COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-831

LUCAS VICUNA

vs.

DRAPER PROPERTIES, INC.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After heavy snowfall in the winter of 2015, Draper Properties, Inc., the owner of a business complex in Canton, hired roofing company MV Construction, Inc., to remove a large amount of snow that had accumulated on the flat roof of one of the complex's buildings. While on the job, Lucas Vicuna, an employee of MV Construction, fell from the roof and suffered serious injuries. He then brought the underlying action for negligence against Draper Properties. His essential theory at trial was that Draper Properties was negligent for failing to ensure that there was adequate fall protection on the roof.

A jury returned a special verdict in favor of Draper Properties, finding that Draper Properties was negligent, but that Vicuna was seventy percent comparatively negligent. An amended judgment entered for Draper Properties, and Vicuna

appeals, arguing that the trial judge erred by excluding evidence of certain regulations and publications issued by the Occupational Safety and Health Administration (OSHA). We affirm.

Discussion. Vicuna moved in limine for an order allowing him to offer evidence of the OSHA regulations governing fall protection, related sub-regulatory guidance, and the OSHA "multi-employer citation policy," which is intended to guide OSHA inspectors as to "when citations should and should not be issued to exposing, creating, correcting, and controlling employers" on a multi-employer worksite. Vicuna argued that these materials were relevant because they imposed on Draper Properties a duty to implement a safety plan "to make sure that one of the accepted forms of fall protection would be available for all workers who went on the roof." He further argued that Draper Properties' failure to implement a safety plan was a proximate cause of his injuries. After extended discussion with counsel for both parties, the judge denied the motion, concluding that the regulations were inapplicable because Vicuna was not Draper Properties' employee, that the multi-employer citation policy did not "set a standard of care" and applied only to "construction sites," and that the other materials were "advisory" and imposed no legal obligations.

We review the judge's ruling for an abuse of discretion, see N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 363 (2013), and we discern none for several reasons. First, although it is true that a regulatory violation can be considered as "some evidence of negligence," St. Germaine v. Pendergast, 411 Mass. 615, 620 (1992), Vicuna did not establish that the OSHA materials were relevant and admissible for that purpose. The case was tried on two theories of liability: that Draper Properties breached the duty of care applicable to property owners, and that it retained sufficient control over Vicuna's work to be liable for his injuries. In his motion Vicuna argued only that the OSHA materials were relevant to the first theory -- specifically, that "[t]he application of OSHA to Draper Properties helps establish what the particular standard of care was for this commercial building owner."

Vicuna fails to explain, however, how the OSHA materials were relevant to determining the standard of care that Draper Properties owed as a property owner under common law. See St. Germaine, 411 Mass. at 620 (extent of duty of care is question of common law). In fact, nowhere in his brief does Vicuna even mention the applicable common-law standard of care.[1] Instead,

[1] Under the common law, all property owners owe the same standard of care to lawful visitors, which is "a duty to 'act as a

Vicuna contends that the OSHA materials were relevant to show that Draper Properties had separate "obligations as an employer" and not "merely [as] a landowner." Likewise, Vicuna argued in his motion that the OSHA materials would show that Draper Properties had "duties as both the property owner under traditional tort law -- to behave reasonably to all lawful entrants upon its premises -- and as an employer engaged in commerce under the [Occupational Safety and Health] Act." But contrary to the premise of Vicuna's argument, safety regulations do not "create a new duty" for purposes of a negligence claim, nor do regulatory violations "constitute negligence per se." Id. See Juliano v. Simpson, 461 Mass. 527, 532 (2012). The judge was therefore within her discretion to exclude the OSHA materials, which could well have confused the jury. See Lyon v. Morphew, 424 Mass. 828, 834 (1997) ("We have never recognized a

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reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.'" Papadopoulos v. Target Corp. 2, 457 Mass. 368, 383 (2010), quoting Young v. Garwacki, 380 Mass. 162, 169 (1980). With regard to open and obvious dangers -- such as the lack of fall protection on Draper Properties' roof -- property owners have a duty to remedy the dangerous condition only if they "can and should anticipate that the dangerous condition will cause physical harm to the [lawful visitor] notwithstanding its known or obvious danger." Papadopoulos, supra at 379, quoting Soederberg v. Concord Greene Condominium Ass'n, 76 Mass. App. Ct. 333, 338 (2010).

common law duty of building owners to place or maintain fall protection safety devices on roofs").

The judge was also within her discretion to conclude that the OSHA materials were not, in any event, applicable to the facts of this case because Vicuna was not Draper Properties' employee and did not perform the work on a construction site. The judge's ruling is consistent with Federal court decisions addressing the scope of the OSHA multi-employer doctrine. See Universal Constr. Co. v. Occupational Safety Health Review Commission, 182 F.3d 726, 730 (10th Cir. 1999) ("The multi-employer doctrine is particularly applicable to multi-employer construction worksites, and in fact has been limited in application to that context"). The doctrine has the remedial goal of ensuring safety on joint construction sites, in recognition of the fact that "[t]he nature of construction requires that subcontractors work in close proximity with one another and with the general contractor." Id. See Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 735 (5th Cir. 2018) (rational for OSHA to apply multi-employer doctrine to "place of employment like a construction worksite, populated by subcontractors, sub-subcontractors, and their employees performing various [and often overlapping] tasks"); United States v. MYR Group, Inc., 361 F.3d 364, 366 (7th Cir. 2004) ("the point of [the] 'multi-employer' gloss . . . is that since

the contractor is subject to OSHA's regulations of safety in construction by virtue of being engaged in the construction business, and has to comply with those regulations in order to protect his own workers at the site, it is sensible to think of him as assuming the same duty to the other workers at the site who might be injured or killed if he violated the regulations").

Relying on a statement in the multi-employer citation policy that it applies across "all industry sectors," Vicuna contends that the judge erred in construing the multi-employer doctrine to apply only to construction sites. The judge drew this conclusion, however, after Vicuna failed to provide her with cases applying the multi-employer citation policy outside the construction context. Even on appeal, Vicuna has not drawn our attention to any such cases. Teal v. E.I. du Pont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984), on which Vicuna relies, did not concern the multi-employer citation policy. It was a diversity case applying Tennessee law, in which the defendant conceded that it owed a duty to comply with a specific OSHA regulation governing clearance of ladders and that it breached that duty. See id. at 805. The question before the Sixth Circuit was whether the trial judge erred by declining to instruct the jury on negligence per se, a doctrine recognized in Tennessee, but not in Massachusetts. See id. at 803; Juliano, 461 Mass. at 532.

Regardless, even if we assume that the multi-employer doctrine is not strictly limited to construction cases, the larger point is that the doctrine governs joint worksites -- i.e., those on which employees of one employer are working alongside employees of another -- a situation that arises most frequently in the construction context. See Acosta, 909 F.3d at 735; Universal Constr. Co., 182 F.3d at 730. The roof of Draper Properties' building was not a joint worksite. Draper Properties hired a single independent contractor, MV Construction, to handle the single job of removing the snow from the roof. Vicuna and the other MV Construction employees performed the job alone, and no employees of Draper Properties were working on the roof when Vicuna's accident occurred. The judge properly concluded that the multi-employer doctrine did not apply in these circumstances. See MYR Group, Inc., 361 F.3d at 366-367 (multi-employer doctrine inapplicable where no employees of defendant were on worksite).

Finally, Vicuna has failed to demonstrate that any error in excluding the OSHA materials was so prejudicial as to require a new trial. To establish prejudice, Vicuna must show that the error "injuriously affect[ed] [his] substantial rights." DeJesus v. Yogel, 404 Mass. 44, 47-48 (1989). An injury to substantial rights occurs "when relevant evidence is erroneously

excluded that, viewing the record in a commonsense way, could have made a material difference." Id. at 48.

The danger of working on the roof was open and obvious. Vicuna, an experienced roofer, could see that the roof had no guardrails and no place to tie off protective equipment, but he chose to proceed with the work despite the obvious risk. Cf. Aulson v. Stone, 97 Mass. App. Ct. 702, 711 (2020) ("danger of working with power tools that include sharp blades was obvious," and "[u]sing the same without ensuring sufficient space for the safe operation of this equipment plainly heightened the risk of injury"). Given Vicuna's expertise as a roofer, the open and obvious nature of the risk of performing the job without protective equipment, and the jury's finding that Vicuna was seventy percent comparatively negligent, we are satisfied that the OSHA materials, which had marginal relevance at best, would have had no material effect on the trial. Cf. Almeida v. Pinto, 94 Mass. App. Ct. 540, 544 (2018) (homeowner did not breach duty of reasonable care by failing to provide decedent with safety equipment or by failing to ask whether he had equipment, "where

he offered to undertake specialized work that he claimed to have done before").[2]

Amended judgment affirmed.

By the Court (Wolohojian, Milkey & Shin, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: July 2, 2021.

[2] Draper Properties cross-appealed from the amended judgment, arguing, among other things, that the judge erred by declining to award costs. Draper Properties acknowledges that whether to award costs rests in the discretion of the judge, see Goulet v. Whitin Machine Works, Inc., 399 Mass. 547, 555 (1987), and it has not demonstrated any abuse of that discretion. Having affirmed the jury's verdict, we need not address the remaining issues that Draper Properties raises on cross appeal.

[3] The panelists are listed in order of seniority.