co.*, 458 So. 2d 58, 60 (Fla. Dist. Ct. App. 1984) (citations omitted) (same); *Jupiter Inlet Corp. v. Brocard*, 546 So. 2d 1, 2 (Fla. Dist. Ct. App. 1988) (same).

224. *Jimenez*, 458 So. 2d at 60 (explaining OSHA cannot alter common law regarding relationship between independent contractor’s employee and manufacturer); see also *Jupiter Inlet*, 546 So. 2d at 2 (explaining that “[s]ection 653(b)(4) of [OSHA] provides that *nothing contained in it shall enlarge, diminish or affect common law or statutory liability of employers* with respect to injuries to or death of an employee arising out of and in the course of employment” (emphasis added)). *Jupiter Inlet* extended liability to a landowner for an injury to an independent contractor’s employee because the owner vitiated the independent contractor relationship. See *id.* at 3. *Jupiter Inlet*’s treatment of the owner’s control is consistent with the *Teal* test. See *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (emphasizing control as part of *Teal* test for extending OSHA duty to premises owner).

225. *Jimenez*, 458 So. 2d at 60 n.3.

226. *Boatwright v. Sunlight Foods, Inc.*, 592 So. 2d 261, 263 (Fla. Dist. Ct. App. 1991) (citations omitted). In *Boatwright*, the owner committed an affirmative act of negligence when he disregarded an independent contractor’s request for a protective guardrail. *Id.* at 262, 263. Regardless of the owner’s actions in *Boatwright*, the court still noted that OSHA cannot be used to define the employer of an independent contractor’s employee when suing a premises owner in tort. *Id.* at 263.

227. See OCC. SAFETY AND HEALTH ADMIN., *supra* note 30.

228. See *supra* notes 84–90 and accompanying text (explaining that if no duty is owed under state law then OSHA cannot be used as evidence of negligence); see also 29 U.S.C. § 653(b)(4) (2006) (stating that OSHA does not enlarge or affect a common law duty).

independent contractor's employees absent an affirmative act or omission of negligence or failure to warn of latent danger.²²⁹ Although Florida law seems to endorse this conclusion, a business premises owner and independent contractor cannot be sure that every Florida court will reach the same conclusion because as illustrated in previous sections, OSHA's broad MED and citation scheme provide opportunity for a broad spectrum of interpretations of a business premises owner's duty of care with respect to inherently dangerous occupations.

Florida has also been hesitant to permit OSHA's admission as evidence of negligence, stating that OSHA violations do not constitute negligence per se.²³⁰ Although Florida courts have previously held as harmless error the admission of OSHA as evidence,²³¹ they have still questioned OSHA's relevance.²³² For example, *Jupiter Inlet Corp. v. Brocard* stated, "[Admission of OSHA] further points to the *troublesome problem of OSHA regulations in evidence*. If OSHA neither enlarges nor diminishes any statutory common law rights in this case, *what possible relevance could the OSHA definition of employer have?*"²³³ Similar concerns have arisen regarding admission of other statutes to establish evidence of negligence or standard of care when no duty exists.

As Florida's Second District Court of Appeal has stated, "Violation of a statute may be evidence of negligence, but such evidence only becomes relevant to a breach of a standard of care after the law has imposed a duty of care."²³⁴ Therefore, under Florida law, even if an

229. See *Fla. Power & Light Co. v. Price*, 170 So. 2d 293, 296–98 (Fla. 1964) (per curiam).

230. See *Cadillac Fairview of Fla., Inc. v. Cespedes*, 468 So. 2d 417, 421 (Fla. Dist. Ct. App. 1985) (citation omitted) (questioning OSHA's relevance); *Jupiter Inlet Corp. v. Brocard*, 546 So. 2d 1, 2–3 (Fla. Dist. Ct. App. 1988) (citing Florida precedent that an OSHA violation is not negligence per se). These statements of Florida law are in addition to the rationale offered in *Melerine's* holding. See *supra* Part III.C.

231. See *Jupiter Inlet*, 546 So. 2d at 3; *Cadillac Fairview*, 468 So. 2d at 421; *Jimenez*, 458 So. 2d at 60–61. However, these cases are distinguishable. In *Jupiter Inlet*, the court determined that Jupiter Inlet Corporation, a land development company, had an employer-employee relationship with the independent contractor's construction worker because its level of control vitiated the employer-independent contractor relationship. *Jupiter Inlet*, 546 So. 2d at 3. Similarly, in *Cadillac Fairview*, by exercising control over the project, the general contractor vitiated the independent contractor relationship. *Cadillac Fairview*, 468 So. 2d at 420–21. Finally, *Jimenez* involved a product liability action in which industry standards assigned responsibility to the purchaser, so OSHA admission was harmless. *Jimenez*, 458 So. 2d at 60–61.

232. See, e.g., *Jupiter Inlet*, 546 So. 2d at 3. The Florida courts' treatment of the control factor is consistent with the *Teal* test's emphasis on control. See *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (emphasizing control as part of *Teal* test for extending OSHA duty to premises owner).

233. *Jupiter Inlet*, 546 So. 2d at 3 (emphasis added).

234. *Estate of Johnson v. Badger Acquisition of Tampa LLC*, 983 So. 2d 1175, 1182 (Fla. Dist. Ct. App. 2008) (citation omitted) (affirming summary judgment for pharmaceutical service provider based on no duty owed in wrongful death action). *But see* Fla. Standard Jury Instructions, 778 So. 2d 264, 266–67 (Fla. 2000) (stating in "Note on Use" that violation of OSHA is evidence

owner violated OSHA and the violation could be construed as evidence of negligence, such evidence may only become relevant to a breach if the law imposed a duty of care on the owner.²³⁵ As stated above, OSHA does not create a duty when no duty exists under Florida law.²³⁶ Without first establishing a duty, an independent contractor's employee may not be able to rely on an OSHA violation as evidence of negligence.²³⁷ Moreover, pursuant to *Melerine*, an owner, as a third party, owes an independent contractor's employees no specific duty under OSHA.²³⁸ Therefore, an OSHA violation possibly may not be admitted as evidence of negligence in a tort action by an independent contractor's employee against a premises owner. However, again, absent a clear MED, outcomes may vary.

B. *Florida Juice Revisited: How Courts Should Address
Future Cases*

To illustrate how the doctrines and case law set forth above apply to state or federal tort actions by an independent contractor's employees against business premises owners, this Article returns to the issue of whether Florida Juice owed Bobby a duty of care under OSHA or if a possible OSHA violation by Florida Juice may be used as evidence of negligence in the estate's action. By doing so, this Article attempts to

of negligence under Standard Jury Instruction 4.11). First, to support its assertion, the Jury Instruction cites *Jupiter Inlet*, but *Jupiter Inlet* itself questioned the relevance of OSHA as evidence of negligence and only admitted it because the owner vitiated the independent contractor relationship. See *Jupiter Inlet*, 546 So. 2d at 3. Second, based on *Estate of Johnson*, the OSHA violation should not be admitted as evidence of negligence if there was no duty owed. *Estate of Johnson*, 983 So. 2d at 1182. Because under Florida law, OSHA does not establish a duty owed by a premises owner to an independent contractor's employee, the jury instruction is inapplicable to the premises owner. Cf. *id.* (stating there must be a duty before violation of a statute is relevant as evidence). *Estate of Johnson* is consistent with other courts' treatment of OSHA. See *supra* note 61 (discussing OSHA's limitations) and notes 77–79; 81–84 and accompanying text (explaining if no duty is owed under state law, then OSHA cannot be used as evidence of negligence).

235. See *supra* notes 84–85 and accompanying text. Cf. *Maddox v. Ford Motor Co.*, No. 94-4153, 1996 WL 272385, at *3–*4 (6th Cir. May 21, 1996) (stating that if no duty is established under state common law, OSHA cannot then create a duty); *Estate of Johnson*, 983 So. 2d at 1182 (stating there must be a duty owed before a violation of a statute is relevant as evidence).

236. See *Maddox*, 1996 WL 272385, at *3–*4 (stating once no duty established under state common law, OSHA cannot then create a duty); see also *supra* notes 223–37 and accompanying text (discussing use of OSHA in Florida). Cf. *supra* note 61 (discussing OSHA's limitations and accompanying cases) and notes 84–85 and accompanying text (explaining that if no duty is owed under state law then OSHA cannot be used as evidence of negligence).

237. Duty must precede standard of care; without duty, there is no negligence. *Jenkins v. W.L. Roberts, Inc.*, 851 So. 2d 781, 783 (Fla. Dist. Ct. App. 2003) (citations omitted); see also SIR FREDERICK POLLOCK, *THE LAW OF TORTS* 468 (13th ed. 1929) (“Proof of negligence in the air, so to speak, will not do.”).

238. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 707 (5th Cir. Unit A Oct. 1981) (“While [OSHA regulations] are evidence of a general standard of care due employees, they establish no standard of care due third persons.”).

illustrate that because OSHA's current MED and MCP are so broad in application, a court, like a Florida state court for example, may interpret the doctrine not to be applicable just as much as it could rely on other persuasive precedent for its applicability. For simplicity, this Article uses below the example of a Florida state court.

Before addressing OSHA's impact on the estate's claim, a court must first determine whether Florida Juice breached its limited duties²³⁹ under *Price*²⁴⁰ and its progeny.²⁴¹ Under *Price*, the issue is whether Florida Juice, by a negligent act or omission, caused injury to Bobby or failed to warn Bobby of latent dangers.²⁴² Although OSHA found the worksite to be unsafe, Florida Juice may argue that there was no evidence that it committed an affirmative act of negligence. Florida Juice also may argue that it did not commit a negligent omission because its contract with Independent Electric did not impose an explicit duty on Florida Juice to monitor, inspect, and correct violations.²⁴³ Moreover, Florida Juice may assert that Alderman's progress assessment did not vitiate the independent contractor relationship, causing Florida Juice to undertake a duty of care for Bobby.²⁴⁴ However, if Alderman's action went beyond merely assessing the progress, there is potential for liability to be imposed on Florida Juice.

Additionally, Florida Juice may argue that it did not owe a duty to provide Bobby with a ladder or safety equipment²⁴⁵ even if Florida Juice required Independent Electric to comply with OSHA standards²⁴⁶ or knew of Independent Electric's violation.²⁴⁷ Again, however, if Florida Juice did provide Bobby with a ladder or safety equipment, it would owe him a duty to do so in a non-negligent manner. Thus, under this analysis, Florida Juice could just as easily not be liable or be liable by a mere change in one action.

Similar to the situation in *Horton v. Gulf Power Co.*, Independent Electric and Bobby had superior knowledge because Alderman suppos-

239. The court must address the state law first, so it can determine if OSHA's admission would enlarge the duty owed. If there is no duty owed, OSHA cannot create one. See *Maddox*, 1996 WL 272385, at *3-4.

240. See *supra* Part III.D.i.

241. See *supra* Part III.D.ii.

242. Fla. Power & Light Co. v. Price, 170 So. 2d 293, 298 (Fla. 1964) (per curiam).

243. See *Skow v. Dept. of Transp.*, 468 So. 2d 422, 424 (Fla. Dist. Ct. App. 1985).

244. See *id.*; see also *Calloway v. PPG Indus., Inc.*, 155 F. App'x 450, 451-52, 455 (11th Cir. 2005) (per curiam) (holding no duty owed by owner to independent contractor's employee who fell while installing water line); *Kaczmarek v. Bethlehem Steel Corp.*, 884 F. Supp. 768, 778 (W.D.N.Y. 1995) (holding owner owed no duty to independent contractor's employee for ammonia gas exposure during repair because owner lacked requisite control).

245. See *Pearson v. Harris*, 449 So. 2d 339, 340-41 (Fla. Dist. Ct. App. 1984).

246. See *Calloway*, 155 F. App'x at 453, 455 (citation omitted).

247. See *Lowe v. United States*, 466 F. Supp. 895, 899 (M.D. Fla. 1979).

edly was not versed in electrical repair.²⁴⁸ To paraphrase *Horton*, Florida Juice was no more required to warn Independent Electric and Bobby “than a householder is required to warn employees of his roofing contractor about the height of the roof.”²⁴⁹ Further, Bobby knew that the generator was energized at the time of the accident.²⁵⁰ Therefore, besides being an obvious danger associated with electrical repair, Florida Juice may argue that the energized generator also, arguably, was not a latent danger, which would have imposed on Florida Juice a duty to warn.²⁵¹ However, Bobby’s estate may reverse Florida Juice’s fortune if it were to prove Alderman also did have superior knowledge regarding the generator and did not share this information with Independent Electric.

Regardless of superior knowledge, some may argue that it is inequitable to treat Florida Juice as Bobby’s employer. Emphasizing economic efficiency of contracts, Florida Juice may argue that it already paid a premium for Bobby’s workmen’s compensation insurance, assuming Independent Electric had calculated it as part of its bid price.²⁵² Therefore, Florida Juice may claim that to hold it liable means it would pay the premium for workmen’s compensation insurance without receiving the benefit²⁵³ and that if it knew it could be subjected to greater liability, it could have hired one of its own employees to perform the work and limited its liability.²⁵⁴ This workers’ compensation quandary concerning a business premises owners’ liability is a prime example of the confusion that ensues from a broad interpretation of the multiemployer doctrine as illustrated below—an example that possibly leaves workers like Bobby with no recourse.

Based on the following, Florida Juice may have not owed a duty to Bobby under *Price*²⁵⁵ and its progeny.²⁵⁶ If no duty was owed under Florida common law, Florida Juice may argue that OSHA may not enlarge a duty that does not exist.²⁵⁷ Thus, under Florida law, it is possi-

248. See *Horton v. Gulf Power Co.*, 401 So. 2d 1384, 1386 (Fla. Dist. Ct. App. 1981); *supra* note 211.

249. *Horton*, 401 So. 2d at 1387 (Smith, C.J., concurring).

250. See *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 604 (7th Cir. 1989); *Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121, 123–26 (Fla. Dist. Ct. App. 1976).

251. See *Fla. Power & Light Co. v. Price*, 170 So. 2d 293, 296 (Fla. 1964) (per curiam).

252. See *supra* text accompanying note 94.

253. See *supra* text accompanying note 95.

254. See *supra* note 95 and accompanying text.

255. See *supra* Part III.D.i. Even if *Price* were to be overruled, Florida Juice still might not be held liable because it failed to exercise the requisite control that would vitiate the independent contract relationship and thus creating a duty at common law.

256. See *supra* Part III.D.ii.

257. See *supra* notes 164–72 and accompanying text. Cf. 29 U.S.C. § 653(b)(4) (2006) (stating that OSHA neither enlarges nor affects the common law duties of employers and employees).

ble that a business premises owner, satisfying *Price*, may not be subjected to a tort action by an independent contractor's employee based on OSHA regulations.²⁵⁸ However, if *Price* were to be reversed and the exceptions to the rule of inherently dangerous work doctrine and dangerous instrumentality doctrine were no longer applicable, the court may consider OSHA's MED in its current form to be relevant when determining Florida Juice's liability, even if Florida Juice was unaware of the MED and its citation scheme's broad applicability.²⁵⁹

Assuming the court considers *Teal*²⁶⁰ or similar law as persuasive because Florida's law is unsettled, Florida Juice may still owe no duty to Bobby. Florida Juice may argue that the estate cannot meet the first prong of the *Teal* test because Florida Juice never exercised the requisite control.²⁶¹ Therefore, OSHA's MED may not be able to be used to impose a duty of care on Florida Juice.²⁶² If there was no evidence that Florida Juice exercised control when Alderman visited the worksite and no evidence that Alderman instructed Independent Electric's workers²⁶³ and there was only evidence that Alderman assessed the project's progress, Florida Juice may have a strong case that it lacked the requisite control,²⁶⁴ making *Teal* inapplicable.²⁶⁵ However, if evidence showed that Florida Juice did exercise the requisite control, it would have destroyed the independent contractor relationship, thus violating *Cantor v. Cochran*²⁶⁶ and creating a duty under Florida law and thus also under OSHA.²⁶⁷ Again, this illustrates the unpredictability OSHA's current MED scheme creates.

If Florida Juice proves that it owed no duty to Bobby under *Price*

258. If no duty is owed, OSHA cannot create one. See 26 U.S.C. § 653(b)(4) (2006).

259. For example, a business premises owner may hire an independent contractor to clean power lines on its property, unaware that OSHA may potentially cite it for violations under MCP and that the injured independent contractor's employee may use the violation in a subsequent tort action against the owner. As stated previously, this a major reason why the current MCP is relevant to this Article's analysis. For a further discussion, see *supra* Part II.A.

260. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984).

261. See *id.* at 804.

262. See *id.*

263. See *Turner v. Scott Paper Co.*, No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6768, at *3, *11-12 (S.D. Ala. Mar. 17, 1995), *adopted by*, No. 94-0284-P-M, 1995 U.S. Dist. LEXIS 6769, at *2 (S.D. Ala. May 18, 1995).

264. See *Skow v. Dep't of Transp.*, 468 So. 2d 422, 424 (Fla. Dist. Ct. App. 1985).

265. Control is a *Teal* test prerequisite; absent control, *Teal* is inapplicable. See *Teal*, 728 F.2d at 804.

266. *Cantor v. Cochran*, 184 So. 2d 173, 174-75 (Fla. 1966) (listing control as factor in determining whether the independent contractor relationship is destroyed); see also *supra* note 178 and accompanying text (discussing importance of control in *Teal* test).

267. Cf. *Jupiter Inlet Corp. v. Brocard*, 546 So. 2d 1, 3 (Fla. Dist. Ct. App. 1988) (finding third party owed duty when vitiating the independent contractor relationship); *Cadillac Fairview of Fla., Inc v. Cespedes*, 468 So. 2d 417, 420-21 (Fla. Dist. Ct. App. 1985) (same).

or *Teal*, the court must still determine if an OSHA violation can be used as evidence of negligence.²⁶⁸ Based on cases like *Estate of Johnson*, Florida Juice may argue that the court should rule that because no duty was owed, a regulatory violation cannot be used as evidence of negligence.²⁶⁹ As stated previously, this analysis is consistent with other jurisdictional analysis regarding the admissibility of an OSHA violation as evidence of negligence.²⁷⁰

Therefore, based on Florida law and other jurisdictional law, it is possible for a court to conclude that OSHA cannot be used to establish a duty of care, nor can an OSHA violation be used as evidence of negligence. However, as illustrated above, mere changes in the hypothetical or a court's interpretation within the broad spectrum of the current MED and OSHA citation scheme may result in the opposite outcome. Hence, the reason there is a current state of confusion in tort actions and OSHA commission proceedings.

V. CONCLUSION

In the 1970s, Congress promulgated the OSH Act to create a safer working environment for America's workers. Although the Act has led to safer working conditions, greater protections are still needed in various dangerous occupations, as the Bureau of Labor Statistics calculated a preliminary total of 4,547 fatal work injuries in 2010.²⁷¹ However, as this Article illustrates, any further regulations or policy statements enacted by OSHA must be done with precision in order to avoid the unintended consequences resulting from policies such as the Multiemployer Citation Policy ("MCP") that were not subject to proper notice and comment rulemaking. Rather than applying the MED and citations policies like the MCP (which on their faces are based on the construction industry-context) to employers in the non-construction industry context such as Florida Juice, OSHA and its state counterparts, if they desire to do so, should enact regulations for specific multiemployer industries through proper notice and comment rulemaking or revise its MED and MCP through notice and comment rulemaking. By employing the scalpel, rather than the sledgehammer, regulators can be more precise in their rulemaking and provide greater clarity for employers hiring

268. See *supra* Part II.C (discussing use of OSHA as evidence of negligence); *supra* Part IV.A (same).

269. See *Estate of Johnson v. Badger Acquisition of Tampa LLC*, 983 So. 2d 1175, 1182 (Fla. Dist. Ct. App. 2008).

270. See *supra* notes 84–90 and accompanying text.

271. News Release, Bureau of Labor Statistics, Dep't of Labor, National Census of Fatal Occupational Injuries in 2010 (Preliminary Results) (Aug. 25, 2011), available at <http://bls.gov/news.release/pdf/cfoi.pdf>.

independent contractors and thus create a safer working environment for all workers.²⁷²

Therefore, this Article does not call for the absolving of all business premises owners from negligent acts but rather for a clarification of their liability when the business premises owners, who are not engaging in affirmative acts of negligence, hire independent contractors whose employees are injured while performing a job deemed a hazardous occupation. Without such clarification, needless litigation and inefficient allocations of resources may ensue.

Although this Article focuses predominantly on the MED's effect on the business premises owner, it does recognize that workers, such as Bobby Roberts, and their families may be without recourse if the independent contractor is insolvent and uninsured. This issue merits greater attention than this Article can provide in this limited space. However, one possible solution is the strengthening of state Workers' Compensation Guaranty Funds. To strengthen these funds, states can expand their application beyond insolvent insurers and self-insurers to apply to situations involving uninsured employers. For states already addressing the issue of uninsured employers, they can fortify their existing programs. To fund this expansion, states may increase penalties for employers who fail to secure worker's compensation insurance. Additionally, to encourage more precise or tailored state regulations of multiemployer worksites, the federal government may earmark unconditional funds to states that revise their labor laws and regulations to create greater clarity for employers such as Florida Juice.²⁷³ States may use these additional funds to help subsidize stronger Workers Compensation Guaranty Funds.

Thus, although general rules may be efficient, they may not be reasonable in practice. Through precise regulations tailored to specific industries and situations and through stronger funding that protects workers of uninsured independent contractors, one can avoid the nega-

272. *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133 (No. 82 178, 1984), 1984 WL 34886, at *3 (“[I]n many instances it may not be feasible, because of an employer’s lack of expertise, or wasteful, without necessarily resulting in the best achievement of safety for all employees, to require the contracting employer to duplicate the safety efforts of the specialist.”).

273. For examples of states addressing the effects of uninsured employer, one can review the Pennsylvania, Alaska, and New Mexico models. *See* 77 PA. CONS. STAT. § 2702 (2011); STATE OF ALASKA, DIV. OF WORKERS’ COMP., Workers’ Compensation Benefit Guaranty Fund, <http://labor.alaska.gov/wc/benefit-guaranty.htm> (last visited Nov. 25, 2011); STATE OF N.M., WORKERS’ COMP. ADMIN., Uninsured Employers’ Fund, <http://www.workerscomp.state.nm.us/partners/uef.php> (last visited Nov. 25, 2011). This proposed scheme is similar to the Department of Education’s “Race to the Top” program. *See* Race to the Top Assessment Program, Dep’t of EDUC., <http://www2.ed.gov/programs/racetothetop-assessment/index.html> (last visited Nov. 25, 2011).

tive externalities of the Florida Juice hypothetical. Until such regulatory reform ensues, the Eleventh Circuit, as a court yet to address directly the MED in a binding decision, is in a prime position to provide clarity in this area of murky laws, doctrines, and policy statements and provide a spark to encourage OSHA to reconsider its MED policies and MCP.