23 N.E.3d 151 (2015)

87 Mass.App.Ct. 1102

Pnina Joseph

v.

Nancy Ellen Nathanson

14-P-328

Appeals Court of Massachusetts

January 16, 2015

Editorial Note:

This decision has been referenced in an "Appeals Court of Massachusetts Summary Dispositions" table in the North Eastern Reporter. And pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from a judgment on a jury verdict against her for violation of the tree cutting statute, G. L. c. 242, § 7, the defendant argues error in the denials of her motions for a directed verdict[1] and for a judgment notwithstanding the verdict or, in the alternative, a new trial. We affirm.

Background.

We summarize the facts in the light favorable to the plaintiff.[2] The plaintiff and the defendant own abutting properties and share a property line. The plaintiff planted thirty-five arbor vitae trees on her property close to the property line to serve as a privacy screen. In October, 2012, the defendant directed her landscaper to enter the plaintiff's property and " prune" the trees. The landscaper " topped" the trees by cutting approximately five to six feet from the top of the trees. The plaintiff brought suit under the tree cutting statute, G. L. c. 242, § 7, and the case proceeded to a jury trial where the jury returned a verdict in favor of the plaintiff, awarding her $35,000. The award was trebled under the statute. The defendant now appeals, alleging that her actions did not constitute a violation of the tree statute because the trees were not " cut down" or " destroyed" as required by the statute.

Discussion.

Our review of a motion for a directed verdict and a motion for judgment notwithstanding the verdict is under the same standard. See *D'Annolfo* v. *Stoneham Hous. Authy.*, 375 Mass. 650, 657, 378 N.E.2d 971 (1978). We review the record to determine " whether, 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" *Masingill* v. *EMC Corp.*, 449 Mass. 532, 543, 870 N.E.2d 81 (2007), quoting from *Raunela* v. *Hertz Corp.*, 361 Mass. 341, 343, 280 N.E.2d 179 (1972). As the dispute on appeal is one of statutory interpretation our review is de novo. See *Sheehan* v. *Weaver*, 467 Mass. 734, 737, 7 N.E.3d 459 (2014), citing *Norfolk & Dedham Mut. Fire Ins. Co.* v. *Morrison*, 456 Mass. 463, 467, 924 N.E.2d 260 (2010).

General Laws c. 242, § 7, provides for liability on the part of anyone who " without license willfully cuts down, carries away, girdles or otherwise destroys trees." The defendant asserts that under the tree statute, the plaintiff's trees had to be completely destroyed or cut down in order for the plaintiff to recover.[3] She argues that the evidence showed that the trees were alive, growing, and healthy after the topping of the trees and therefore could not possibly have been " destroyed."

We interpret a statute to give effect " to all its provisions, so that no part will be inoperative or superfluous." *Wheatley* v. *Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 601, 925 N.E.2d 9 (2010), quoting from *Bankers Life Ins. & Cas. Co.* v. *Commissioner of Ins.*, 427 Mass. 136, 140, 691 N.E.2d 929 (1998). The statute here requires that the trees be " cut down, carried away, girdled or *otherwise* destroyed (emphasis supplied)." G. L. c. 242, § 7. Thus, " otherwise destroyed" includes, but is not limited to, the preceding phrases including " cut down." In other words, " cut down, carried away," and " girdled" are examples of how a tree may be destroyed; they are not exclusive.[4]

The judge instructed the jury that the word " destroy" has a commonly understood meaning, which includes " to ruin completely, to ruin the structure, organic existence or condition of a thing, to demolish, to injure or mutilate beyond possibility of use.[5] " The defendant did not object and thus, any issue relating to the jury instructions is waived.[6] Mass.R.Civ.Pro. 51(b), 365 Mass. 816 (1974). The definition given to the jury correctly provided a broader

meaning to the term destroy than the examples in the statute. The plaintiff's expert testified that the " topping" of the trees meant that they would never grow vertically again and were no longer functional as a privacy screen. The jury were entitled to credit that testimony, agree with the plaintiff's theory of the case that the trees were " mutilated beyond possibility of use" as a privacy screen and therefore find in favor of the plaintiff. See *Walsh* v. *Chestnut Hill Bank & Trust Co*., 414 Mass. 283, 291-292, 607 N.E.2d 737 & n.8 (1993).[7] There was no error.

Judgment affirmed.

Order denying motion for judgment notwithstanding the verdict or, in the alternative, for new trial, affirmed.

Kafker, Grainger & Agnes, JJ.[8]

Notes:

[1]The defendant moved for a directed verdict at the close of the plaintiff's case and again at the close of all the evidence.

[2]We also note that the relevant facts recited here are essentially undisputed.

[3]Before trial the defendant stipulated to the other elements of the statute. Therefore the only contested issue at trial was whether the trees were destroyed as required under the statute.

[4]Notwithstanding the absence of a comma after " girdled," we consider it clear that the phrase " otherwise destroyed" refers to all three antecedent phrases. Any other interpretation would require the conclusion that cutting down a tree is not destroying it under the statute. See *Taylor* v. *Burke*, 69 Mass.App.Ct. 77, 80-81, 866 N.E.2d 911 (2007). See also *Moulton* v. *Brookline Rent Control Bd*., 385 Mass. 228, 230-231, 431 N.E.2d 225 (1982).

[5]This instruction becomes " the law of the case." *Aimtek, Inc*. v. *Norton Co*., 69 Mass.App.Ct. 660, 667, 870 N.E.2d 1114 (2007).

[6]Before the judge concluded his jury instructions and asked the jury to begin deliberations, the judge called the attorneys to sidebar to discuss any objections. Counsel for the plaintiff requested an additional instruction on the word " destroy." Counsel for the defendant indicated he was " content" and made no objection.

[7]The defendant primarily relied on *Andrew E. O'Malley* v. *Thomas J. Ruhan*, 2006 Mass.App.Div. 177 (2006), in its arguments at trial and on appeal. That case is of no help to the defendant here. In that case, the defendant cut the limbs of trees back to the tree trunks rendering them permanently lopsided but otherwise healthy. Importantly, the court held that the trees continued to serve their purpose as a privacy screen, although no longer aesthetically pleasing. The court dismissed the plaintiff's claim for tree trespass because the trees were not destroyed. Here, the plaintiff's claim is that the trees were in fact destroyed because they can no longer be used as a privacy screen. *Id*. at 174 & n.2.

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