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DOLAN MEDIA COMPANY

APPEALS COURT

Negligence

Tree farm - Immunity - Warning sign

Where (1) a plaintiff, who was injured while shopping for a Christmas tree at the defendant's tree farm, filed a negligence action and (2) the defendant was awarded summary judgment based on the immunity provided by G.L.c. 128, §2E, that judgment must be vacated in light of the fact that the defendant did not post a warning notice at the tree farm as required by the statute.

"The judge ruled that the word 'shall' contained in the warning notice provision made the posting of the notice mandatory. He found, however, that the statute was ambiguous in regard to the effect that the lack of the warning notice had on the limitation on liability provided by the statute. Therefore, based on the fact that the statute had a preamble that made it an emergency act, the motion judge ruled that the failure to post the warning notice did not eliminate the statutorily created limitation on liability and did not expose 'pick-your-own' farms to liability for their negligence or for grossly negligent acts. ...

"To hold that the failure to post the warning notice would have no effect on the limitation on tort liability set forth in the statute would render the mandatory requirement to post the warning notice superfluous and give the owner of the tree farm discretion to post the warning notice. Such discretion simply cannot be harmonized with the statute's explicit command that the warning notice must be posted.

"Therefore, we hold that an owner of a tree farm must post a warning sign in accordance with G.L.c. 128, §2E, in order to avail himself of the protection of the statute. We reverse the judgment on all counts."

Dissenting judge's comments

Grainger, J. "The meaning of the text is perfectly clear: it calls for a sign or signs with particular wording; the fact that it fails to prescribe a consequence, leading to some doubt that it will be heeded uniformly, does not make the language superfluous or unclear. The language of a statute is not rendered 'inoperative or superfluous,' hence amenable to judicial improvement, because we perceive that the legislature has failed to provide sufficient motivation to ensure it will be followed. ... I would affirm the judgment."

MacFadyen v. Maki (Lawyers Weekly No. 11-269-07) (10 pages) (Smith, J.) (Grainger, J., dissenting) (Appeals Court) Case heard by Smith, J., on a motion for summary judgment. Robert R Berluti for the plaintiff; James T. Scamby for the defendant (Docket No. 06-P-1394) (Oct. 31, 2007).