

The Deconstruction of Landowner Liability in Missouri: Errant Interpretations of *Matteuzzi v. Columbus Partnership*¹

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INTRODUCTION

In Missouri, the circumstances under which a landowner² is liable for injuries suffered by an independent contractor's³ employee while working on the landowner's land appear to be settled. The state appellate courts agree that a landowner is liable if: (1) the work is inherently dangerous⁴ and the contractor's employee is ineligible for workers' compensation,⁵ or (2) the landowner controls either the

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1. 866 S.W.2d 128 (Mo. 1993).

2. This Note uses the pronoun "it" to refer to the landowner because the landowner is a business entity in every case considered herein.

3. Missouri has no statutory definition of the term "independent contractor." In *Vaseleou v. St. Louis Realty & Securities Co.*, the Missouri Supreme Court defined an independent contractor as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of his work." 130 S.W.2d 538, 539 (Mo. 1939).

The following are among the factors that Missouri courts consider to determine whether a worker is an employee or an independent contractor: the extent of control that the party ordering the work may or does exercise over the details of the work, whether the work requires special training, the length of employment, the ordering party's right to discharge the worker, the method of payment, who supplies tools, whether the work is part of the regular business of the party ordering the work, and whether the party ordering the work has a right to hire others to assist the worker and to direct assistants in their work. *Handley v. State, Division of Employment Sec.*, 387 S.W.2d 247, 253 (Mo. Ct. App. 1965).

4. In *Salmon v. Kansas City*, the Missouri Supreme Court defined an inherently dangerous activity as one that is "dangerous to others, no matter how carefully performed, where the danger arises from the act itself and not from the manner in which it is done." 145 S.W. 16, 23 (Mo. 1912) (en banc).

5. *Bowles v. Weld Tire & Wheel, Inc.*, 41 S.W.3d 18, 24 (Mo. Ct. App. 2001); *Wilson v. River Market Venture, I*, 996 S.W.2d 687, 693 (Mo. Ct. App. 1999) (citing *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 403-04 (Mo. Ct. App. 1997)).

employee's physical activities or "the details of the manner in which the work is done."⁶ Conversely stated, a landowner that controls neither the physical activities of the contractor's employees nor the details of how they perform the work is not liable under any negligence theory for injury to an employee covered by workers' compensation.⁷ The courts of appeals invariably cite the Missouri Supreme Court's most recent examination of the issue in *Matteuzzi v. Columbus Partnership* as precedent for these landowner liability rules.⁸

This Note argues that the prevailing interpretation of *Matteuzzi* is in error. The courts of appeals currently apply a test designed for analyzing premises liability in construction work cases (the "control-of-the-work-test")⁹ to cases that do not involve construction work. Consequently, post-*Matteuzzi* appellate court decisions base landowner liability on the landowner's degree of control over the plaintiff's work, even when the plaintiff's injury is due to a condition of the premises that is unrelated to the work.¹⁰ This practice is

6. *Smart v. Chrysler Corp.*, 991 S.W.2d 737, 743 (Mo. Ct. App. 1999). See also *Coonrod v. Archer-Daniels-Midland Co.*, 984 S.W.2d 529, 533 (Mo. Ct. App. 1998); *Callahan v. Alumax Foils, Inc.*, 973 S.W.2d 488, 491 (Mo. Ct. App. 1998); *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373, 377 (Mo. Ct. App. 1996); *Lawrence v. Bainbridge Apartments*, 919 S.W.2d 566, 569 (Mo. Ct. App. 1996); *Horner v. Hammons*, 916 S.W.2d 810, 814 (Mo. Ct. App. 1995).

7. *Callahan*, 973 S.W.2d at 490-91.

8. 866 S.W.2d 128 (Mo. 1993) (en banc). *Matteuzzi* is not the Missouri Supreme Court's latest holding on the issue. Later on the same day that it decided *Matteuzzi*, the court applied the rule from that case to a similar set of facts in *Owens v. Shop 'N Save Warehouse Foods, Inc.*, 866 S.W.2d 132 (Mo. 1993). However, the court omitted the bulk of the *Matteuzzi* analysis from *Owens*.

9. According to this test, a landowner is liable for injuries suffered by a contractor's employee if the employee can demonstrate that the landowner controlled the employee's physical activities or the details of the manner in which the employee performed the work. See *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 404 (Mo. Ct. App. 1997). Most courts refer to the test as some variation of "control test," or simply state the rule. See, e.g., *Callahan v. Alumax Foils, Inc.*, 973 S.W.2d 488, 490-91 (Mo. Ct. App. 1998) (referring to the "control test"); *Coonrod v. Archer-Daniels-Midland Co.*, 984 S.W.2d 529, 533-34 (Mo. Ct. App. 1998) (stating the rule); *Horner v. Hammons*, 916 S.W.2d 810, 814 (Mo. Ct. App. 1995) (referring to the "degree of control test"). James A. Burt refers to the "control of the work test" in his article, *Landowner Liability to Employees of Independent Contractors: A Graphic Restatement*. 53 J. MO. B. 86, 91 (1997). This term is adopted in this Note because it best describes the nature of the test.

10. As of February 2003, only one court of appeals case, *Callahan v. Alumax Foils, Inc.*, has used the control-of-the-work test to evaluate an injury unrelated to the work. 973 S.W.2d

unrealistic and unjust; it fails to ask which party is better able to avert the plaintiff's injury, and it does nothing to prevent the recurrence of such injuries.

Part I of this Note focuses on the principal theory of landowner liability to employees of independent contractors, known as premises liability,¹¹ and the development of the test that often governs that theory,¹² the control-of-the-work test. Part II examines the Missouri Supreme Court's treatment of another landowner liability theory, the inherently dangerous activity doctrine,¹³ in *Zueck v. Oppenheimer Gateway Properties, Inc.*¹⁴ In this forerunner to *Matteuzzi*, the court identified the considerations relevant to evaluating landowner liability to employees of independent contractors. Part III analyzes *Matteuzzi*, wherein the Missouri Supreme Court both adopted the control-of-the-work-test and virtually eliminated the inherently dangerous activity doctrine as a cause of action for employees of independent contractors. Part IV reviews the subsequent case law in the appellate courts involving claims by contractors' employees against landowners. Part V explains how these appellate court decisions have distorted *Matteuzzi* and how the resulting precedent can create unrealistic and unjust results. Finally, Part VI offers the appropriate statement of the law after *Matteuzzi*. It explains *Matteuzzi*'s advantages over the prevailing view, using the

488 (Mo. Ct. App. 1998). Language in other cases, however, makes it clear that there is no other accepted means to evaluate landowner liability to employees of independent contractors who are covered by workers' compensation. *See, e.g.,* Coonrod v. Archer-Daniels-Midland Co., 984 S.W.2d 529, 534 (Mo. Ct. App. 1998) (a landowner has no duty of care to the plaintiff unless the landowner exercises substantial control over the work); Anheuser-Busch, Inc. v. Mummert, 887 S.W.2d 736, 739 (Mo. Ct. App. 1994) (the only relevant query in such cases is whether the landowner's involvement in the work was sufficient to impose liability).

11. This Note uses term "premises liability" to refer to the general duty of a landowner to exercise reasonable care to prevent injury to the employee of an independent contractor while on the land. More specific versions of this duty are detailed at sections 343 and 422 of the Restatement. RESTATEMENT (SECOND) OF TORTS §§ 343, 422 (1965). These sections are reproduced at notes 35 and 113, *infra*. Recent appellate court decisions have denied the viability of premises liability claims by employees of independent contractors who are covered by workers' compensation. *See, e.g.,* Callahan v. Alumax Foils, Inc., 973 S.W.2d 488 (Mo. Ct. App. 1998); Gillespie v. St. Joseph Light & Power Co., 937 S.W.2d 373 (Mo. Ct. App. 1996).

12. This Note challenges the post-*Matteuzzi* appellate court decisions that maintain that the test governs every instance of such liability.

13. *See infra* note 60 and accompanying text.

14. 809 S.W.2d 384 (Mo. 1991).

considerations that the Missouri Supreme Court announced in *Zueck* as a guide.

I. THE DEVELOPMENT OF THE CONTROL-OF-THE-WORK TEST

According to the control-of-the-work test, a landowner is not liable for injuries suffered during a period of construction by a contractor's employee who is covered by workers' compensation, unless the landowner controls the employee's physical activities or the details of the manner in which the employee performs the work.¹⁵

A. Early Struggles with the Control Issue

Although the Missouri Supreme Court adopted the control-of-the-work test fairly recently,¹⁶ the question of control has long been at the center of cases involving injuries to employees of independent contractors.¹⁷ Such cases present a peculiar problem by bringing two generally accepted rules into conflict with each other. The first general rule states that a landowner has a duty to use reasonable and ordinary care to prevent injury to invitees,¹⁸ a category that includes employees of independent contractors.¹⁹ This rule describes a kind of premises liability.²⁰ The second general rule states that the duty of furnishing a reasonably safe workplace for an employee rests with the employer.²¹ The two rules conflict as to which party—the landowner or the employer—bears liability for the plaintiff's injuries when the employer is a contractor who does not own the workplace.²²

15. 866 S.W.2d 128, 132 (Mo. 1993) (citing *Halmick v. SBC Corporate Services, Inc.*, 832 S.W.2d 925, 929 (Mo. Ct. App. 1992)). If the worker's employer is not liable for workers' compensation insurance, the worker may still state a claim under the inherently dangerous activity doctrine. The worker may thus circumvent the control-of-the-work test. *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 404 (Mo. Ct. App. 1997).

16. The court adopted the test in *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128 (Mo. 1993) (citing *Halmick*, 832 S.W.2d at 929).

17. Control is also the decisive element in discerning independent contractors from statutory employees. *See supra* note 3.

18. *Glaser v. Rothschild*, 120 S.W. 1, 3 (Mo. 1909).

19. *Enloe v. Pittsburgh Plate Glass Co.*, 427 S.W.2d 519, 522 (Mo. 1968).

20. *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373, 379 (Mo. Ct. App. 1996).

21. *Herdler v. Buck's Stove & Range Co.*, 37 S.W. 115, 118 (Mo. 1896).

22. Normally, when the plaintiff sues both the landowner and the contractor, the landowner argues one rule and the contractor argues the other. *See, e.g.*, *Clark v. Union Iron &*

Early Missouri Supreme Court efforts to reconcile this conflict employed fact-specific analyses. These decisions provide a useful history of the court's struggle with the question of control.

1. The Landowner's Duty

In *Ryan v. St. Louis Transit Co.*,²³ the court emphasized the landowner's duty to an employee of an independent contractor. The plaintiff was a pipe fitter.²⁴ The defendant, an electric company and operator of streetcars, had hired the plaintiff's employer to install water pipes in the basement of its powerhouse.²⁵ The plaintiff died from electrocution when one of the pipes he was working with touched a poorly insulated electrical cable that was hanging from the ceiling.²⁶

The court made four observations. First, the insulation on the cables was not the proper kind to use in such a location.²⁷ Second, if the proper type of insulation had been used, the injury would not have occurred.²⁸ Third, the dangerous condition of the pipes was not obvious upon sight.²⁹ Finally, the court found that the plaintiff acted with reasonable care in performing his work.³⁰

Based on these findings, the court found the landowner liable for the plaintiff's injuries.³¹ The court held that the landowner was bound to anticipate that the plaintiff would touch one of the cables during the course of his work.³² The landowner's lack of control over the

Foundry Co., 137 S.W. 577, 579, 583 (Mo. 1911); *Jewell v. Kansas City Bolt & Nut Co.*, 132 S.W. 703, 704, 706-07 (Mo. 1910). While it is true that more than one party can bear liability in many circumstances, the apparent conflict between the two rules fueled the push for a rule offering greater predictability.

23. 89 S.W. 865 (Mo. 1905).

24. *Id.* at 865.

25. *Id.* at 866.

26. *Id.* at 867.

27. *Id.* The insulation was "of a kind to be easily affected by the extraordinary temperature to which the transit company knowingly and continually subjected" the cables. *Id.* at 868.

28. *Id.* at 868.

29. *Id.* at 867. "[A] reasonable man would have felt that he could safely undertake to work in their vicinity." *Id.* at 869.

30. *Id.* at 869.

31. *Id.* at 868.

32. "[K]nowledge of the character of the insulation installed by itself, of the conditions

plaintiff did not negate its duty to exercise reasonable care to make the premises reasonably safe for the plaintiff's work.³³ Further, although the plaintiff and a fellow employee were the only people in the basement, the room was under the landowner's "exclusive control."³⁴

The principles on which the *Ryan* court relied later appeared in section 343 of the Restatement (Second) of Torts, which sets forth landowner liability to invitees.³⁵

2. The Contractor's Duty

Clark v. Union Iron & Foundry Co. provides a good contrast to *Ryan*.³⁶ The court emphasized the employer's duty to provide a safe workplace for the employee.³⁷ The plaintiff, a laborer, had recovered from the landowner in a previous action,³⁸ and brought this action against his employer. The landowner, a railway company, hired the plaintiff's employer to erect a coal chute on its premises.³⁹ The

under which it was maintained, and of the probable effect of those conditions on the safety of the insulation, must be chargeable to the defendant company." *Id.*

33. *Id.* at 869.

34. *Id.* at 868.

35. RESTATEMENT (SECOND) OF TORTS § 343 (1965). Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

36. 137 S.W. 577 (Mo. 1911).

37. *Id.* at 581-82.

38. *Id.* at 580-81. About the landowner's duty, the court said:

[W]hen the railway company made the contract with [the contractor], by implication it agreed that [the contractor and its employees] might go upon its premises and do all things that were necessary to accomplish that purpose. And the law imposed the duty on the railway company to use no dangerous agencies in or about the premises that would injure or kill such employes while so engaged within the scope of their employment.

Id. at 582.

39. *Id.* at 578.

employer maintained a foreman on the premises to oversee the work.⁴⁰ There was a pole in the area, to which several electrical wires were attached.⁴¹ During the course of the work, the employer's foreman ordered the plaintiff to climb the pole and connect a support cable for the coal chute.⁴² The plaintiff was injured when he touched an electrical wire that was poorly insulated.⁴³

Based on these facts, the court found the contractor liable for the employee's injuries.⁴⁴ In response to the contractor's argument that it had no more opportunity than the plaintiff to discover the dangerous condition, the court held that the contractor had a duty to inspect the premises and warn the employee of any hidden dangers that were reasonably discoverable.⁴⁵ By ordering the plaintiff to climb the pole, the foreman gave the contractor's assurance that the pole was safe to climb.⁴⁶

B. A Test for Cases Involving Construction Work

An early version of the control-of-the-work test debuted in *Hunt v. Jefferson Arms Apartment Co.*,⁴⁷ a 1984 appellate court decision. In *Hunt*, the plaintiff fell down an elevator shaft while working on a hotel renovation project.⁴⁸ The contractor maintained physical control of the building,⁴⁹ and no employee of the landowner was involved in the plaintiff's accident.⁵⁰ In fact, one of the plaintiff's fellow employees had moved the elevator cab to another floor without

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 579. The plaintiff received a "terrific shock" so that he became a "helpless cripple for life." *Id.* at 580.

44. *Id.* at 582.

45. *Id.* at 583. This assertion, the court said, "is but another way of stating the rule that the master must use reasonable care to furnish a reasonably safe place for his servants to work." *Id.* at 582.

46. *Id.* at 581.

47. 679 S.W.2d 875 (Mo. Ct. App. 1984).

48. *Id.* at 878. As part of his job, the plaintiff transported debris on a motor buggy from upper floors to a dumpster located outside of the building. Assuming that the elevator cab was on his floor, the plaintiff drove through open elevator doors into an empty shaft. *Id.*

49. *Id.* at 880.

50. *Id.* at 881.

closing the elevator doors.⁵¹

Despite such circumstances, the plaintiff won a sizable jury verdict against the landowner in trial court, arguing landowner liability to invitees.⁵² The court of appeals responded by adopting a rule intended to make construction cases more predictable. Citing an Iowa Supreme Court decision, the court held that a landowner's duty of care to the employee of an independent contractor ceases when the landowner surrenders control of the premises to the contractor during a period of construction.⁵³ The landowner cannot be held liable for injuries suffered during construction on the premises unless the landowner "substantially" supervised the construction.⁵⁴ The court further stated that contract provisions offer little guidance as to which party has factual control of the premises.⁵⁵

A later appeals court decision, *Halmick v. SBC Corporate Services, Inc.*,⁵⁶ added the final elements to the control-of-the-work test by specifying the level of landowner control that qualified as "substantial." As in *Hunt*, the plaintiff in *Halmick* suffered his injuries while working on a construction project.⁵⁷ After applying the *Hunt* test, the court stated that a landowner retains liability if it controls the employees' physical activities or the "details of the manner in which" the employees perform the work.⁵⁸

51. *Id.* at 878.

52. *Id.* at 877. The trial court awarded \$1,300,000. *Id.*

53. *Id.* at 880 (citing *Lunde v. Wennebago Industries, Inc.*, 299 N.W.2d 473, 479 (Iowa 1980)). A landowner that surrenders "control and possession of the premises to an independent contractor during a period of construction . . . is not the possessor of the land during the construction period." *Id.*

54. "The owner's involvement in overseeing the construction must be substantial in order to justify imposition of liability on the owner." 679 S.W.2d at 880.

55. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 328E, cmt. a (1965)). Contract provisions "merely set forth legal relationships between the various contracting parties." *Id.* at 880. The court also cited the comment's statement that possession within the context of a landowner's liability for injuries occurring on the premises is used "strictly in the factual sense." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 328E, cmt. a (1965)). Interestingly, the *Hunt* court quoted the statement regarding factual control just before adopting an early form of the control-of-the-work test. *Id.* at 880. While the test helped the court determine factual possession during the hotel renovation project, the test later enabled courts to ignore factual control in cases such as *Callahan v. Alumax Foils, Inc.*, 973 S.W.2d 488 (Mo. Ct. App. 1998) and *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373 (Mo. Ct. App. 1996).

56. 832 S.W.2d 925 (Mo. Ct. App. 1992).

57. *Id.* at 927.

58. *Id.* at 929 (citing *Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354, 359

II. ZUECK AND THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE⁵⁹

Missouri's inherently dangerous activity doctrine holds a landowner liable for injuries to third parties or employees of independent contractors not covered by workers' compensation. The doctrine predicates liability on the landowner's failure to take precautions to prevent an injury caused by an inherently dangerous activity performed on the land.⁶⁰ Because workers' compensation

(Mo. 1954); *Boulch v. John B. Gutmann Construction Co.*, 366 S.W.2d 21, 29 (Mo. Ct. App. 1963)). The cases cited by the court dealt with third-party injury claims against companies for the negligence of independent contractors working for those companies.

59. The history of the inherently dangerous activity doctrine in Missouri is well documented. See *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128 (Mo. 1993) (containing an extensive analysis of the doctrine by the Missouri Supreme Court); *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384 (Mo. 1991) (containing another thorough analysis by the Missouri Supreme Court); Burt, *supra* note 9 (addressing the status of the doctrine after *Matteuzzi* and critiquing the Missouri Supreme Court's reasoning in *Zueck*); Carol J. Miller, *Inherently Dangerous Exception Versus Worker's Compensation*, 48 J. MO. B. 212 (1992) (recounting the history of the doctrine and assessing its status in the aftermath of *Zueck*); Matthew A. Clement, *Missouri Slams the Door on Employees of Independent Contractors*, 59 MO. L. REV. 1037 (1994) (examining the doctrine's history and agreeing with the then recent *Matteuzzi* holding); Nancy L. Ripperger, *The Inherently Dangerous Doctrine in Missouri: A Socially Just Doctrine?*, 56 MO. L. REV. 479 (1991) (examining the doctrine's development and advocating the approach that the Missouri Supreme Court would soon adopt in *Zueck*).

60. *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 404 (Mo. Ct. App. 1997). The doctrine originally served as an exception to the general common law rule that a landowner is not vicariously liable for the negligent acts of a contractor's employee. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 71, at 509, 512 (5th ed. 1984). The general rule served the rationale that the contractor, as the person in immediate control of the employee, should bear the burden of liability for the employee's actions. *Id.* at 509. "[The work] is to be regarded as the contractor's own enterprise, and he, rather than the [landowner], is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it." *Id.* This rule proved unsatisfactory, however, where a landowner contracts for work that is likely to cause injury or damage to persons or property bordering the land without the taking of special precautions. Landowners could order the dangerous work and avoid liability for any resulting harm simply by contracting out. In *Bower v. Peate*, the court addressed the problem by stating that a landowner is liable for the negligence of the contractor or the contractor's employees if the landowner contracts for work that poses hazards to the surrounding area without taking special precautions. 1 Q.B.D. 321, 326 (1876). A landowner:

who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else . . . to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

Id. Although Keeton indicates that *Bower* established the inherently dangerous activity doctrine

covers the vast majority of contractors whose employees perform inherently dangerous activities, the doctrine is now largely defunct as a cause of action for employees of independent contractors.⁶¹

In contrast, the courts did not consider workers' compensation when judging claims under the doctrine before 1991.⁶² In that year, however, the Missouri Supreme Court decided *Zueck v. Oppenheimer Gateway Properties, Inc.*⁶³ In *Zueck*, the court eliminated vicarious liability claims under the doctrine for plaintiffs covered by workers' compensation.⁶⁴ The court presented at least seven identifiable justifications for its holding.

(see KEETON § 71, at 512), the Missouri Supreme Court not only invoked a theory similar to the doctrine in 1874, but also applied that theory to find a landowner liable to a contractor's employee. See *Horner v. Nicholson*, 56 Mo. 220, 221 (Mo. 1874).

61. All employers in the construction industry, where inherently dangerous activities most often take place, must carry workers' compensation insurance. MO. REV. STAT. § 287.030 (1994). In other industries, every employer with five or more employees must carry the insurance. *Id.* § 287.030(3); Miller, *supra* note 59, at 220.

62. The doctrine was generally available to employees of independent contractors, regardless of workers' compensation coverage, for over sixty years. The Missouri Supreme Court officially recognized the cause of action for such plaintiffs in *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 S.W.2d 617 (Mo. 1928) (en banc).

63. 809 S.W.2d 384 (1991).

64. *Id.* at 390. The court held that "the inherently dangerous exception no longer applies to employees of independent contractors covered by workers' compensation . . ." *Id.* The plaintiff had advanced only a vicarious liability theory, however, and comments in the chief justice's concurring opinion led to some speculation that a cause of action survived where the landowner was directly negligent under the inherently dangerous activity doctrine. *Id.* at 391 (Blackmar, C.J., concurring). The chief justice stated that there may still be an inherently dangerous activity cause of action in "a case in which the evidence supports a finding of a duty from the owner to others and a breach of that duty through the owner's own negligence." See *Halmick v. SBC Corporate Services*, 832 S.W.2d 925, 928 (Mo. Ct. App. 1992) (acknowledging the chief justice's remarks as the basis for the plaintiff's claim); *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128, 131-32 (Mo. 1993) (comparing the vicarious and direct negligence versions of the inherently dangerous activity doctrine in response to the plaintiff's claim of direct negligence under the doctrine).

Vicarious liability under the inherently dangerous activity doctrine is set forth in section 416 of the Restatement. That section, titled "Work Dangerous in Absence of Special Precautions," states:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

RESTATEMENT (SECOND) OF TORTS § 416 (1965).

First, workers' compensation provides the plaintiff with a source of recovery, obviating the need for the landowner to insure against the employee's injuries.⁶⁵ Second, because the contractor's workers' compensation costs are included in the contract amount, the landowner has already paid for the employee's insurance and should not have to bear any further liability.⁶⁶ Third, the doctrine defeats the tort policy goal of placing the burden of liability on the party who can best avoid the harm.⁶⁷ The experienced independent contractor, not the landowner, should bear liability because the contractor is better able to identify an activity's inherent dangers and prevent them from causing injury.⁶⁸ Fourth, the doctrine encourages the landowner to avoid liability by using its own employees to perform dangerous work that a skilled contractor could better handle, thereby increasing the risk of injury to workers.⁶⁹ Fifth, by encouraging the use of statutory employees to perform the work, the doctrine increases risk to third parties who are not participating in the work.⁷⁰ Sixth, the contractor's own negligence often causes injuries incurred during the course of dangerous work. Thus, inherently dangerous activity claims defeat the tort policy goal of placing the loss upon the party who is at fault.⁷¹ Finally, Missouri's workers' compensation law releases the

65. 809 S.W.2d at 388, 389. "The employees of the independent contractor are protected by workers' compensation." *Id.* at 388.

66. *Id.* at 389. The court later called this situation "double liability" in *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128, 131 (Mo. 1993). See *Peone v. Regulus Stud Mills, Inc.*, 744 P.2d 102, 113 (Idaho 1987) (Bistline, J., dissenting) for criticism of this justification from another jurisdiction.

67. 809 S.W. 2d at 388 (quoting W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984)).

68. 809 S.W.2d at 387-88.

69. *Id.* at 388.

70. *Id.* The court favored the continued availability of the doctrine to third parties, such as pedestrians:

Common sense permits a landowner to identify the potential harm which an activity may create to persons not participating in the activity. Having identified the risks, a responsible landowner may undertake the steps necessary to protect third parties from that harm. The need to deny access to a facility, erect protective barricades around excavations, construct protective overheads where work aloft is anticipated, and a myriad of obviously needed and easily fabricated devices are relatively easy to anticipate and provide.

Id. at 387.

71. *Id.* at 390. The court emphasizes this point: "The purpose of the law of torts is to . . .

employer from all further liability for an employee's injury.⁷² A faultless landowner thus has no recourse against a contractor whose negligence causes the injury.⁷³

III. THE *MATTEUZZI* DECISION

The Missouri Supreme Court addressed the inherently dangerous activity doctrine and applied the control-of-the-work test in the same case for the first time in *Matteuzzi*.⁷⁴ The court held that (1) an employee of an independent contractor covered by workers' compensation cannot bring any form of inherently dangerous activity claim against a landowner;⁷⁵ and (2) during a period of construction, an employee of an independent contractor must show that the landowner controlled either the employee's physical activities or the "details of the manner in which" the employee performed the work in order to prove that the landowner retained liability for the plaintiff's injuries.⁷⁶

afford compensation for injuries sustained by one person as a result of the [negligent] conduct of another." *Id.* at 388 (quoting W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984)).

72. 809 S.W.2d at 388-89 (citing MO. REV. STAT. § 287.120 (1986)). The statute reads, "[e]very employer subject to the provisions of this chapter . . . shall be released from all other liability therefor whatsoever, whether to the employee or any other person." MO. REV. STAT. § 287.120 (1986). In *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting*, the Missouri Supreme Court held:

[T]he language of Sec. 287.120(1), 'shall be released from all other liability *therefor* whatsoever,' means all other liability 'for personal injury or death of the employee'; and does not mean liability for breach of an independent duty or obligation owed to a third party by an employer whose liability for injury to his employee is under the compensation act. It seems unlikely that workmen's compensation acts were intended to affect the rights of third parties outside of the employer-employee relationship.

323 S.W.2d 788, 796 (Mo. 1959). This observation is in direct conflict with the court's subsequent dictum in *Zueck*, that landowners have no right to be indemnified by negligent contractors. *See* 809 S.W.2d 384, 388 (Mo. 1991).

73. 809 S.W.2d at 388-89. For criticism of the court's reasoning on this issue, see Burt, *supra* note 9, at 89-90, noting that landowners can ensure indemnification by specifying the right in the work contract (citing *McDonnell*, 323 S.W.2d at 796).

74. 866 S.W.2d 128 (Mo. 1993).

75. *Id.* at 132.

76. *Id.* (citing *Halmick v. SBC Corporate Services, Inc.*, 832 S.W.2d 925, 929 (Mo. Ct. App. 1992)). The plaintiff was replacing the roof of a row house that was undergoing extensive renovation. *Id.* The work required the plaintiff to position himself on the roof, which was supported only by a deteriorated brick wall. The plaintiff was injured when the wall collapsed.

The plaintiff in *Matteuzzi* argued that the landowner was directly negligent in failing to take the proper precautions to minimize the risk of injury posed by an inherently dangerous activity.⁷⁷ According to the plaintiff, this direct liability form of the inherently dangerous activity doctrine remained viable after *Zueck*.⁷⁸

The court considered whether its earlier reasoning in *Zueck*, for eliminating vicarious landowner liability, also applied to claims alleging the landowner's own negligence.⁷⁹ The court focused on two justifications in the *Zueck* holding: the unfairness of imposing two forms of liability—for workers' compensation and for inherently dangerous activities—on the landowner, and the increased risk of injury that results when the landowner opts to use statutory employees to do the work instead of experienced independent contractors.⁸⁰ The court concluded that these reasons apply to either version of the doctrine, and rejected the plaintiff's argument.⁸¹

Having dispensed with the inherently dangerous activity issue, the court next considered whether the plaintiff might have a premises liability cause of action.⁸² The plaintiff claimed that the landowner breached its duty to provide a safe workplace.⁸³ The court noted the general rule of landowner liability to employees of independent

He later filed a claim for workers' compensation with his employer as well as a separate claim for damages against the landowner. *Id.*

77. The plaintiff's theory is set forth in section 413 of the Restatement. RESTATEMENT (SECOND) OF TORTS (1965). That section, titled "Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor," states:

One 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 if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Id.

78. *Matteuzzi*, 866 S.W.2d at 131.

79. *Id.* at 130-32. See *supra* notes 64-73 and accompanying text for the details of the court's analysis in *Zueck*.

80. 866 S.W.2d at 131-32.

81. *Id.* "The same reasons set forth in *Zueck* for rejecting a claim under section 416 are equally persuasive to reject a claim under section 413." *Id.* at 131.

82. *Id.* at 132.

83. *Id.*

contractors.⁸⁴ Where the landowner “relinquishes possession and control of the premises to an independent contractor during a period of construction,” however, the general rule no longer applies. In such situations, the court announced, the control-of-the-work test applies. The court found that the landowner exercised too little control to be liable for the plaintiff’s injuries.⁸⁵

IV. THE DEVELOPMENT OF THE PREVAILING INTERPRETATION OF *MATTEUZZI*

A. *Lawrence v. Bainbridge Apartments: The Court Applies the Control-of-the-Work Test to Non-Construction Situations*

The Court of Appeals for the Western District of Missouri decided *Lawrence v. Bainbridge Apartments*⁸⁶ three years after the *Matteuzzi* decision. Together with two later appellate court cases, *Lawrence* shaped the prevailing view of *Matteuzzi*.⁸⁷ In *Lawrence*, the court applied the control-of-the-work test to a window washer’s claim against the owner of an apartment complex,⁸⁸ making *Lawrence* the first case to apply the test in a non-construction situation.

The plaintiff in *Lawrence* was injured in a fall while cleaning the upper level windows of an apartment building.⁸⁹ After filing a claim for workers’ compensation benefits against the company employing him for the job, he brought a negligence claim against the landowner alleging premises liability based on control.⁹⁰

84. *Id.*

85. *Id.*

86. 919 S.W.2d 566 (Mo. Ct. App. 1996).

87. The two other cases are *Callahan v. Alumax Foils, Inc.*, 973 S.W.2d 488 (Mo. Ct. App. 1998), and *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373 (Mo. Ct. App. 1996).

88. 919 S.W.2d at 569-70.

89. *Id.* at 568.

90. *Id.* at 567-68. The plaintiff also invoked the inherently dangerous activity doctrine. *Id.* Whether the company, Smart Way Janitorial Service, was the plaintiff’s employer for workers’ compensation purposes was a matter of dispute in the workers’ compensation proceedings. *Id.* at 571-72. The court noted the holding of *Scott v. Edwards Transportation Co.*, that abrogation of the inherently dangerous activity doctrine applies only where an independent contractor is “liable” to a plaintiff employee for his injuries pursuant to the workers’ compensation law. *Id.* at 571 (citing *Scott v. Edwards Transp. Co.*, 889 S.W.2d 144 (Mo. Ct. App. 1994)). Although an administrative law judge had awarded workers’ compensation benefits to the plaintiff, the

To determine whether the landowner retained such control, the court looked to *Owens v. Shop 'N Save Warehouse Foods, Inc.*⁹¹ The Missouri Supreme Court decided *Owens* on the same day as *Matteuzzi*, using identical legal principles.⁹² The plaintiff in *Owens* slipped and fell from scaffolding while painting the ceiling of a building that was under construction.⁹³ The landowner had insisted that the plaintiff use a certain color of paint, even though that color was unavailable in the non-slip variety that the plaintiff preferred.⁹⁴ Similarly, the landowner in *Lawrence* insisted that the plaintiff wash the apartment building windows from the outside, even though the buildings lacked adequate structures to which the plaintiff could tie his safety line.⁹⁵ As in *Owens*, the *Lawrence* court found that the plaintiff could not satisfy the control-of-the-work test.⁹⁶ The plaintiff was free to do the work as he chose, so long as he did so from the outside of the building.⁹⁷

Appeals Board for the Kansas Division of Workers' Compensation later set aside the award on appeal. *Id.* at 568. The issue was whether the plaintiff was in fact an employee of a contractor. *Id.* Because the plaintiff's appeal of the second ruling was pending when the court entered its holding in *Lawrence*, the court remanded the case. The appeals board ordered the trial court to reinstate the inherently dangerous activity claim on remand if it found that the plaintiff was not a covered employee under workers' compensation. *Id.* at 572. On remand, the trial court found that the plaintiff was not an employee, but a solo independent contractor. *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 403 (Mo. Ct. App. 1997). The plaintiff, therefore, did not qualify as an employee under the workers' compensation statute, and was ineligible for benefits. *Id.* See MO. REV. STAT. § 287.030(1) (1993). The court held that such a worker could not recover for injuries under the inherently dangerous activity doctrine. 957 S.W.2d at 405. The court reasoned that, as an independent contractor, the plaintiff enjoyed stronger bargaining power than an employee would, as well as the freedom to accept or decline an offer based on his assessment of the risk involved. *Id.*

91. 866 S.W.2d 132 (Mo. 1993).

92. The Missouri Supreme Court applied the same new rules regarding the inherently dangerous activity doctrine and premises liability in both cases. *Id.* at 134-35. While the court decided *Matteuzzi* first, and presented its reasoning for the new rules more thoroughly there than in *Owens*, the *Lawrence* court found the fact pattern it faced more analogous to *Owens* than to *Matteuzzi*. 919 S.W.2d at 569.

93. 866 S.W.2d at 134.

94. *Id.* at 134-35. The oil paint became slippery when enough of it accumulated on the scaffolding. *Id.* at 133.

95. 919 S.W.2d at 568. The landowner believed that washing the windows from the outside of the buildings, rather than from the inside, would be less intrusive to the tenants.

96. *Id.* at 570.

97. *Id.* This echoed the holding in *Owens*, where the court called the choice of paint color "wholly different from the activity of painting." 866 S.W.2d at 135.

*B. Gillespie v. St. Joseph Light & Power Co.: The Court Applies the Control-of-the-Work Test to Section 343 Claims*⁹⁸

In 1996, the same court that produced the *Lawrence* opinion decided *Gillespie v. St. Joseph Light & Power Co.*⁹⁹ *Gillespie*, another non-construction case, held that *Matteuzzi's* control-of-the-work test governs landowner liability to invitees as outlined in section 343 of the Restatement.¹⁰⁰ The plaintiff in *Gillespie* was installing computer cable atop two elevated structural beams in a functioning power facility.¹⁰¹ Thick dust and insulation covered a gap between the two beams, causing the plaintiff to mistake them for one solid beam.¹⁰² The plaintiff, who was not wearing a safety belt, fell when his foot broke through the insulation covering the gap.¹⁰³

The plaintiff invoked the premises liability theory found in section 343 of the Restatement.¹⁰⁴ He noted that the Missouri Supreme Court had previously applied this theory to claims like his,¹⁰⁵ and that *Zueck* and *Matteuzzi* rejected only the inherently dangerous activity doctrine set out in sections 413 and 416 of the Restatement.¹⁰⁶ Conceding that neither *Zueck* nor *Matteuzzi* mentioned section 343, the court nevertheless found that both cases implicitly included the section by noting the general rule of landowner liability to invitees.¹⁰⁷ The court also stated that by abrogating direct liability under section 413, the *Matteuzzi* court "necessarily balanced the type of policy concerns"

98. RESTATEMENT (SECOND) OF TORTS § 343 (1965). See *supra* note 35 and accompanying text.

99. 937 S.W.2d 373 (Mo. Ct. App. 1996).

100. *Id.* at 378-79.

101. *Id.* at 374.

102. *Id.* at 374-75.

103. *Id.*

104. *Id.* at 377-78.

105. *Id.* at 378. The plaintiff cited *Hokanson v. Joplin Rendering Co., Inc.* for this claim. 509 S.W.2d 107 (Mo. 1974). In *Hokanson*, the court analyzed an employee of an independent contractor's claim by referring to section 343. *Id.* at 110. The plaintiff claimed that the feet of the ladder the landowner supplied for the plaintiff's work were greasy. *Id.* The court found that the dangerous condition that caused the injury was open and obvious, and that the landowner was therefore not liable. *Id.* at 113-14. Like the cases discussed in Part I, *Hokanson* is an example of a properly analyzed landowner liability case.

106. 937 S.W.2d at 378. These portions of the Restatement are reproduced at notes 64 and 77, *supra*.

107. *Id.* at 378-79.

that would factor into the decision to disallow claims under section 343.¹⁰⁸ Accordingly, the court ruled that the control-of-the-work test applies to section 343 claims.¹⁰⁹

C. Callahan v. Alumax Foils, Inc.: The Court Applies the Control-of-the-Work Test to Section 343 Claims Where the Cause of Injury Is Unrelated to the Work

The most recent noteworthy interpretation of *Matteuzzi* is found in *Callahan v. Alumax Foils, Inc.*¹¹⁰ *Callahan*, like *Lawrence* and *Gillespie*, dealt with a non-construction situation. But unlike its predecessors, *Callahan* dealt with an injury that did not spring from the plaintiff's work activity.¹¹¹ Even in such circumstances, *Callahan* held, a plaintiff must satisfy the control-of-the-work test.

The plaintiff in *Callahan* argued that because his case was distinguishable from *Halmick*, he could proceed under section 343¹¹² as well as section 422.¹¹³ The plaintiff distinguished his case from

108. *Id.* at 378.

109. *Id.* at 379.

110. 973 S.W.2d 488 (Mo. Ct. App. 1998).

111. *Id.* at 490. The plaintiff, an employee of an independent plumbing contractor, was installing water piping in a running manufacturing plant. *Id.* at 489; Appellant's Brief at 38, *Callahan v. Alumax Foils, Inc.*, 973 S.W. 2d 529 (Mo. Ct. App. 1998) (No. 72908). While performing this work, he was overcome by carbon monoxide fumes, and fell from his ladder. *Callahan*, 973 S.W.2d at 489. He sustained a neck injury requiring "cervical fusion surgery," as well as memory loss due to carbon monoxide poisoning. Appellant's Brief at 12, *Callahan* (No. 72908). A pipe that carried exhaust fumes from a machine called a "chiller unit" or "oven" ran through the room. *Id.* at 10. Apparently, a plant employee had replaced a portion of the pipe with a rubber hose to alleviate a condensation problem in the exhaust system. *Id.* at 10-11. The hose became disconnected due to unknown causes, and instead of carrying the carbon monoxide out of the building, it released the fumes in the room. *Id.* at 11. Shortly before losing consciousness, the plaintiff noticed the rubber hose hanging down to the floor, where it looped in a circle. *Id.* at 10. The court deemed these details immaterial, saying, "whether or not the dangerous condition existed before plaintiff began working on defendant's property is not relevant to our analysis." 973 S.W.2d at 491.

112. Appellant's Brief at 37, *Callahan* (No. 72908) (citing *Halmick v. SBC Corporate Services, Inc.*, 832 S.W. 2d 925 (Mo. Ct. App. 1992)).

113. *Id.* at 40-41. Section 422 of the Restatement, titled "Work on Buildings and Other Structures on Land," states:

A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or

Halmick in two key ways. First, whereas the employee in *Halmick* was working on a construction project that was in the factual control of the contractor, the plaintiff's injury occurred in a fully operational manufacturing plant.¹¹⁴ Second, whereas the employee's injury in *Halmick* was a natural consequence of his work,¹¹⁵ the plaintiff's injuries were due to a dangerous condition that preexisted his arrival on the premises.¹¹⁶ Therefore, the plaintiff argued, the landowner was in possession of the premises, and the plaintiff's injuries were unrelated to his work. In such a situation, the control-of-the-work test should not apply.¹¹⁷ Instead, either section 343 or section 422, both

outside of the land for physical harm caused to them by the unsafe condition of the structure

(a) while the possessor has retained possession of the land during the progress of the work, or

(b) after he has resumed possession of the land upon its completion.

RESTATEMENT (SECOND) OF TORTS § 422 (1965). Unlike section 343, section 422 specifically mentions independent contractors. *Id.* This Note focuses on section 343 as the main alternative to the current rule because the principles of landowner/invitee liability found in that section have a more extensive history in Missouri than do the ideas found in section 422. A search of Missouri case law on Westlaw and Lexis/Nexis returned only three mentions of section 422. The court briefly refers to the section in *Matteuzzi* to support the contention that the duty of care shifts from the landowner to the independent contractor when the landowner relinquishes control and possession of the premises to the contractor. 866 S.W.2d 128, 132 (Mo. 1993). The only other mention of section 422, other than in *Callahan*, appears in *Saggio v. City of Arnold*, 807 S.W.2d 114, 116 (Mo. Ct. App. 1990). The section appears there only because the plaintiff called attention to it. *Id.* The court quickly dismissed the plaintiff's point. *Id.* The adoption of either theory for claims by employees of independent contractors against landowners in non-construction situations would be a major improvement over the control-of-the-work test.

114. 973 S.W.2d at 491; Appellant's Brief at 39, *Callahan* (No. 72908). Although the court in *Callahan* never mentioned the word, "construction," the plaintiff emphasized the construction/non-construction distinction in the Appellant's Brief submitted to the court. *Id.* at 39. The appellant's brief also repeatedly asserted that the landowner must have factual control of the premises if the plant is operating fully during the work. *Id.* at 36, 38-40. Comment c. to section 422 of the Restatement strongly supports the plaintiff's position. The comment states, "Possession usually is surrendered fully in the case of construction or demolition work, and it may be surrendered in cases of extensive repairs. Normally, however, the employer remains in possession during ordinary repairs, and for that reason the rule here stated is more frequently applied in such cases." RESTATEMENT (SECOND) OF TORTS § 422 cmt. c (1965).

115. 832 S.W.2d at 926-27. "As part of his duties, appellant was required to work on steel girders approximately 45 feet above the ground. While walking along one of these girders, appellant slipped on a 'slick or slippery' surface of the girder and fell to the ground." *Id.*

116. See *supra* note 111.

117. 973 S.W.2d at 490-91. The control-of-the-work test applies when the "landowner relinquishes possession and control of the premises to an independent contractor during a period

containing premises liability theories, should govern the case.¹¹⁸

These distinctions fell on deaf ears. The court rejoined each of the plaintiff's arguments with the observation that *Matteuzzi* requires the plaintiff to satisfy the control-of-the-work test to bring a claim against the landowner under any negligence theory.¹¹⁹ The existence of a dangerous condition before the plaintiff began working, the court said, is irrelevant to the case.¹²⁰

V. POST-MATTEUZZI DECISIONS ANALYZED

Each of the three court of appeals decisions discussed in Part IV expanded the Missouri Supreme Court's *Matteuzzi* decision in a way that weakened the ability of employees of independent contractors to bring negligence claims against landowners. Critical examination of these holdings reveals legally suspect analyses that amount to bad policy.

A. Lawrence v. Bainbridge Apartments

As noted in Part IV, *Lawrence* was the first case to apply the control-of-the-work test in a non-construction case.¹²¹ It is easy to find where the *Lawrence* opinion goes astray. As the court recites the controlling case law, all from *Matteuzzi*, it begins detailing the control-of-the-work test. Included in the recitation is the phrase, "during the period of construction."¹²² However, the court never again mentions those crucial words. One possible explanation for how the court overlooked the construction issue is that it was distracted by the similarities between the facts before it and those in *Owens*. In each case, the plaintiff worked at elevated heights without

of construction." *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128, 132 (Mo. 1993). The plaintiff conceded that the landowner did not control his work. 973 S.W.2d at 491; Appellant's Brief at 43, *Callahan* (No. 72908).

118. 973 S.W.2d at 490-91.

119. *Id.* The court even went so far as to say that the plaintiff must satisfy the test "to recover under any tort theory." *Id.* at 490.

120. *Id.* at 491. "[W]hether or not the dangerous condition existed before plaintiff began working on defendant's property is not relevant to our analysis."

121. 919 S.W.2d 566 (Mo. Ct. App. 1996). See *supra* notes 86-90 and accompanying text.

122. 919 S.W.2d at 569 (citing *Matteuzzi*, 866 S.W.2d at 132).

taking the appropriate safety precautions. In each case, the landowner's demands added risk to the work. In *Owens*, however, the plaintiff was painting the ceiling of a grocery store that was *under construction*.¹²³ There was no construction activity in *Lawrence*. The control-of-the-work test was therefore appropriate for *Owens*, but not for *Lawrence*.

Although *Lawrence* set bad precedent, the court reached the correct result. Employing a section 343 premises liability analysis, we see that the dangerous condition was the lack of "tie back" structures on the roof.¹²⁴ This condition was obvious to the plaintiff well before it posed any danger to him. As a professional window washer, he knew the risk of proceeding without adequate support for a safety line. The landowner would therefore not be liable.¹²⁵

B. Gillespie v. St. Joseph Light & Power Co.

Gillespie was the first case to hold that the control-of-the-work test governs premises liability claims under section 343 of the Restatement.¹²⁶ The court cited *Halmick*¹²⁷ and *Matteuzzi*¹²⁸ as precedent for this holding.¹²⁹ As in *Lawrence*, the court oddly ignored the construction work context of those cases.¹³⁰ The court reasoned that *Zueck* implicitly included section 343 in its holding by noting the general rule of landowner liability to invitees.¹³¹ The court also found that *Matteuzzi* necessarily contemplated section 343 premises liability

123. 866 S.W.2d at 133.

124. Section 343, titled "Dangerous Conditions Known to or Discoverable by Possessor," subjects the landowner to liability for harm caused to invitees by "a condition on the land." RESTATEMENT (SECOND) OF TORTS § 343 (1965) (reproduced at note 35, *supra*).

125. Section 343(b) imposes no liability unless the landowner "should expect that [the plaintiff] will not discover the danger." *Id.* § 343(b).

126. See *Gillespie v. St. Joseph Light & Power Co.*, 919 S.W.2d 373, 378 (Mo. Ct. App. 1996). The plaintiff in *Lawrence* did not plead section 343.

127. *Halmick v. SBC Corporate Services, Inc.*, 832 S.W.2d 926 (Mo. Ct. App. 1992).

128. *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128 (Mo. 1993).

129. *Gillespie*, 937 S.W.2d at 377.

130. The plaintiff in *Halmick* was engaged in the construction and remodeling of an airport hangar. 832 S.W.2d 926, 926. The plaintiff in *Matteuzzi* was replacing the roof of a row house that was undergoing extensive renovation. 866 S.W.2d 128, 132. The *Gillespie* court also follows *Lawrence* in using the word "construction" in its discussion without noting its significance. 937 S.W.2d at 377.

131. 937 S.W.2d at 378-79.

claims when it eliminated the direct negligence version of the inherently dangerous activity doctrine.¹³² If, as these assertions maintain, the Missouri Supreme Court deems the same analysis applicable to both the doctrine and section 343 premises liability, it follows that *Zueck's* reasons for eliminating vicarious landowner liability under the doctrine are equally persuasive to reject a claim under section 343.¹³³ As discussed in section VII, this is not the case.

As in *Lawrence*, the court's strained reading of the *Zueck* and *Matteuzzi* decisions produced the proper result. The plaintiff argued that insulation and dust made two slim parallel beams look like one big one, thus creating a dangerous condition.¹³⁴ As a professional installer of computer cable,¹³⁵ however, the plaintiff surely knew the dangers involved in the work. The danger was not unreasonable, as section 343 requires for liability.¹³⁶ Further, although he had access to an extension ladder and a safety belt, the plaintiff declined to use either safety device.¹³⁷ This lack of precaution is not something that the landowner should have expected, which is another requirement for section 343 liability.¹³⁸ The result would therefore be the same had the court allowed a section 343 claim.

C. Callahan v. Alumax Foils, Inc.

In *Callahan*, as in *Gillespie*, the court held that the control-of-the-work test governs all negligence claims by employees of independent contractors against landowners.¹³⁹ Almost immediately after stating the facts of the case, the court announced that the plaintiff could not

132. *Id.* at 378.

133. *See supra* notes 65-73 and accompanying text. As the court noted in *Matteuzzi*, "the same reasons set forth in *Zueck* for rejecting a claim under [the indirect liability form of the inherently dangerous activity doctrine] are equally persuasive to reject a claim under [the direct liability form of the doctrine]." 866 S.W.2d 128, 131 (Mo. 1993). From this, the *Gillespie* court inferred that *Zueck* and *Matteuzzi* intended to eliminate all forms of direct landowner liability to employees of independent contractors covered by workers' compensation. 937 S.W.2d at 378.

134. 937 S.W. 2d at 374-75.

135. In fact, he was the crew chief. *Id.* at 374.

136. RESTATEMENT (SECOND) OF TORTS § 343(a) (1965).

137. 937 S.W.2d at 374.

138. RESTATEMENT (SECOND) OF TORTS § 343(b) (1965).

139. 973 S.W.2d 488, 490 (Mo. Ct. App. 1998).

proceed under section 343.¹⁴⁰ It held that the plaintiff's only option was to demonstrate the requisite landowner control under the control-of-the-work test.¹⁴¹ The court admitted that the plaintiff would have avoided summary judgment if he had been able to proceed under a theory that the defendant was negligent for failing to warn of a dangerous condition on its property.¹⁴² Following *Gillespie*, however, the court indicated that *Matteuzzi* precluded the use of such a theory.¹⁴³ Accordingly, because the plaintiff worked at his own direction, the landowner escaped liability.¹⁴⁴

In neither *Lawrence* nor *Gillespie* did the court's errant analysis likely affect the success of the plaintiff's claims. By contrast, *Callahan* demonstrates the danger in the prevailing interpretation of *Matteuzzi*. In order to assign liability for an injury that was unrelated to the plaintiff's work,¹⁴⁵ the *Callahan* court applied a test that measures the landowner's control over that work. In such a situation, the control-of-the-work test does not reflect reality; it cannot determine factual control of the situation. Unlike *Lawrence* and *Gillespie*, the plaintiff was in no position to avoid his injury. Nothing about his training as a pipe fitter had prepared him for the danger posed by carbon monoxide fumes emitted by a source unrelated to his work. The landowner, on the other hand, should have periodically inspected the pipes in its own manufacturing plant, especially pipes

140. *Id.* Perhaps due to the precedents set in *Lawrence* and *Gillespie*, the court makes relatively few justifications for its holding. Some of the court's declarations seem rather hasty. The following is an example:

Matteuzzi explicitly holds that a plaintiff who is covered by his employer's workers' compensation insurance cannot bring a cause of action against the landowner under section 413 of the Restatement. Thus, whether or not the dangerous condition existed before plaintiff began working on defendant's property is not relevant to our analysis.

Id. at 491 (citation omitted). Section 413 presents the requirements for direct negligence under the inherently dangerous activity doctrine. RESTATEMENT (SECOND) OF TORTS § 413 (1965). There are no references to the condition of the premises in this section. Dangerous conditions, on the other hand, are addressed in section 343. *Id.* § 343. The court makes no effort to explain why the demise of a theory that is based solely on the nature of the work results in the elimination of a second theory, which is based solely on the condition of the premises. See *supra* notes 77 and 35 for the text of sections 413 and 343, respectively.

141. 973 S.W.2d at 490.

142. *Id.* at 491.

143. *Id.*

144. *Id.* at 491-92.

145. See *supra* note 111.

that it knew to contain deadly carbon monoxide.

Furthermore, from a deterrence perspective, the *Callahan* ruling gives companies such as the defendant no incentive to inspect their facilities to ensure a safe working environment for employees of independent contractors. The scenario presented in *Callahan* is likely to repeat itself unless landowners have an incentive to act with reasonable care. When a cause of action is routinely denied in such cases, plaintiffs are powerless to protect themselves.

VI. A BETTER INTERPRETATION OF *MATTEUZZI*

To properly understand *Matteuzzi*, it is important to recognize that (1) the Missouri Supreme Court analyzed two distinct causes of action: one under the inherently dangerous activity doctrine and another under section 343 premises liability, and (2) the court made its statements regarding the control-of-the-work test in the context of construction work.

First, the court addressed the inherently dangerous activity doctrine. The court noted that the doctrine has two variations. The first variation is a cause of action for the landowner's direct negligence in failing to take proper precautions.¹⁴⁶ The alternate variation holds the landowner vicariously liable for the contractor's negligence in failing to take proper precautions.¹⁴⁷ The court ruled that neither variation is available to employees of independent contractors who are covered by workers' compensation.¹⁴⁸

Thus far, there are two possible indications that the court meant to include section 343's theory of landowner liability in its abrogation of the direct negligence version of the inherently dangerous activity doctrine. First, at the beginning of its discussion of the doctrine's common law origins, the court refers to the doctrine as "a species of premises liability."¹⁴⁹ In this context, the court's statement is merely a reference to the doctrine's original purpose, which was to protect neighbors from dangerous activities performed on a landowner's

146. *Matteuzzi v. Columbus Partnership*, 866 S.W.2d 128, 130-31 (Mo. 1993).

147. *Id.*

148. *Id.* at 132.

149. *Id.* at 130.

property.¹⁵⁰

The second possible indication that the court meant to treat the doctrine and premises liability equally is the court's quotation of *Halmick*¹⁵¹ to the effect that the inherently dangerous activity/non-inherently dangerous activity distinction is no longer valid.¹⁵² Appellate courts have construed this language to mean that the control-of-the-work test applies to all negligence theories.¹⁵³ Clearly, this interpretation reads too much into the short passage. It is far likelier that the court meant only that plaintiffs cannot avoid the control-of-the-work test by invoking the inherently dangerous activity doctrine.¹⁵⁴

Regardless of the court's intent in invoking *Halmick*, there is no escaping the fact that *Matteuzzi* sanctioned the use of the control-of-the-work test only in situations involving construction work. Following its discussion of the inherently dangerous activity doctrine,

150. In *Bower v. Peate*, the case that announced the doctrine, the court opines that the general rule "cannot prevail" where a landowner:

directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property.

1 Q.B.D. 321, 326 (1876) (emphasis added). The same court further said that a landowner:

who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else . . . to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

Id. (emphasis added).

151. *Halmick v. SBC Corporate Services*, 832 S.W.2d 925 (Mo. Ct. App. 1992).

152. 866 S.W.2d at 131. "*Halmick* properly states that '... the inherently dangerous activity/non-inherently dangerous activity dichotomy is abolished in cases where the employee of an independent contractor is injured and is covered by workers' compensation . . .'" *Id.* (quoting *Halmick*, 832 S.W.2d at 928).

153. See, e.g., *Gillespie v. St. Joseph Light & Power Co.*, 937 S.W.2d 373, 377 (Mo. Ct. App. 1996).

154. The appellate courts have taken the *Halmick* reference out of context. The sentence immediately preceding the *Halmick* quote characterizes *Halmick* as having recognized that both sections 413 and 416 are eliminated. 866 S.W.2d at 131. The sentences following the quote are also about the two versions of the doctrine. *Id.* Indeed, this entire section of the opinion speaks solely of the inherently dangerous activity doctrine.

the court announced a transition to a discussion of the landowner's duty to provide a safe workplace.¹⁵⁵ The court's repeated use of the term "construction" during this discussion leaves little doubt that the court meant to confine the control-of-the-work test to construction work liability.¹⁵⁶

As the court implies, construction cases are unique because the landowner usually must vacate the premises while the work is being performed. In such situations, the landowner has no factual control of the premises.¹⁵⁷ With this loss of control, there is a corresponding loss of liability.

In contrast, landowners often retain factual control of the premises in non-construction situations.¹⁵⁸ Post-*Matteuzzi* appellate court decisions have overlooked this preliminary question of premises control. Only once it is established that the landowner relinquished control of the premises is the control-of-the-work test properly applied.

In summary, a logically sound reading of *Matteuzzi* reveals that the court did indeed virtually eliminate the inherently dangerous activity doctrine. However, it did *not* include premises liability claims in that action. Most importantly, the court intended to confine the control-of-the-work test to the construction work context.

155. *Id.* at 131, 132. "Because this case comes to us on a motion to dismiss, we must determine if the allegations in *Matteuzzi*'s petition support, in the alternative, a cause of action under a different theory of premises liability. In that regard, *Matteuzzi* claims that the landowner had a duty to make the jobsite safe whether or not the construction involved an inherently dangerous activity." *Id.* at 132.

156. This discussion spans four paragraphs, in which the word "construction" appears four times. *Id.*

157. *See Id.* The court states:

It is well-settled that a property owner owes an invitee the duty to use reasonable and ordinary care to prevent injury to the invitee, and that an employee of an independent contractor who has permission to use a landowner's premises or facilities is such an invitee. If, however, the landowner relinquishes possession and control of the premises to an independent contractor during a period of construction, the duty of care shifts to the independent contractor.

Id. (citations omitted). "Factual control" is what the *Hunt* court originally sought to determine with the control-of-the-work test. *See supra* note 55 and accompanying text.

158. *See supra* note 114.

VII. THE ONLY INTERPRETATION THAT IS CONSISTENT WITH *ZUECK*

As noted above,¹⁵⁹ the appellate court in *Gillespie* maintained that the Missouri Supreme Court's analyses in *Zueck* and *Matteuzzi* pertain to premises liability claims as defined in section 343 of the Restatement. If *Gillespie* is correct, then *Zueck's* seven justifications for partially abrogating the inherently dangerous activity doctrine should be equally persuasive to reject a premises liability claim.

The first justification is that the employee's workers' compensation coverage eliminates the need for landowner liability. This theory's application to inherently dangerous activity claims has some merit. The landowner is typically not at fault, so the employee's workers' compensation limitation operates the way it was intended—to limit the employer's liability.¹⁶⁰ From the premises liability perspective, however, there is a competing policy concern that militates against eliminating landowner liability: that imposing premises liability on the landowner would lessen the risk of injury by requiring the landowner to show reasonable care with regard to known or reasonably known dangers on the premises. As the *Callahan* case illustrates, without premises liability, landowners have no incentive to act with reasonable care,¹⁶¹ which increases the risk of injury to workers. The positive effects of premises liability, and the negative effects of eliminating it, cumulatively outweigh workers' compensation's concern with limiting employer liability.

Second, the *Zueck* court held that it is unfair to place some of the workers' compensation burden on the landowner through a higher contract price while exposing it to tort liability as well.¹⁶² This justification is suspect as applied to either theory. Members of society incur this type of "double liability" in many situations.¹⁶³ The added

159. See *supra* notes 131-33 and accompanying text.

160. See *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384, 388 (Mo. 1991) (explaining the quid pro quo nature of the workers' compensation system).

161. See *supra* notes 139-43 and accompanying text.

162. 809 S.W.2d at 388-89.

163. When someone rents a car, for example, the cost of the rental company's liability insurance is factored into the rental price. This fact does not shield the driver from liability for his negligent operation of the vehicle. In *Peone v. Regulus Stud Mills, Inc.*, the dissenting judge offered the following hypothetical: "What if a truck driver of one of Regulus's major customers ran down a Regulus employee? Should the fact that the price of the stud includes, at least in

cost resulting from workers' compensation coverage is a normal cost of doing business.¹⁶⁴

The third justification is that the doctrine defeats the tort policy goal of placing the burden of liability on the party who can best avoid the harm.¹⁶⁵ Because the contractor presumably has experience performing the particular dangerous activity, this justification clearly applies to the inherently dangerous activity doctrine. With premises liability, however, it does not stand. A contractor, no matter how experienced, can do little to avoid the harm posed by hidden dangers. The key to avoiding the harm in premises liability is knowledge of the dangerous condition. The landowner is far more likely to have such knowledge than is the contractor. This particular justification for eliminating the inherently dangerous activity doctrine therefore has no bearing on premises liability claims.

The fourth justification is that liability under the doctrine encourages the landowner to negligently utilize its own employees to do the work that skilled independent contractors are far better equipped to handle, thus increasing the risk of injury to workers.¹⁶⁶ This justification's applicability to the doctrine is self-explanatory. Much like the third justification, however, it provides little rationale for eliminating premises liability claims. By hiring a contractor when premises liability applies, the landowner assumes risk only to the extent that it (a) knows or reasonably should know of a dangerous condition and appreciates the danger it poses to invitees, *and* (b) should expect the invitees to either fail to detect the danger or fail to protect themselves against it, *and* (c) fails to alert the invitees to the condition. The risk, in other words, is far from unduly burdensome.

The fifth justification, that the doctrine increases risk to innocent third parties,¹⁶⁷ does not apply to premises liability. Requiring landowners to notify invitees of dangerous conditions will in no way endanger innocent third parties.

part, the cost of workmen's compensation premiums shield that customer from tort liability?" 744 P.2d 102, 113 (Idaho 1987) (Bistline, J., dissenting).

164. The court makes the same statement in *Zueck*, but oddly regards it as an argument against imposing landowner liability. 809 S.W.2d at 389.

165. *Id.* at 387-88.

166. *Id.* at 388.

167. *Id.*

The sixth justification is that the doctrine defeats the tort policy goal of placing the loss upon the party who is at fault. Again, the only party who could be at fault under premises liability is the landowner. If, for some reason, the landowner failed to warn invitees of a dangerous condition, then a premises liability cause of action would serve the same goal that the doctrine defeats.

The *Zueck* court's final justification for eliminating the doctrine is that a negligent contractor's workers' compensation immunity precludes the landowner from recovering from him after being sued by one of the contractor's employees. This justification is suspect as applied to the doctrine.¹⁶⁸ When applied to premises liability claims, it makes no sense. If there is a negligent party in a premises liability claim, it will be the landowner. Therefore, the right to indemnity would be useless to the landowner under premises liability.

CONCLUSION

The Missouri Supreme Court should affirmatively and clearly reinstate premises liability claims under section 343 of the Restatement for employees of independent contractors. Not only is the prevailing interpretation of *Matteuzzi* at odds with the language of the opinion; it is completely unresponsive to reality. As the court wisely stated in *Zueck*, "[Tort] rules ought to function to promote care and punish neglect by placing the burden of their breach on the person who can best avoid the harm. When a rule of tort liability encourages a result contrary to these policy goals, it ought to be abandoned."¹⁶⁹

168. For criticism of the court's reasoning on this issue, see Burt, *supra* note 9, at 89-90, noting that landowners can ensure indemnification by specifying the right in the work contract (citing *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788, 796 (Mo. 1959)).

169. 809 S.W.2d at 388.