Burke v. Mesniaeff, 334 Conn. 100 (2019): Love, Marriage, and…Trespass?

By CHARLES D. RAY and MATTHEW A WEINER

Can a spouse ever trespass on property owned by the spouse's husband? What if the spouse has a key, or the husband didn't perceive his spouse to be trespassing when the trespass allegedly occurred? And what happens when the trial court butchers a charge on one special defense, but not another? Must a retrial necessarily follow? These were some of the questions the Court faced in *Burke v. Mesniaeff*, 334 Conn. 100 (2019).

The plaintiff, Elizabeth Burke, and the defendant, Gregory Mesniaeff, were married in 1989. Nine years later, Mesniaeff purchased a house in Sharon that he titled solely in his name. Although Mesniaeff spent more time at the Sharon home than did Burke, Burke had keys to the house, stayed there occasionally, had painted the inside, and stored personal possessions—including clothing—there. Both Mesniaeff and Burke listed the Sharon house as their residential address on their Connecticut drivers' licenses.

Because the Sharon house is subject to a historic preservation easement, it must occasionally be opened to the public for viewing. As a result, Mesniaeff invited members of The Questers, a historical preservation organization of which he was a member, to tour the house on the afternoon of December 5, 2009. Mesniaeff did not invite Burke to attend the tour "because she was not a member of The Questers, they were not 'on the best terms at that time,' and he was 'afraid that there could be some problems if she was there.'"

It turns out that Mesniaeff's gut feeling was correct. When Burke learned, from an online posting, that the tour had been scheduled and realized that her husband had not invited her, she decided to go to the house "because she was convinced that [Mesniaeff] would deny the existence of the historic house tour, and she 'couldn't take the lying anymore….'"

When she arrived at the Sharon house—where Mesniaeff and three other members of The Questers were inside—Burke did not park in the driveway. Instead, she parked at a neighboring guest cottage. After entering through a back entrance, Burke encountered Mesniaeff, who was standing with a female guest. According to the female guest and Mesniaeff, Burke flew into a rage and demanded to know who the woman was and why she was in Burke's house. Mesniaeff believed, based on Burke's behavior and past experience, that she posed a risk of harm to his guests.

After asking Burke to leave, Mesniaeff grabbed her arm and "escorted" her out of the house and toward the place where he believed she had parked. Burke struggled, trying to return to the house. Along the way, a couple driving by in a car observed the pair and heard Burke screaming that she was being assaulted by her husband. While one of them called the police, the other placed himself between Burke and Mesniaeff. At that, Mesniaeff returned to the house, apologized to his guests, and drove them to the train station. Upon his return from the train station, Mesniaeff encountered the police and cooperated with their investigation. Burke and Mesniaeff later divorced.

Burke thereafter filed a personal injury lawsuit against Mesniaeff based on his conduct at the Sharon house. Burke alleged, among other things, that Mesniaeff had assaulted her. Mesniaeff raised a number of special defenses, including that his actions were in defense of others and that his actions were justified because Burke was "trespassing on [his] property."

During the charge conference that followed an eight-day jury trial, the parties disagreed as to whether Burke's alleged

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trespass was a proper defense to her claims. Burke argued that she could not, as a matter of law, commit trespass because the Sharon house was marital property. Mesniaeff claimed that, because the house was in his name only, it was appropriate for the trial court to instruct the jury that, if Burke was engaged in committing a criminal trespass, Mesniaeff was justified in using physical force to end the trespass. Noting the conflicting evidence before the jury, the trial court decided to give the instruction and leave it to the factfinder to decide. The trial court also included a defense of others instruction in its final charge.

After multiple requests to rehear evidence, the jury returned a verdict in favor of Mesniaeff. Specifically, the jury found that Mesniaeff had committed an intentional assault and battery against Burke, but that "recovery was barred by…the special defenses of justification and defense of others." Burke appealed to the Appellate Court which, in a 2-1 decision, affirmed. *Burke v. Mesniaeff*, 177 Conn. App. 824 (2017).

Before the Supreme Court, Burke made several arguments. First, she claimed that the trial court improperly had instructed the jury that Mesniaeff's conduct could be justified by Burke's alleged trespass because she had a legal right to be present at the shared marital residence. Second, she contended that this improper instruction had "irrevocably tainted the jury's finding that [Mesniaeff] was acting in defense of others because a criminal trespasser's refusal to leave when so instructed by the rightful owner' is inherently threatening…." (Internal quotation marks omitted.) Third, she argued that the evidence was insufficient to support a finding that Mesniaeff had acted in defense of others.

Justice Ecker, writing for himself, Chief Justice Robinson, and Justices Palmer, Mullins, and Vertefeuille, agreed with Burke that the trial court had improperly instructed the jury with respect to justification, but nevertheless affirmed the judgment. To begin, Justice Ecker examined the criminal trespass statute, General Statutes § 53a-20, to determine whether a justification defense premised on the right to terminate a criminal trespass applied under the facts of this case. He concluded that it did not.

Justice Ecker explained that "[b]oth criminal trespass and defense of premises contain a scienter requirement. Specifically, in order to commit a criminal trespass, the trespasser must know that he is not privileged or licensed to enter or remain on the premises and, in order to be justified in using physical force to prevent or terminate the commission…of a criminal trespass, the person in possession or control of the premises must reasonably [believe] that the use of force is necessary to prevent or terminate the commission… of a criminal trespass…." (Citation omitted; internal quotation marks omitted.) Thus, contrary to the positions taken by both parties, there is no black and white rule when it comes to married couples. Instead, the answer to the question of whether one spouse may trespass on the property of another depends on whether the "trespassing" spouse had a possessory or occupancy interest in the premises and, if she did not, whether she knew that. Both inquiries are highly fact specific, with the first depending on factors such as "the relationship status of the spouses (i.e., whether the parties are legally separated or involved in divorce proceedings), the existence of extended periods of separation, the applicability of any relevant court orders, the establishment of separate residences, the existence of any agreements regarding access to the subject property, and the method and manner of entry."

In this case, the evidence established that Burke had a possessory or occupancy interest in the house because she had a key to it, would go back and forth between it and the parties' primary marital residence, kept personal belongings there, listed it as her address on her driver's license, and the parties were neither divorced nor separated. In addition, Mesniaeff himself testified that, at the time he removed her, he did not think that Burke was criminally trespassing. Because the evidence established that Burke had a possessory or occupancy interest in the house and that Mesniaeff did not remove her to terminate a trespass, the trial court should not have given the defense of premises instruction.

Burke, however, was not entitled to a new trial because the error was harmless in light of the jury's determination that Mesniaeff had acted in defense of others. Notwithstanding Burke's assertion that "criminal trespassers are 'inherently threatening,' and, therefore,…the trial court's improper reference to criminal trespass…infected…the entire trial," defense of others was still "an independent, freestanding special defense" distinct from the problematic trespass defense. It also was supported by evidence in the record, including testimony from two of Mesniaeff's guests that "they were afraid of [Burke] and felt physically threatened by her out of control behavior."

Justice D'Auria, writing for Justice Kahn and himself, concurred. In his concurring opinion, Justice D'Auria focused on the question of whether the improper jury instruction on criminal trespass required a new trial. Noting that, since 1974, the Court has placed on an appellant "the substantial burden of demonstrating that an erroneous charge on one count or defense tainted the consideration of the remaining counts or defenses," Justice D'Auria

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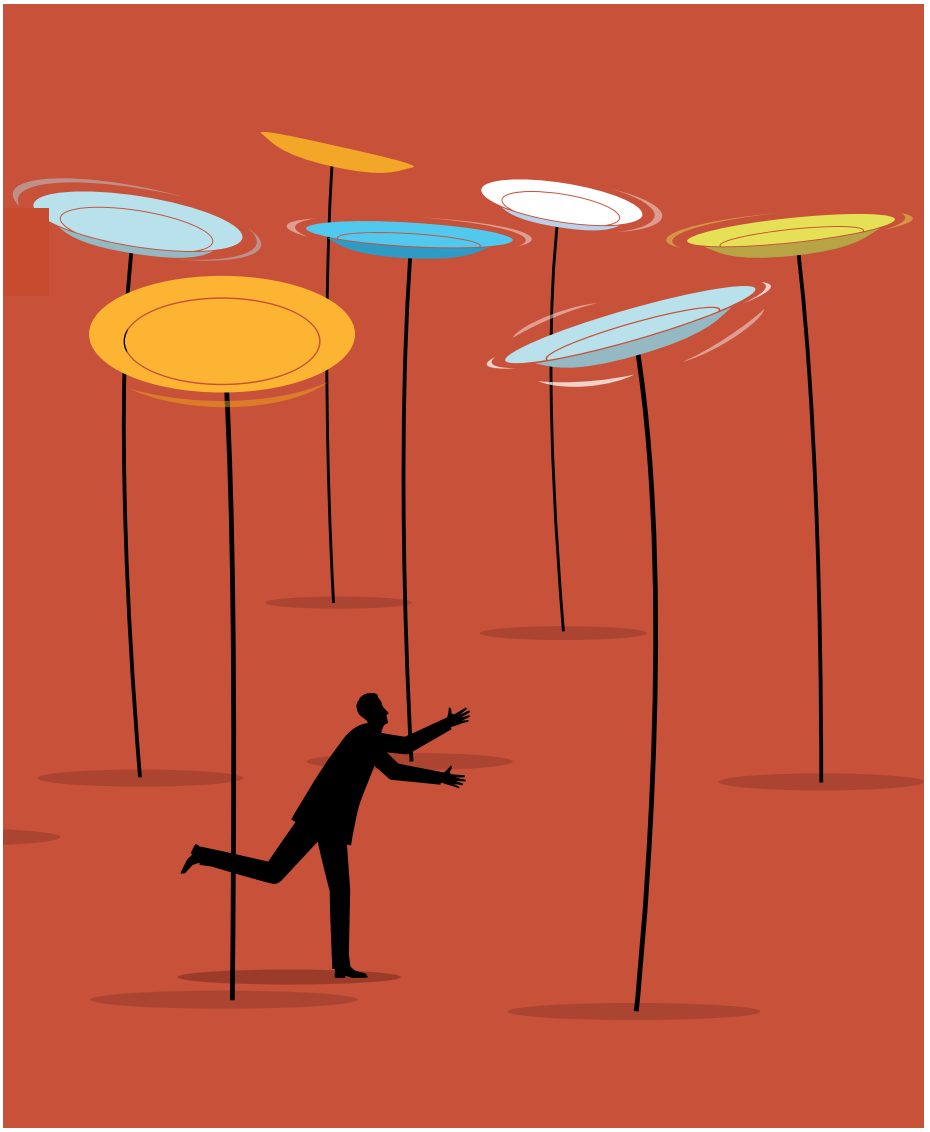
Charles D. Ray *is a partner at McCarter & English LLP, in Hartford. He clerked for Justice David M. Shea during the Supreme Court's 1989–1990 term and appears before the Court on a regular basis.*

Matthew A. Weiner *is Assistant State's Attorney in the Appellate Bureau of the Office of the Chief State's Attorney. ASA Weiner clerked for Justice Richard N. Palmer during the Supreme Court's 2006–2007 term and litigates appellate matters on behalf of the State.*



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exercise or that stress drove you to see a therapist to explore your mental well-being. Support others in ensuring that they make better choices. Don't insist they live the same life, inclusive of mistakes, as you. Empower them to do better.

Last, to my struggling young lawyers and to my senior colleagues I give the same message: lead by example. The legal culture in our state starts at the top and spreads by example. Prioritize your family time. Illustrate that you and your significant other have found a groove that works for you. Talk about your life and the most cherished parts of it. Your example will be a roadmap for generations to come. Don't squander the opportunity to make that road smoother. Smoother doesn't mean easier, it's simply a shift away from unnecessary pressures and a focus on productivity. You'll be surprised what most lawyers can achieve with more aspects of their life in balance.

I end this year amid great uncertainty as to the current state of our nation and state. If a global pandemic and social unrest following a horrific racial injustice has taught us anything, it is to support one another. Perhaps the answer to the balance we are all seeking depends not just on ourselves, but on the collective. Balance can only truly be achieved with support from colleagues, family, and friends—it's the allowance we give to one another to thrive. May we accept and champion balance to achieve a thriving bar community. ■

Supreme Deliberations

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was "compelled to conclude" that Burke was not entitled to a new trial. See *Dinda v. Sirois*, 166 Conn. 68, 75 (1974) ("When two or more separate and distinct defenses…are present in a case, an error in the charge as to one normally cannot upset" the judgment). Though Justice D'Auria seemed open to reconsidering this standard, he was constrained by Burke's failure to argue that the Court should overrule its precedent, or to argue that this was not a "normal[ ]" case to which the standard set forth in *Dinda* should apply.

Justice D'Auria's concurrence got us thinking: should the Court revisit *Dinda*? It makes sense that an appellant faces an uphill fight when asserting that a defect in the instruction on one special defense entitles her to a new trial, even though the jury found in favor of the appellee on a legally and factually distinct special defense. But recognizing a factually distinct special defense is not always easy. As explained by Justice D'Auria, if a reviewing court were permitted to consider evidence that the "assault had occurred farther from the house than some of the testimony indicated," he "would have a much harder time concluding that there was no taint from the improper trespass charge."

Then again, if *Dinda* is to be overruled—or at least modified—what should the new rule look like? We'll leave the answer to that difficult question to you. ■