APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C 38350

E B *Plaintiff-Appellant*

vs.

G M *Defendant-Appellee*

BRIEF OF PLAINTIFF-APPELLANT WITH APPENDIX

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PRELIMINARY STATEMENT

B and M were married in 1989 and shared a marital residence in New Rochelle, New York, as well as a second home in Sharon, Connecticut, at which they stayed together frequently. A145; A198-200. On December 5, 2009, while still married to B, M violently assaulted her at the Sharon home, including dragging her 44 yards down the driveway and street, throwing her numerous times to the ground and jerking her back up again, and not stopping until the intervention of a concerned bystander; this assault caused B severe and lasting injuries. A150-56; A158-71. The jury found that M committed an intentional assault and battery and that it was the proximate cause of B's permanent physical injuries. A37-38. These injuries include the further deterioration of her left shoulder (which M had damaged in a prior incident of violence), A172; A174-79, and a right hamstring rupture; her hamstring had to be surgically repaired and her left shoulder required total-replacement surgery. A179-80; A188-89; A194-95. As M was aware, B was particularly susceptible to physical injury due to her autoimmune disorder (lupus). Not only is the debilitating physical condition that M caused permanent, it will continue to worsen over time, impairing the “quality and quantity” of her life. A174-79; A190-96 (Testimony of Dr. Paget).

Despite the jury’s findings of intentional assault and battery causing or aggravating her injuries, B did not recover any damages because the jury also accepted two special defenses—(i) that M was justified in assaulting B in defense of premises because she was criminally “trespassing” on the Sharon property, and (ii) that M was justified in assaulting B because he was defending others from imminent attack during this supposed trespass. A38; A267-68. However, the special defenses, as delineated in

flawed jury instructions, were unlawful. First, the fact that the Sharon house was co-owned and cohabited by both parties rendered a defense of premises (i.e., trespass) defense unavailable. Not only was B incapable of "trespassing" on her own property, she was also incapable of possessing the requisite intent to trespass. The court's failure to alert the jury to the legal significance of marital property also rendered the jury's verdict on defense of premises reversible error. The jury's belief that B had no right to be there, as a result of the misleading instructions, inescapably infected its assessment of whether she posed a threat warranting defensive action. Second, M's failure to adequately notify B of his reliance on *criminal law* defenses to this *civil* tort action prejudiced B. She was deprived of a fair opportunity to try the case—and have the jury instructed—on critical elements of special defenses by M that were triggered by the criminal nature of the trespass that he accused B of committing, in particular his duty to retreat.

These fundamental errors infected the jury deliberations on all the charges. First, the fact that this was marital property (and the parties were "co-dwellers") meant not only that B could not have been trespassing, but also that M had a duty to retreat before he could lawfully utilize violence to "defend" either the property or the people inside. Here, a "retreat" would have merely meant bolting the doors and calling the police, or helping his guests leave the house by automobile, which is what the guests did promptly after the police were finally called by a concerned bystander. A100-101. Second, the fact that B had every right to enter the home, when combined with the jury's own finding of intentional assault and battery, would almost surely have changed the jury's view of M's claims that he was defending the premises or the guests. Third, since the diminutive and unwell B made no verbal or physical threat—and the primary evidence M used to justify

his assault on her consisted of other words she allegedly shouted (while a room away from the people M claimed he was defending)—the required instruction that “mere words” are not sufficient as a matter of law to justify violence in defense of others would have negated that special defense. Finally, given the severity of B's injuries, the evidence could not support a reasonable finding that M's substantial violence was necessary, reasonable, or proportional. For all these reasons, the special defenses were inapplicable as a matter of law and unsupported by sufficient evidence, rendering the jury verdict unsustainable.

The net effect of these errors was that a husband who engaged in a brutal domestic assault and battery was allowed to turn his victim into a criminal trespasser on property she had every lawful right to enjoy, and to mislead the jury into finding that if a husband keeps his wife’s name off of a deed, he can violently assault, injure, and remove her. The trial court’s imprimatur on such a use of extreme violence profoundly undermines Connecticut’s strong and well-established public policy against domestic violence.

STATEMENT OF PROCEEDINGS AND FACTS

Procedural History

B brought this action for assault and battery against her ex-husband to recover for the extensive physical injuries and pain and suffering he inflicted on her when on December 5, 2009 he grabbed her, hurled her to the ground, and dragged her away from their shared home in Sharon, Connecticut.

The case was tried over the course of eight days in the Superior Court of the Judicial District of Stamford/Norwalk at Stamford. On August 18, 2015, the jury rendered a verdict, finding that M assaulted and battered B and that his violence was the proximate cause of B's severe injuries and the aggravation of her lupus. The jury, however,

accepted two special defenses—(i) justification based on defense of premises against criminal trespass by B and (ii) defense of others—and thus awarded B no damages. A38; A267-68. B timely appealed that judgment. A45.

Factual Summary

The parties were married in 1989 and shared a primary home in New Rochelle, New York. A145. In 1998, M bought a second home in Sharon, Connecticut.[1] M put his name only on the deed. A105. M and B spent extensive time at the Sharon home together over the course of their marriage. B had a key to the Sharon home and went "back and forth" between it and the primary marital residence in New Rochelle. A91-92; A198-200. It was not disputed that she kept clothes and other belongings at the Sharon home. A137-40.[2] B also selected the color scheme and painted the whole interior of the Sharon home. A176. Both B and M had Connecticut driver's licenses with the Sharon address. A231-32. At the time of the incident, B and M were married and living together. A123-24; A143-45.

On December 5, 2009, M hosted at the Sharon home three guests—Anne Teasdale, Suzanne Chase Osborne, and Lauren Silberman—from a historical preservation organization called the Questers. A86. M did not tell B that he would be holding this event; instead, she found out about it from the Questers' website and decided to go to

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[1] M never claimed, much less did he try to prove, that the Sharon house was purchased with anything other than marital assets.

[2] Laurel Powers described B's retrieval, after the assault, of personal belongings and house and kitchen wares, including clothes, shoes, a blue pot, a pepper mill, throw rugs, ceramic bowls, souvenirs, ski boots, a foot stool, and wall hangings. *Id.*

Moreover, B's possessions in the Sharon home were documented in a walkthrough video of the home that had been created in order to document the parties' personal property in connection with the parties' divorce proceedings. A203-06; Defendant's Exhibit AJ.

Sharon to see what was happening, since she and M had plans to attend a Christmas party in Manhattan that evening. A143-47. M had a history of prior physical abuse against B, so she planned to arrive near the end of the event when people would still be around, as a safety precaution. A147-49. In a previous altercation in 2008, which also occurred at the Sharon home, M caused permanent damage to B's left shoulder. A172; A174-79.

When B arrived, M was still giving Osborne, Teasdale, and Silberman a tour of the home. B approached the main entrance, which is at the rear of the house, but M stopped her after she walked inside. M grabbed B by the arm and pulled her out and away from the house. B testified that he then grabbed her by the head and neck in a headlock, and dragged her down the driveway and up the sidewalk to the neighboring Sharon Center School. A150-56; A164. M dragged her a distance nearly half the length of a football field—44 yards. A167-68; A233-34. B testified that while M was dragging her he threw her to the ground forcefully multiple times. As soon as B struck the ground, M jerked her up by her arm again. Throughout this ordeal, B was screaming, “Help, help! Call the police!” B tried to break free, but she could not get out of M's grasp. A158-71. Osborne, Teasdale, and Silberman remained in the house. A214-15; A221-26.

A third-party bystander, Pierce Kearney, testified that he was driving by and saw M throw B to the ground. He rolled down the window and heard B screaming for help. Seeing that M had B by the head and throat, Kearney intervened to protect B. Only then did M release his hold. M then stated to Kearney, “It’s okay, she’s my wife.” Kearney got between M and B and said, “No, this is

over." Kearney's wife, who remained in the car, called the police; Kearney waited with B until the police arrived and wrote a statement for the police regarding the incident. A78-83; A168-71; Plaintiff's Exhibit 65. Kearney testified as a witness at trial. A77.

M admitted during his testimony that he assaulted, physically restrained, and forcibly led B away from the house, despite her active resistance; he also admitted that he initiated physical contact with B and that he injured her physically, albeit in a "miniscule way." A93-95; A97; A115; A118-20. M maintained that B initially consented to "walking together away from the house" while he held her with his left hand on her upper right arm, and that it was only when they got three quarters of the way down the driveway that he used force to prevent B's attempts to free herself from his restraint because he "felt at that moment she was trying to run back into the house and confront the guests." A94-96; A127-28. He denied that he threw her to the ground at all, and testified that she "slipped" once or twice on the snow, claiming that he held her up and put pressure on her arm to *prevent* her from falling. A106-07; A127-31. M claimed that B then started "taking swipes" at him, trying to hit him in the face with her left arm (even though he admitted to being aware that B had a previous left shoulder injury). A110; A127. The jury, however, found that M committed an intentional assault and battery and that his assault and battery was the proximate cause of B's injuries. A37-38.

M's testimony contained a number of admissions of relevance to the special defenses he asserted. He admitted that he initiated the physical altercation, by first pulling her away from the house by the arm, and then, keeping hold of her as she resisted. He admitted that "an assault" occurred by virtue of "inappropriate," "non-consensual," and "unauthorized" touching. Furthermore, M conceded that his conduct was wrong and

that he “physically restrained” B and “forcibly led [her] away from the house against her will”. A93-98. Notably, he admitted that at the time of this incident he did not consider her to be trespassing. A102. And his testimony and that of one of his witnesses indicated that B referred to the house as “my house.” A108; A217.

M's battery of B caused severe physical injuries and aggravation of her lupus. A190-96. In particular, M caused B to suffer multiple bodily contusions; left shoulder pain and injury; left shoulder tear of the supraspinatus tendon; left shoulder tear of superior labrum; severe post-traumatic, rapidly progressive osteoarthritis of the left shoulder and synovitis, and aggravation of her left shoulder injury also previously caused by M; neck pain; low back pain; lumbar disc displacement; bilateral leg radicular pain; right hamstring injury and tear with surgical repair; post-traumatic stress disorder; depression; anxiety; and severe physical, mental, and emotional distress. A52-53; A182-96. (Testimony of Dr. Paget). B's bodily injuries require ongoing treatment and will require more care in the future. The injuries to B's lower back, left shoulder, and right hip, leg, and hamstring are irreparable. They will continue to worsen over time. A192; A196. B will continue to suffer severe physical and emotional distress, and will be severely limited in carrying out even basic household activities. A17-35; A190-96.

Because the jury found that M's assault and battery was “justified” by his defense of premises against B's “trespass” and his “defense of others,” it awarded no damages for her injuries. A36-39. However, the jury was not told that (i) M's defenses were unavailable if the home was marital property; (ii) he had a duty to retreat before using force if B was a co-dweller of the house; and (iii) “mere words” are insufficient to justify the use of force in defense of others. In fact, the court told the jury: “the defendant alleges that

plaintiff entered and/or remained on the property after she was directed to leave *by him, the owner of the property*." A75 (emphasis added). As a result, the only thing the jury heard from the court about the legal status of the property was that M was the sole owner—virtually ensuring the erroneous outcome here.

SUMMARY OF ARGUMENT

The trial court made at least three fundamental errors that infected the jury's deliberations and require reversal.

First, allowing the justification defense ("defense of premises") was error as a matter of law. This defense required a finding that B was criminally trespassing on the Sharon home. Yet the Sharon home was shared, marital property, which B frequently stayed in (she owned a key and kept clothes and other belongings there). Numerous state courts have held that there can be no trespass on marital property absent a court order restricting entry, and there was no such order here. To the extent that the trial court believed there was

"evidence on both sides" regarding the status of the property, A250-51, it was required to instruct the jury to make a factual finding on whether the Sharon home was marital property, as liability turned on this question. Instead, the court never told the jury that *if* the home was marital property B *could not* be a criminal trespasser; in fact, the court implicitly and incorrectly informed the jury that the home was M's alone. This was error, and it infected the rest of the jury's findings on both special defenses, since the jury's deliberations on whether B posed a threat to the guests was irrevocably tainted by its mistaken belief that she had no right to be there.

Second, M had adequate notice of his criminal law defenses, in violation of Practice Book § 10-3. M did not plead in his special defenses either the defense of premises statute, § 53a-20, or the criminal trespass statute, § 53a-107. These

statutes were raised only after all the evidence was presented. This prejudiced B. While the court allowed M to benefit from the incorporation of these statutory defenses at the eleventh hour, B, the supposed *criminal* trespasser or threatener, was deprived of the opportunity any criminal defendant would have had: to develop the evidence to refute the claim that *she* had committed a crime. Without adequate notice, B had no opportunity to research, develop at trial, and seek to instruct the jury on the *criminal doctrines*, particularly the duty to retreat, which would have negated M's special defenses. Moreover, the jury should also have been instructed on the law restricting defense of others to a response to overt acts beyond “mere words.” Although not brought to the attention of the trial court, these missing instructions are so fundamental as to constitute plain error, producing an unreliable verdict.

Finally, there was insufficient evidence to support the “defense of others” special defense. Neither M nor his witnesses claimed that B threatened or approached anyone in the house. Her non-threatening words alone are legally insufficient to constitute grounds for defensive violence. But even if the diminutive and injured B could reasonably have been found to present an imminent danger to his guests, the degree of M's violence, as evidenced by the serious injuries credited by the jury, cannot as a matter of law have been found to be reasonable, proportional, or necessary; rather, this was deadly force, which M was not justified in inflicting. M's decision to use such force, rather than bar the door and call the police or simply leave, is consistent with his prior violence, is a product of his hostility toward his wife, and belies his claim that he was protecting himself or anyone else. The court’s refusal to add B's requested clarifications to the jury instructions, to emphasize the importance of considering whether M could

still be liable if he applied excessive force, combined with the fundamental errors in the instructions, created a cumulatively confusing and misleading set of instructions which resulted in an unsustainable verdict.

Connecticut's well-established public policy against domestic violence is profoundly undermined by the jury instructions and verdict in this case. It cannot be a proper construction of the law of trespass, or defense of others, that a vicious beating of a diminutive and unwell wife by her husband is justified as either the protection of a marital home or the guests within it.

This Court should reverse the trial court's decision to allow the special defenses of justification and defense of others, and remand for a hearing on damages.

ARGUMENT

I. The Trial Court Erred In Instructing The Jury On Criminal Trespass When, As A Matter Of Law, B Could Not Have Been Trespassing On Marital Property

When the trial court instructed the jury on M's justification defense, which was based on a defense of premises, it erred in including an instruction on the legal consequences of B's supposed criminal trespass, because the Sharon home was joint marital property. B and M lived in it together, and B regularly used it. Moreover, there was no dispute that B viewed it as equally her own house; she therefore lacked any intent to trespass, a required element of the crime.

M pled the justification special defense as follows:[3]

> At the time of the incident, the Plaintiff was trespassing on the Defendant's property. The Plaintiff, *knowing that she was not licensed or*

[3] Contrary to the requirements of Practice Book § 10-3, M's pleading did not specify the statutes upon which his defenses were based—*criminal statutes* for trespass and defense of premises, which he raised only after all evidence was presented at trial. *See* Section II, *infra*.

> *privileged to do so*, entered and remained on the property. Despite the Defendant, who is the owner of the property, directing her to leave, the Plaintiff refused to do so. The Plaintiff then continued to exhibit disorderly conduct and/or create a public disturbance. As such, the Defendant was justified in using reasonable force in escorting the Plaintiff from the premises.

A16 (emphasis added).

During the August 13, 2015 charging conference, B's trial counsel made multiple objections to the inclusion of the trespass charge, on the ground that a spouse cannot commit trespass on marital property. A245-48; A256-57; *see also* A262 (taking an exception to the charge on the issue of trespass). The trial court overruled those objections, and while stating nothing about the fact that it was marital property, instructed the jury that M asserted that he was "the owner of the property." A75; A251-52.

1. Standard Of Review

The question whether there can be a criminal trespass by a spouse on joint marital property is a question of law, and as a result, this Court's "review is plenary." *Sweeney v. Sweeney*, 271 Conn. 193, 207 (2004) (quoting *Tappin v. Homecomings Fin. Network, Inc.*, 265 Conn. 741, 750 (2003)). This Court reviews the trial court judgment on this legal issue de novo. *See Flint v. Universal Mach. Co.*, 238 Conn. 637, 643 (1996).

2. Connecticut Law And The Undisputed Facts Require A Ruling That The Sharon Home Was Marital Property

Connecticut law and the undisputed facts compel a finding that the Sharon home was marital property. B and M were married in 1989. Although M titled the house in his name only, the Sharon property was purchased in 1998—nine years into the marriage. The assault and battery occurred in 2009 while the parties were still married and living together, with their primary residence in New York. A121-22; A143-45. B had keys to the house; went "back and forth" between the parties' marital residence in New York and

the Sharon house; stayed at the Sharon house for weeks at a time; and kept clothes, shoes, and other belongings at the house. A135; A137-40; A198-200; A203-06; Defendant's Exhibit AJ. She also contributed to the maintenance of the home, including painting the entire interior herself and routinely renting out the property's cottage. A124; A176. *See State v. Garrison*, 203 Conn. 466 (1987) (affirming trial court finding that defendant could not defend the premises against victim, the alleged trespasser, where victim maintained clothing on the premises and had lived there intermittently).

It therefore is no surprise that M admitted in his deposition that at the time of the incident he did not believe his wife to be trespassing. M stated that B "ha[d] a right to be there." A90-92; A111. Notably, he did not think she was trespassing because they "were married at the time." A103. It was only at trial that M changed his testimony—stating that although he did not think B was trespassing when he physically ejected her from the house, it "occurred to [him]" later. A102.

The facts and the law compel the conclusion that the Sharon home was marital property. Marital property is commonly defined as "[p]roperty that is acquired during marriage and that is subject to distribution or division at the time of marital dissolution." *Black's Law Dictionary* 1336 (9th ed. 2009). Connecticut law, which does not statutorily define marital property, applies an even broader definition in the dissolution context, as governed by Conn. Gen. Stat. § 46b-81. In contrast to "community property" states, which define only certain types of property as marital and subject to division at divorce, Connecticut is an "all property" state. The Supreme Court of Connecticut has stated that this approach "does not limit, either by timing or method of acquisition or by source of funds, the property subject to a [divorce] trial court's broad allocative power." *Krafick v. Krafick*, 234 Conn. 783, 792 (1995). *Krafick*

cites with approval Black's Law Dictionary's definition of property, which "extends to every species of valuable right and interest, and includes real and personal property . . . [,]" noting that "[n]othing in the legislative history of § 46b-81 indicates an intent to narrow the plain meaning of property from its ordinarily broad and comprehensive scope." *Id.* at 794-95 (internal quotations omitted). This broad approach to the concept of marital property recognizes that marriage is "a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially . . . ." *Krafick*, 234 Conn. at 795 (internal quotation marks omitted); *see also O'Neill v. O'Neill*, 13 Conn. App 300, 308, 309 n.1, 311 (1988).

In short, there could be no dispute that a home purchased during the marriage using marital funds—even if only deeded to one spouse—is marital property in Connecticut. In *Picton v. Picton*, 111 Conn. App. 143, 152-54 (2008), the Appellate Court affirmed that a house purchased solely by a husband nine years into the marriage was marital property under § 46b-81. The husband was the record owner of the property and was responsible for major renovations and upgrades made to the house over a three-year period during the marriage. *Id.* at 153. Nonetheless, the court rejected the husband's contention that his wife "made no contribution to the preservation of or appreciation in value of the . . . property," in part because relevant contributions can be either monetary or nonmonetary. *Id.*

As in *Picton*, M could not deprive B of her marital property rights by putting only himself on the deed. The property was purchased while the parties were not only married, but living together. Moreover, the undisputed facts here vastly exceed the relatively thin reed relied on in *Picton* since B indisputably contributed to the home by painting the interior. The property plainly was marital, and B had an equal right to be there.

Even putting aside the issue that B could not have been trespassing on marital property, the fact that M did not believe B to be trespassing at the time barred M's ability to assert this defense. The defense of premises statute, Conn. Gen. Stat. § 53a-20 (upon which M relied in asking for the instruction on defense of premises, which he did not specifically plead), provides that "reasonable physical force" is only justified to the extent that the person in possession or control of the premises "reasonably believes such to be necessary to prevent or terminate the commission . . . of a criminal trespass." Since by his own admission, M did not believe B to be trespassing at the time he applied force to B, he could not have reasonably believed he needed to use physical force to "defend the premises" against a "trespasser." A102.

3. A Spouse Cannot Trespass On Marital Property Unless A Court Order Restricts Her Entry And She Has An Intent To Trespass

While Connecticut has not had occasion to rule on the question of trespass by a spouse on marital property, other states with comparable property law have held squarely that "a co-owner generally has no protectable interest in preventing joint tenants from entering their jointly-owned property." *People v. Wyant*, 171 Ill. App. 3d 306, 308 (1988) (holding that the defendant husband could not be charged with criminal trespass on marital property, even following a divorce where the former wife had sole and exclusive possession but title remained in joint tenancy pending sale of the home). In fact, "one spouse cannot be criminally liable for trespass in the dwelling of the other." *State v. Herder*, 65 Ohio App. 2d 70, 76 (1979). A spouse has a possessory interest even in the dwelling of the other spouse and may not be found guilty of trespass because the spouse has a "right to be there." *State v. Winbush*, 44 Ohio App. 2d 256, 258 (Ohio Ct. App. 1975).

These rulings make clear that a spouse cannot commit trespass on marital property—and it is irrelevant whether one spouse has told the other to leave. Any other rule would be entirely unworkable. The result would be that in every domestic dispute, however minor, if one spouse orders the other to leave, failure of the second spouse to do so would be criminal trespass, and would subject the latter to the lawful use of violence to evict him or her. This is both nonsensical and contrary to the legislative purpose of the criminal trespass statute.

Thus, courts have held that there can be no trespass on marital property absent a court order restricting entry, such as a protective order. *See* Paul M. Coltoff & Alan Weinstein, 87 *Corpus Juris Secundum* § 155 (2015) ("[A] spouse cannot be convicted for an entry on the property of the other, even after having been forbidden to enter, unless there is a court order restricting entry."); *State v. Brooks*, 101 Ohio App. 3d 260, 269 (1995) ("[O]ne spouse cannot be held criminally liable for trespass in the dwelling of the other spouse unless there exists a court order restricting one of the spouses from entering the dwelling of the other"); *compare State v. Langan*, No. A-1836-09T3, 2010 WL 4740182, at *2 (N.J. Super. Ct. App. Div. Nov. 24, 2010) (holding that a husband could be found guilty of criminal trespass because he had specific knowledge, by virtue of the fact that there was a temporary restraining order in place, that he was not allowed on the marital property); *People v. Cheyne*, 93 Misc. 2d 554, 555 (N.Y. Dist. Ct. 1978) (holding that a divorced husband could be guilty of trespass where a divorce judgment awarded the divorced wife exclusive possession of the premises).

Even if the legal status of the house was ambiguous, Connecticut law is clear on the core element of a criminal trespass claim: intent. The criminal trespass statute, Conn. Gen. Stat. § 53a-107, which the trial court incorporated into the special defense of justification

(trespass) over B's objection, requires a finding that the trespasser had knowledge that she was not "licensed or privileged" to enter the premises. Conn. Gen. Stat. Sec. 53a-107; *Garrison*, 203 Conn. 466 ("The actor's knowledge that he is not privileged or licensed to enter or to remain on the premises is a requirement of criminal trespass"); *see also State v. Martone*, 160 Conn. App. 315, 319 (2015); *State v. Delgado*, 19 Conn. App. 245, 253-54 (1989). This record precluded any finding of such intent. In fact, M did not even *assert* that B knew or believed that she was on property which was not hers. Nor could he—the evidence was undisputed that she saw this property as her own. A141; A153 (B stated, "Why do I have to leave . . . this is my house too.").

At the time of the incident, B understood the Sharon home to be marital property. B explained to the police that it was "their home" and her written statement noted that she and M had two homes—one in New York and one in Sharon. The police report itself listed the Sharon home as B's address, based in part on its presence on her driver's license. Plaintiff's Exhibits 64-65; A136; A231. Accordingly, even *if* the Sharon property could somehow be ruled not marital property, B could not have committed criminal trespass due to the gaping absence of any intent to trespass. This lack of intent on its own—combined with M's own contemporaneous belief that she was not trespassing— should have precluded the trespass-based defense from ever going to the jury.

4. At A Minimum, The Jury Should Have Been Instructed To Make The Threshold Determination Of Whether The Sharon Property Was Marital Property Before Considering The Special Defenses

The home's marital property status was a legal question that should have been determined by the trial court, and thus the trespass instruction should never have been given to the jury. But even if the trial court believed that the marital-property status of the Sharon home was a factual question, it erred by failing to require the jury to decide the threshold

question of whether the property was marital. Absent an initial determination that the house was *not* marital property, the trespass defense was unavailable.

During the charging conference, in overruling B's objection to the trespass defense, the trial court noted that, while M's name was on the deed, there was ample evidence that the parties shared the home. A250-51 (stating that there was "evidence on both sides" of the marital property question). Even taking the court's perspective that the status of the property was a question of fact, such a "factual" question had to be resolved by the jury. Without either a factual finding or legal ruling on whether the property was marital, no defense based on trespass could properly be applied.

Here, the court instructed the jury on criminal trespass as the basis for a justification defense, over B's objections, without also instructing the jury that a spouse cannot trespass on marital property. No mention of the term marital property and no issue of ownership appeared in the jury charge.[4] Rather, the court's only mention of ownership was to describe M as the owner of the home. A75 (charging the jury that "the defendant alleges that plaintiff entered and/or remained on the property after she was directed to leave *by him, the owner of the property*") (emphasis added). In the absence of any mention that the

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[4] The jury charge on the special defense of justification stated, in relevant part:

> For example, a person in possession or control of premises is justified in using reasonable physical force upon another person, when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or intent to commission a criminal trespass by such person in or upon such premises. A person commits criminal trespass when knowing that such person is not licensed or privileged to do so, such person enters, or remains in a building or any other premises after an order to leave, or after an order not to enter that was personally communicated to such person by the owner of the premises.

A72.

jury needed to make that predicate determination, the instruction misled the jury to *presume, incorrectly,* that B had no legal right to be there.[5]

The erroneous instruction on defense of premises also infected the jury's deliberation on the special defense of defense of others because the claim that M believed he needed to use defensive force to protect others was premised on the notion that B was "trespassing at the time of the incident." A15 ("[w]ith respect to the allegations of December 5, 2009, any actions taken by the Defendant were in defense of others. The *Plaintiff was trespassing* at the time of the incident and was acting in a disorderly manner") (Defendant's Amended Special Defenses) (emphasis added). Had the jury not been misled by the trespass instruction on this point, it could not have reasonably concluded that M believed he needed to "protect" his guests from B, who was simply trying to enter her own home.

In short, the failure of the instructions to convey the marital property issue infected both defenses. The confusion and potential for active misleading inherent in the trespass instruction—and the absence of an appropriate marital property instruction—rendered the jury's deliberations fatally flawed, and requires reversal. *See State v. Terwiliger*, 294 Conn. 399 (2009) (upholding Appellate Court's reversal on grounds that the jury instructions, as a whole, could have misled reasonable jurors regarding which party bore the burden concerning the defense of premises defense).

[5] The trial court (but not the jury) knew that M had been arrested for assault and battery following the incident—yet, this instruction implied that it was B who was the wrongdoer because she was "trespassing." A132-33.

5. The Erroneous Jury Instructions And The Verdict They Produced Undermine Connecticut's Strong Public Policy Against Domestic Violence

Connecticut law demonstrates a robust public policy against domestic violence—a public policy that is deeply undermined by the jury instructions and verdict here.

As state legislators have proudly announced, Connecticut's legislature regularly engages in "closing loopholes and otherwise fine tuning [its] . . . state of the art national standard domestic violence laws." *An Act Concerning Domestic Violence: Hearing on H.B. 7093 Before the H. Comm. on Appropriations* (Conn. May 28, 1999) (statement of Rep. Lawlor, Member, H. Comm. on Appropriations). Since the enactment of the original Restraining Order Act, Public Act 81-272 (the "Act"), the legislature has broadened and strengthened the state's domestic violence laws in order to provide more comprehensive protections for victims. In 1986, the legislature made comprehensive revisions to the Act which enhanced protection for victims and effected more stringent penalties for offenders, including by providing for mandatory arrest; issuance of protective orders in criminal prosecutions; criminal sanctions for violation of protective orders; and pretrial family violence education programs for persons arrested for family violence crimes. *See* Public Act 86-337 (Conn. 1986); *Odom v. Odom*, No. FA020097864S, 2002 WL 1042492, at *1 (Conn. Super. Ct. Apr. 30, 2002). The 1986 amendments also expanded the statutory definition of parties covered under the Act from "adult persons" to "family and household members." Public Act 86-337 (Conn. 1986). In 1999, the legislature further expanded the definition to include "persons in, or who have recently been in, a dating relationship." Public Act 99-186 (Conn. 1999).

Connecticut's strong public policy against domestic violence is also manifested in a broad array of civil remedies for the many ancillary effects of domestic violence. In addition to

civil restraining orders and criminal protective orders provided for in the Act, victims of domestic violence may terminate their leases early without penalty if they reasonably believe it is necessary to avoid imminent harm to themselves or their children. *See* Conn. Gen. Stat. § 47a-11e (2012). They are also ensured up to twelve days of leave from employment for reasons related to domestic violence, such as seeking medical care or attending court hearings. Conn. Gen. Stat. § 31-51ss (2012). Under Connecticut's Temporary Family Assistance Program, victims may be excused from mandatory work activity or child support enforcement requirements for reasons related to domestic violence. Conn. Gen. Stat. § 17b-112b (2012). Moreover, Connecticut provides a state-sponsored Address Confidentiality Program through the Office of the Secretary of State to victims of domestic violence for their safety. Conn. Gen. Stat. § 54-240a (2005).

In light of the foregoing, it is clear that Connecticut's well-established public policy against domestic violence is subverted by the jury instructions and verdict in this case. Allowing a self-help ejectment by a physically dominant spouse without a court order is an invitation for domestic abuse. And given Connecticut's long-standing public policy against proceeding by way of self-help remedies when evicting a tenant, it seems even more incredible that an abusive husband can forcibly eject his wife from marital property where he clearly would not be able to do so if she were merely a tenant. *Daddona v. Liberty Mobile Home Sales, Inc.*, 209 Conn. 243, 258 (1988). This Court should join sister state courts in expressly holding that a spouse cannot be guilty of trespass on marital property without a court order restricting entry. It cannot be a proper application of the law of trespass, or of defense of others, that a brutal attack on a diminutive and unwell wife by her previously violent husband is justified as either the protection of a marital home or of the guests within it.

To allow the erroneous application of these special defenses to shield an abuser from being held responsible for serious injuries he perpetrated is contrary to Connecticut's strong public policy against domestic violence.

II. The Trial Court Erred In Incorporating The Criminal Law Of Trespass Into The Jury Charge When M Failed To Give B Adequate Notice That His Defense Relied On Criminal Statutes

The trial court also erred in including the definition of criminal trespass in the first degree from § 53a-107 in the jury instructions on justification because that statute was not pled in M's special defenses, in violation of Practice Book § 10-3(a). B's counsel made multiple objections on these grounds. A242-43; A254-55. The error seriously prejudiced B. Had M complied with Connecticut procedure, B would have had adequate notice of M's attempt to raise *criminal* claims against her, and to defend herself accordingly—primarily, by raising the duty to retreat, a criminal law doctrine which would have completely rebutted M's asserted special defenses.

1. Standard Of Review

Legal determinations made by the trial court are reviewed de novo. *Bridgeport Harbour Place I, LLC v. Ganim*, 131 Conn. App. 99, 115 (2011). Here, the trial court's decision to include the definition of criminal trespass in the first degree into the justification special defense was based on its legal rulings that (1) there was sufficient notice in M's pleadings on the issue of trespass and (2) the Practice Book should not be applied "strictly where it would work an injustice." A251-52.

2. B Was Prejudiced By The Lack Of Adequate Notice Of The Statutory Basis For The Justification Defense Due To M's Failure To Cite The Criminal Statute On Which The Defense Was Grounded

Despite the trial court's concern that M failed to give adequate notice (in violation of Practice Book § 10-3(a))[6] of the *criminal* trespass statute on which he was basing his justification (trespass) special defense, it ruled that M provided B with "sufficient notice" because the word "trespass" was used in M's special defenses pleading. A251. But M's failure to follow the Practice Book's requirements prejudiced B by depriving her of fair notice—indeed, any notice whatsoever—that the claimed trespass at issue was criminal. It was error to allow M to rely on the criminal trespass statute for his defense, and that error prejudiced B's ability to present evidence and defend against the criminal charges which M asserted against her (and that ultimately decided the case), or to challenge the jury instructions with the legal defenses she would have had available (in particular, the duty to retreat and "mere words" doctrine) had she known she was defending herself against criminal claims.[7]

Practice Book § 10-3(a) provides that "[w]hen any claim made in a complaint, cross complaint, special defense, or other pleading is grounded on a statute, the statute *shall be*

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[6] When the trial court asked for an explanation of M's lack of compliance with Practice Book § 10-3, M's counsel claimed that the specific statute was not cited in the special defenses pleading because "at one point, [B] had maintained that she never was told to get off the property," and accordingly M was not sure which definition of trespass applied to the case. A249. However, if M was prepared to testify that he ordered B off the property, what B has to say on the point made no difference to the *availability* of M's defense or his obligation to disclose it. The Practice Book does not excuse non-compliance on the ground that a defense might not be borne out by the evidence at trial, or may be in dispute. Further, the record contradicts this assertion and undeniably shows that B did not waver in her testimony that M did ask her to leave—her account of the assault and battery, as recorded in the police report, was consistent with her testimony at trial. A141; Plaintiff's Exhibits 64-65.

[7] Burke's counsel made note of this, saying to the court, "I'm not going to be able to go and put the evidence in and I'm not gonna be able to get the charge." A254.

specifically identified by its number" (emphasis added). A party that fails to comply with this procedural rule may be prevented from later asserting the specific statute on which it intended to rely. *See, e.g.*, *Gold v. Rowland*, 296 Conn. 186, 220 (2010) ("[T]he plaintiff raised no such claim in his complaint. . . . The plaintiff has not explained why his statutory claim should not be barred under [Practice Book § 10-3(a)]."). "The critical consideration under § 10-3(a) . . . is whether the [opposing party was] on notice of the statutory basis for the . . . claims." *Caruso v. Bridgeport*, 285 Conn. 618, 629 (2008). The other party must be on notice of the "*true nature*" of the claim. *Id.* (emphasis added). The relevant pleading must operate to provide the opposing party with the requisite notice such that prejudice does not result by the lapse in pleading. *See Flannery v. Singer Asset Fin. Co., LLC*, 312 Conn. 286, 300 (2014).

Here, M never pled the defense of premises or criminal trespass statutes in alleging his justification special defense. A245; A13-16. Indeed, it was not until the August 13, 2015 charging conference, after all evidence-taking was completed, that M's counsel announced that the justification special defense was grounded in the "defense of premises" statute, § 53a-20, which is only available if there is a "criminal trespass."[8]

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[8] Conn. Gen. Stat. § 53a-20 reads: "A person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises . . . ."

Notably, in the 1971 revision to the statute, the legislature added the word "reasonable"—underscoring that only the use of *reasonable* physical force is justified, and inserting statutory language to ensure it. *See* Public Act No. 871 (Substitute House Bill No. 9194) (Conn. 1971). As described more fully below, the evidence could not support a finding that M's use of force in the instant case was reasonable. *See* Section IV.3, *infra*.

M's lack of proper notice of the "true nature" of the special defense, prejudiced B. *See Caruso*, 285 Conn. at 629. B did not learn until the trial was effectively over—i.e., just before the jury instructions were given to the jury—that a *criminal* definition of trespass would be incorporated into the jury charge in this *civil* matter. A242-43. *Cf. Cue Associates, LLC v. Cast Iron Associates, LLC*, 111 Conn. App. 107, 114 (2008) ("[I]f a particular statute of limitations is not pleaded, the plaintiff is not on notice to plead and prove matters in avoidance of the particular statute of limitations not pleaded."); *compare Burton v. City of Stamford*, 115 Conn. App. 47, 65 (2009) (finding the plaintiff sufficiently apprised the defendant that he was proceeding under a statute not specifically pled where the plaintiff made reference to that statute (1) at the outset of trial, (2) in its argument in opposition to the defendant's motion for a directed verdict, (3) in a memorandum of law, and (4) in its written request to charge at the charging conference).

B's trial strategy and legal claims would have been different had she begun the trial aware that not only did she have to prove the assault and battery, but that she also had to prove the criminal law "defenses" to criminal trespass as they applied to *her*. This switch to a criminal law paradigm critically undermined counsel's ability to advocate for appropriate jury instructions, which could have negated M's special defenses. *See* Section III, *infra*. In particular, B's counsel would have had no reason to consider the duty to retreat, a criminal doctrine, during what he knew to be a civil trial. *See* A254.

By virtue of the eleventh hour transformation of this civil action into an inadequately tried criminal action, M got the benefit of applying an alleged criminal label to B, while B, the alleged "criminal" trespasser, lacked adequate opportunity to *defend herself* against that charge, as any criminal defendant ordinarily would. This combination of

inclusion of some criminal law doctrines and exclusion of others rendered the jury instructions one-sided and misleading and the trial fundamentally unfair.[9] *See Terwiliger*, 294 Conn. 399.

III. The Absence Of Pivotal Instructions On The Duty To Retreat And The "Mere Words" Doctrine Was Plain Error

The trial court further erred in giving materially incomplete instructions on M's defenses, in light of the fact that the parties shared the Sharon home. The jury needed to know that M had a duty to retreat before using any physical force, in defense of premises or in defense of others, because neither defense applies to a co-dweller. Another instruction that was glaringly absent from the jury instructions, given the unique facts and circumstances in the instant case, was the doctrine that mere words are an insufficient basis for a reasonable expectation of the imminent use of physical force, so as to justify the use of defensive force. These plain errors were essential to fundamental fairness, extremely prejudicial to B, and require reversal.

1. Standard Of Review

This Court "may in the interests of justice notice plain error not brought to the attention of the trial court." Practice Book § 60-5. Plain error review "is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." *State v. Hinckley*, 198 Conn. 77, 87-88 (1985). An important factor in determining whether to invoke the plain error doctrine is whether the claimed error "result[ed] in an *unreliable verdict* or a miscarriage of justice." *Id.* at 88 (emphasis added). This is such a case, especially since the absence of

[9] The trial court itself expressed confusion about M's special defenses, given the lack of clarity in his pleading. A235-36.

objection stemmed from M's failure to disclose until the eleventh hour the criminal statutes on which he relied. *See* Section II, *supra*.

2. The Absence Of An Instruction That M Had A Duty To Retreat Before Using Force Fundamentally Tainted The Jury's Deliberations On Both Special Defenses

Generally, the criminal law establishes that a person is justified in using reasonable[10] physical force upon another person in defense of others from what he reasonably believes to be the imminent use of physical force, to such degree as he reasonably believes is necessary. *State v. Bryan*, 307 Conn. 823, 833 (2013); *State v. James*, 54 Conn. App. 26, 32 (1999). *See* Section IV.2, *infra*. Consistent with the law's emphasis on reasonableness, a person has a duty to retreat from using deadly physical force if he can safely avoid using such force. *Id.* at 32-33. Deadly physical force is defined as "physical force which can be reasonably expected to cause death or *serious physical injury.*" *State v. Singleton*, 292 Conn. 734, 757 (2009) (emphasis added); Conn. Gen. Stat § 53a-3(5).[11] Although the "castle doctrine" provides that one is not generally required to retreat if attacked in one's own dwelling, Connecticut courts are clear that this doctrine does not apply where the other

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[10] As B's severe injuries show, the force used by M, who was nearly a foot taller and 70 pounds heavier than his wife, who was already physically debilitated from his prior violence and from lupus, was not reasonable. *See* Section IV, *infra*.

[11] The trial court should also have instructed the jury on what constitutes deadly physical force, and under what circumstances deadly force is permissible, so that the jury could have made the factual determination. The extent of B's injuries provides an ample evidentiary basis to establish that M used deadly force. A182-96; Plaintiff's Exhibit 47. However, without the requisite instruction, there was no way for the jury to make the necessary assessment. *See State v. Whitford,* 260 Conn. 610, 631-32, 799 A.2d 1034, 1047 (2002); Criminal Jury Instructions, 2.8-1 Self-Defense and Defense of Others—§ 53a-19 (2013), https://www.jud.ct.gov/JI/Criminal/part2/2.8-1.htm.

In addition, the defense of others defense raised by M only allowed the use of reasonable force. *See* Section IV, *infra*. An instruction on deadly force would have also put a point on the fact that Meniaeff's force was not "reasonable" for purposes of this special defense.

person is a co-dweller. *State v. Shaw*, 185 Conn. 372, 382 (1981); *State v. Adams*, 52 Conn. App. 643, 647-48 (1999), *aff'd*, 252 Conn. 752 (2000); *James*, 54 Conn. App. at 33. In other words, a person must retreat rather than using deadly force, even when in his own dwelling or "castle," if threatened by a co-dweller. Importantly, whether or not a person is a co-dweller is a question for the jury. *James*, 54 Conn. App. at 36. However, that question was not presented to the jury here.

As discussed in Section I, *supra*, the Sharon home was marital property in which both B and M stayed, kept possessions, and maintained, rendering B a "co-dweller" as a matter of law. Because they were co-dwellers, rather than "defending" against B by deadly force, M had a duty to retreat to avoid the confrontation, which he could easily have accomplished with complete safety by barring the door and calling the police, or leaving with his guests by car, as he successfully did following his assault on B.[12] Here, the absence of an instruction on the duty to retreat resulted is a miscarriage of justice and was bound to mislead reasonable jurors. *See Terwiliger*, 294 Conn. 399. If the jury was given the opportunity to find that B was a co-dweller—a finding which the record below clearly supports, if not requires—the duty to retreat would have negated both of M's claimed defenses. The trial court's failure to give the requisite instruction resulted in a severe miscarriage of justice, where the victim of the assault was labeled a criminal trespasser and deprived of compensation for her severe injuries.

[12] M conceded that after Kearney intervened and M returned to the house (while the police were on the way), it took about one minute for him and his three guests to gather their belongings and leave for the train station. A99-100.

3. The Jury Should Have Been Instructed That Mere Words Cannot Justify The Use Of Force In Defense Of Others

The law in Connecticut is clear that offensive words alone—unaccompanied by a physical or verbal threat—do not support a reasonable expectation of imminent physical harm. This doctrine arises from the criminal law barring an "initial aggressor" from making a self-defense claim. The Supreme Court of Connecticut has held that in order to be deemed an initial aggressor, the individual's conduct must "create a reasonably perceived threat of physical force." *State v. Jones*, 320 Conn. 22, 53 (2015). It stated, "[W]e previously have indicated that the *mere use of offensive words, without more, is insufficient* to qualify a [person] as the initial aggressor." *Id.* (emphasis added); *see also State v. Whitford*, 260 Conn. 610, 621 (2002) (agreeing that "the discussion of a subject as to which animus existed between the parties . . . does not by itself make . . . [one] the aggressor") (internal citations omitted).

Connecticut courts have also made clear that words alone do not give rise to a reasonable apprehension of harm in analyzing whether a civil assault has occurred. So, too, here, "mere words . . . do not amount to an assault." *Kindschi v. Meriden*, No. CV064022391, 2006 WL 3755299, at *5 (Conn. Super. Ct. November 28, 2006) (internal quotation omitted). Rather, a person's behavior—i.e., some overt act—"must create a fear of imminent harm from an objective standpoint." *Wilk v. Abbott Terrace Health Ctr., Inc.*, No. CV065001328S, 2007 WL 2482486, at *8 (Conn. Super. Ct. Aug. 15, 2007); *Griffin v. O'Connell*, No. CV135034557S, 2015 WL 897277, at *10 (Conn. Super. Ct. Feb. 6, 2015).

M's contention that he was responding to an imminent threat appears to be grounded chiefly on the testimony that B was allegedly yelling "Whose [sic] that

woman?" and "What are you doing in my house?" when trying to enter her home.[13] A108; A217. Even assuming arguendo that this occurred, the case law cited above precludes treating these words as legal justification for his defensive use of force. The jury should have been instructed to that effect. Although this precise instruction was not requested by B's counsel, his requests for other clarifying instructions related to M's "over-reaction" and excessive force are sufficient to bring this instruction within the purview of the objections he raised. A263-65. In any event, the absence of such an instruction rendered the trial fundamentally unfair and the jury's verdict unreliable.

IV. The Defense Of Others Special Defense Was Legally And Factually Barred

Multiple legal errors rendered the second special defense, defense of others, inapplicable here: the lack of a ruling or an instruction on marital property, B's lack of any intent to trespass, M's admitted lack of belief that B was trespassing, and the lack of instructions on M's duty to retreat and the doctrine that mere words do not constitute a legally cognizable threat. The jury's assessment of whether M could reasonably have believed B to pose an imminent threat to his guests was irrevocably tainted by the misleading suggestion in the jury instructions that she was a trespasser with no right to be at the Sharon home. *See* Section I, *supra*. This, along with the absence of instructions on M's duty to retreat because she was a co-dweller, undermined the jury's ability to deliberate fairly and accurately in applying the law to the facts.

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[13] B's counsel correctly pointed out that this refrain is "all [M] ever said that she said" in support of his claim. A108. M later testified that B's face was "full of anger and menacing demeanor" and that she had "body language that [he] recognized from previous such incidents"—but he provided no additional detail for these statements and did not explain what alleged prior "incidents" could have given him cause to be "terrified" of the much smaller and weaker B. A125-26.

In addition, the record lacks sufficient evidence to support a finding that M acted in defense of others in his assault on B. Not only was his violence not reasonably necessary to prevent imminent harm, the amount of force was neither reasonable nor proportional.

1. Standard Of Review

In reviewing a jury verdict for sufficiency of the evidence, this Court must determine "whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict." *Gaudio v. Griffin Health Servs. Corp.*, 249 Conn. 523, 534 (1999); *see also Purzycki v. Fairfield*, 244 Conn. 101, 113 (1998). This standard of review must be applied, however, in conjunction with the equally well-established principle that there must be "sufficient evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation." *Carrol v. Allstate Ins. Co*., 262 Conn. 433, 442 (2003) (quoting *Paige v. St. Andrew's Roman Catholic Church Corp*., 250 Conn. 14, 17-18 (1999)).

2. There Was Insufficient Evidence For The Jury To Reasonably Conclude That M Was Acting In Reasonable Defense Of Others

To prevail on the special defense of "defense of others," a defendant must reasonably believe (1) that one or more third persons are at risk of imminent physical harm and (2) that force is necessary to prevent such harm.[14] Furthermore, the use of force must be reasonable and proportional. *See Bryan*, 307 Conn. at 833. Finally and importantly, the criminal law is clear that the defense of others "does not encompass a preemptive strike." *State v. Lewis*, 220 Conn. 602, 620 (1991). "The defendant must entertain an honest belief that the other person is using or is about to use *physical force*, and the defendant's decision to use

[14] The Supreme Court of Connecticut has ruled that the defense of others is interpreted consistently with the law of self-defense. *Bryan*, 307 Conn. at 833-34.

defensive force must be based on this sincere belief *as opposed to anger*, malice or revenge." *State v. Peters*, 40 Conn. App. 805, 814-15, *cert. denied*, 237 Conn. 925 (1996) (emphasis added). The right to use defensive force "does not arise from a mere apprehension of danger but only from actual or reasonably expected attack. . . ." *State v. Croom*, 166 Conn. 226, 229 (1974).

On this record, no jury could reasonably find that B posed an imminent threat of physical harm.[15] First, there was no testimony that B issued any verbal threats of harm to anyone. M conceded this. A99. Rather, the defense appeared to rely primarily on the assertion that B was allegedly screaming "Whose [sic] that woman?" and "What are you doing in my house?" when approaching the Sharon home. A108; A217; A222-23 (Testimony of Teasdale and Osborne).[16] As explained above, these words, even *if* true, are legally insufficient to justify M's use of force. *See* Section III.3, *supra.*

Second, B was physically incapable of posing a threat. B was only 5'3" and 120 pounds and suffered from various physical limitations. A152. M, who was 6'1" and 190 pounds, was keenly aware of B's left shoulder injury, which he had previously inflicted, and the fact that she suffered from lupus, which made her more vulnerable to physical injury. A97-98; A110; A113-14.

Third, B did not have an *opportunity* to physically threaten anyone because M intercepted her immediately after she entered the Sharon house—preempting any

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[15] The evidence indicates that M's intent was not protective, but was a "preemptive strike," *Lewis*, 220 Conn. at 620, presumably arising from his anger that B found out about the event even though he did not tell her about it, *Peters*, 40 Conn. App. at 814-15. *See* A89; A144-45; A152. This is consistent with M's history of using violence against B. *See* A172; A174-79.

[16] Notably, Silberman had no recollection of hearing B screaming, although she was in the same room as Teasdale and Osborne at the time. A229.

potential “imminent threat” she could conceivably have posed to M's guests.[17] B walked onto the porch, which leads to the house, and opened the back door. After she walked into the house, M “came at [her] immediately,” told her she had to leave, and physically “pulled” her out of the house. A151-53. M admitted that he initiated physical contact with her, and that he got her out of the house as soon as she walked in. A94; A105-06.

In the absence of any overt act or threat by B to harm anyone, the unavoidable conclusion is that when M assaulted B, he did so in a “preemptive strike” out of anger—not out of a reasonable belief that his guests faced an imminent threat from B. M was angry that B showed up at their Sharon home during the house tour—an event he specifically did not tell her about. A88-89; A146. The violent actions in which he engaged in removing B from the property and dragging her 44 yards down the entirety of the driveway and up the sidewalk, while throwing her to the ground and jerking her up again, stemmed from anger, and not out of genuine concern for others’ physical safety.[18]

The record thus could not support a finding that M reasonably believed that B posed an imminent threat to third parties, given (i) the undisputed absence of physical proximity to the third parties; (ii) the absence of any legally cognizable threatening behavior on the part of B; (iii) B's undisputed diminutive size and compromised physical condition; and (iv) the fact that M—not B— initiated the physical altercation by intercepting her immediately upon entering her own house.

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[17] This is supported by Osborne’s testimony that B did not take any “aggressive action” towards her. A224.

[18] This was yet another installment in M's anger-fueled history of physically abusing B. M severely injured B's shoulder in 2008, also at the Sharon house. This incident resulted in lasting physical damage to B's left shoulder. A172; A174-79.

3. Even Assuming B Presented A Threat Of Imminent Physical Harm, The Evidence Is Insufficient To Support A Finding That The Force Used Was Necessary, Reasonable, Or Proportional To The Supposed Threat

Even assuming that the jury could find that M reasonably believed that B posed a threat of imminent physical harm to the guests, the brutal force that M exerted far exceeds any bounds of reasonableness or proportionality.

The defense of others defense is available only when a defendant uses the degree of force that is "*necessary*, under all the circumstances, to prevent an impending injury." *Hanauer v. Coscia*, 157 Conn. 49, 54 (1968) (emphasis added); *see also Markey v. Santangelo*, 195 Conn. 76, 81 (1985) ("If, in fact, the jury believed that [the defendant] had acted in self-defense, they would then have had to consider whether in so acting he used more force than was reasonably necessary to prevent an impending injury."). Necessity requires that "force should be permitted only (1) *when necessary* and (2) *to the extent necessary*. The actor should not be permitted to use force when such force would be equally as effective *at a later time* and the actor suffers no harm or risk by waiting." *Bryan*, 307 Conn. at 833 (emphasis added). The law makes clear that if the amount of force is unreasonable and disproportional, as it was here, the defense of others defense is barred. The party that stands to benefit from the application of the defense must have acted reasonably. *Brown v. Robishaw*, 282 Conn. 628, 640 (2007).

B's counsel expressly urged the court more than once to include clarifying jury instructions that would help ensure that the jury considered the reasonableness of M's use of force—specifically, that if M's conduct was "unreasonable" or an "overreaction to a perceived threat," he is still liable. A263-65. The court rejected this clarification on the ground that it was unnecessary. This was error, as it is apparent that the instructions were fatally unclear on these very points. Moreover, the jury should have been

instructed on the meaning of deadly physical force and the very limited circumstances when deadly force is allowed—and the absence of these instructions resulted in an unreliable verdict.[19]

Here, even if a reasonable jury could conclude that M reasonably believed that B posed an imminent physical threat to his guests, it needed to also find that it was necessary for him to use this degree of violent force—and *at this time*, rather than waiting or using some lesser degree of force. But it is clear that no harm or risk would have occurred by waiting in this circumstance. On the contrary, anyone who was genuinely concerned for anyone's safety could simply have bolted the door shut and called the police, or left the scene, as he and his guests did in record time after the assault. A99-100.

M's choice to employ brute force to remove B from the premises and to escalate the violence by dragging her for 44 yards was unreasonable and disproportional. A167-68; A233-34. Indeed, a reasonable exertion of force under the circumstances would not have compelled a complete stranger to pull over to the side of the road, get out of his vehicle, and affirmatively intervene in the violence out of concern for B's safety. Kearney, an entirely disinterested witness, saw M push B to the ground and hold her by her head and throat in a headlock. When Kearney rolled down his window, he heard B pleading for someone to call the police; M then sought to excuse his behavior by saying, "It's okay. She's my wife."[20] Only when Kearney approached the parties did M release B from his grasp and cease his violence. A79-82.

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[19] *See* note 11, *supra*.

[20] M's attempt at excusing his behavior signifies that his purpose was not to protect others. Instead of saying that he was stopping B from harming someone else, trespassing, or causing any sort of danger, his spontaneous statement in defense of his conduct was "It's okay. She's my wife."

The jury's finding that the defense of others justification applied was not supported by the evidence—because no reasonable factfinder could conclude, based on the evidence presented at trial, that M's use of force was reasonable and proportional to any "threat" imposed. The medical evidence documenting the severity of B's injuries as a result of M's vicious attack on the much smaller and weaker B could not be squared with the requirement of a reasonable and proportional use of force. Unfortunately, the trial court's refusal to clarify and specify these very points, as requested by B's counsel, was a cause of the jury's faulty verdict. A263-65.

CONCLUSION

This Court should reverse the decision below with respect to the applicability of the special defenses of justification and defense of others, and remand to the trial court for a hearing on the issue of damages for the injuries suffered by B as a proximate cause of M's assault and battery.

Dated: May 13, 2016

RESPECTFULLY SUBMITTED,

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CERTIFICATION OF BRIEF

We hereby certify, pursuant to Connecticut Rule of Appellate procedure § 67-2, that:

(1) The electronically submitted brief and appendix were delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address was provided; and

(2) The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and

(3) A copy of the brief and appendix was sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) The brief and appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) The brief complies with all provisions of this rule.

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