

SUPREME COURT PENDING CASES

STATE *v.* MICHAEL J. MARSALA, SC 20249

Judicial District of Milford at G.A. 22

Criminal; Lesser Included Offenses; Whether Appellate Court Properly Concluded that Defendant not Entitled to Instruction on Infraction of Simple Trespass as a Lesser Included Offense of Criminal Trespass in the First Degree. Mall security banned the defendant from the Connecticut Post Mall's property in Milford after receiving many calls reporting that a man carrying a red gas can was in one of the mall's parking lots. The defendant was told that panhandling was not allowed on mall property. On November 27, 2015, a mall security officer saw the defendant in a mall parking lot holding a gas can. She told the defendant that he had been banned from the property and warned him that he would be arrested if he was found on the property again. The next day, the officer again found the defendant in a mall parking lot. The defendant was arrested and charged with one count of criminal trespass in the first degree in violation of General Statutes § 53a-107 (a) (1). A person is guilty under that statute when, knowing that he is not privileged or licensed to do so, he enters or remains on any premises "after an order to leave or not to enter [has been] personally communicated to [him] by the owner of the premises or other authorized person" After the close of evidence, the defendant submitted a request that the jury be charged on the infraction of simple trespass under General Statutes § 53a-110a as a lesser included offense of criminal trespass. A person is guilty of simple trespass in violation of § 53a-110a when, knowing that he is not licensed or privileged to do so, he enters or remains on any premises without intent to harm any property. The trial court denied the request to charge, and the jury found the defendant guilty of criminal trespass in the first degree. The defendant appealed, claiming that the trial court improperly declined to instruct the jury on the infraction of simple trespass as a lesser included offense of criminal trespass in the first degree. The Appellate Court (186 Conn. App. 1) rejected that claim and affirmed the defendant's conviction, ruling that the defendant was not entitled to an instruction on a lesser offense under the four-prong test of *State v. Whistnant*. *Whistnant* holds that a defendant is entitled to an instruction on a lesser offense only if, among other things, (1) there is some evidence which justifies conviction of the lesser offense, and (2) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser. The Appellate Court

found that, here, the evidence presented to the jury excluded the possibility that the defendant could be found not guilty of criminal trespass in the first degree, but then found guilty of the infraction of simple trespass and accordingly that the defendant was not entitled under *Whistnant* to a jury instruction on the infraction of simple trespass. In this certified appeal, the Supreme Court will decide whether the Appellate Court properly concluded that the defendant was not entitled to an instruction on the infraction of simple trespass as a lesser included offense of criminal trespass in the first degree. For its part, the state argues that the Appellate Court's judgment can be affirmed on the alternative ground that an infraction can never constitute a lesser included offense of a criminal offense.

STATE *v.* ELVIN G. RIVERA, SC 20277
Judicial District of Hartford

Criminal; Whether Defendant Properly Precluded from Cross-Examining State's Key Witness About Specific Facts Underlying Witness' Prior Misdemeanor Convictions. The defendant was convicted of breach of the peace in the second degree, criminal mischief in the third degree and threatening in the second degree. The defendant's conviction stemmed from a dispute he had with Stephen Chase, a tow truck operator. Chase secured the defendant's car for towing after observing it parked at a condominium complex in an area marked as a fire lane. Chase informed the defendant when he exited a nearby garage that he was towing the car because it was parked in a fire lane. The defendant became agitated, moved toward the tow truck where Chase was standing and struck the tow truck with a pipe. Chase grabbed a can of pepper spray from his tow truck and sprayed the defendant in the face. The defendant dropped the pipe and pulled a knife out from his pocket. Chase entered his tow truck, drove a safe distance away from the defendant and called the police. The defendant claimed on appeal that the trial court violated his constitutional rights to confrontation and to present a defense by precluding him from cross-examining Chase as to the specific acts underlying several misdemeanor convictions rendered against Chase, including convictions on three separate counts of larceny in the sixth degree and a conviction of a single count of breach of the peace in the second degree. The Appellate Court (187 Conn. App. 813) affirmed the defendant's conviction, concluding that the trial court did not abuse its discretion in prohibiting the defendant from cross-examining Chase as to the specific acts underlying his 2014 larceny convictions and his 2013 breach

of the peace conviction. It found that the trial court reasonably determined that statements made by Chase in police reports relating to the larceny convictions in which he admitted to stealing cell phones to exchange for drugs were too remote in time to have probative value as to the incident underlying the present case, which occurred in March, 2015. The Appellate Court further found that those statements did not tend to prove that Chase had a motive to steal the defendant's car in order to support a drug habit, where there was no indication in the record that Chase was under the influence of substances at the time of the incident here. The Appellate Court also found that Chase's plea of guilty to the breach of the peace charge did not impugn his statement in a 2012 police report relating to the charge that he had used pepper spray in self-defense, such that the specific acts underlying that conviction were not probative of Chase engaging in a pattern of making false self-defense claims. Furthermore, the Appellate Court found that the altercation underlying Chase's breach of the peace conviction, which occurred more than two years before the incident that gave rise to the defendant's conviction, was too remote in time and bore minimal probative value on Chase's credibility. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court correctly determined that the trial court properly precluded the defendant from cross-examining Chase about the specific facts underlying his prior misdemeanor convictions.

MARGARET E. DAY, COCONSERVATOR (ESTATE OF SUSAN D. ELIA) *v.* RENEE F. SEBLATNIGG et al., SC 20280
Judicial District of Stamford-Norwalk at Stamford

Probate; Conservatorship; Whether Irrevocable Trust Created by Voluntarily Conserved Person is Void Ab Initio under General Statutes § 45a-655 (e) Regardless of Conserved Person's Testamentary Capacity. In 2011, Susan D. Elia applied to the Greenwich Probate Court for the voluntary appointment of a conservator of her estate. The Probate Court granted her application and appointed Renee Seblatnigg as the conservator of her estate. After her appointment, Seblatnigg consulted with First State Fiduciaries regarding the creation of a self-settled irrevocable Delaware asset protection trust for Elia. Seblatnigg then entered into an asset protection services agreement on Elia's behalf with an affiliate of First State Fiduciaries. She also met with Elia on the same day and supervised Elia's execution of a trust instrument that created a Delaware irrevocable trust. Seblatnigg did not seek or obtain the approval of the Probate Court to establish the Delaware irrevocable trust or to supervise Elia's

execution of the trust document. Seblatnigg resigned as the conservator of Elia's estate in 2013, and the plaintiff, Margaret Day, was appointed coconservator of Elia's estate for the limited purpose of attending to matters related to Elia's interest in the Delaware irrevocable trust. The plaintiff brought this action against Seblatnigg and First State Fiduciaries seeking a judgment declaring that the irrevocable trust was void and unenforceable and ordering that any assets transferred from Elia's estate into the trust be returned to the estate. The trial court granted summary judgment in favor of the plaintiff, determining that Elia lacked the ability to execute the trust while under a voluntary conservatorship. First State Fiduciaries appealed, and the Appellate Court (186 Conn. App. 482) affirmed the trial court's judgment, finding that the trial court rightly determined that Elia, as a voluntarily conserved person, did not retain control over her estate. The Appellate Court noted that the clear language of General Statutes § 45a-655 gives control over a conserved person's estate to the conservator, and it rejected First State Fiduciaries' claim that a 2007 revision of the conservatorship statutes was intended to suggest that a voluntarily conserved person retains control over her estate. The Appellate Court further noted that a voluntarily conserved person may seek to be released from a voluntary conservatorship if they wish to regain control of their estate. First State Fiduciaries was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly upheld the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under § 45a-655 (e), regardless of whether the conserved person at the time of transfer had unimpaired testamentary capacity.

GREGG FISK *v.* TOWN OF REDDING et al., SC 20333
Judicial District of Fairfield

Public Nuisance; Inconsistent Verdicts; Interrogatories; Whether Jury Verdict in Nuisance Action Should Be Set Aside Because Jury's Finding that Condition was Inherently Dangerous was Inconsistent with Jury's Finding that Condition did not Constitute an Unreasonable Use of Land. The plaintiff was injured when he fell from a retaining wall constructed by the town of Redding. He brought this action claiming that the town was liable for absolute public nuisance, contending that the town had created a nuisance by constructing the retaining wall without a fence on top of it. Following a trial, the jury returned a verdict in favor of the town, and the trial court accepted the verdict. The plaintiff then filed a motion to set aside the verdict, claiming that the jury's responses to interrogatories

were inconsistent. The plaintiff argued that the interrogatory responses were inconsistent in that, while the jury indicated that the wall constituted an inherently dangerous condition, it nonetheless found that the wall did not constitute an unreasonable or unlawful use of the land by the town. The trial court denied the motion and rendered judgment in accordance of the verdict. The plaintiff appealed, and the Appellate Court (190 Conn. App. 99) reversed the judgment and remanded the case for a new trial, finding that the jury's answers to the interrogatories were "fatally inconsistent" and could not be harmonized. The Appellate Court found that the jury could not have determined that the alleged inherently dangerous condition—the retaining wall without a fence—was both inherently dangerous and not an unreasonable use of the land. The defendant has been granted certification to appeal. The Supreme Court will decide whether the Appellate Court properly determined that the jury's verdict should be set aside because the jury's response to the first special interrogatory, that the condition of an unfenced retaining wall was inherently dangerous, was fatally inconsistent with its response to the third special interrogatory, that the defendant's use of the land nevertheless was not unreasonable.

JOHN DOE #2 et al. v. ROBERT RACKLIFFE et al., SC 20420
Judicial District of New Britain

Negligence; Sexual Abuse of Minors; Statutes of Limitation; Whether Timeliness of Negligence Claims Brought Against Defendant Doctor Governed by Negligence Statute of Limitations or by Statute of Limitations for Civil Claims Alleging Sexual Abuse of Minors. This appeal stems from six consolidated tort actions brought between 2014 and 2015 by seven plaintiffs who were minor patients of the defendant pediatrician Robert Rackliffe between 1972 and 1988. The plaintiffs pleaded claims of medical malpractice and negligent infliction of emotional distress (the negligence claims), sexual abuse of a minor and intentional infliction of emotional distress. The plaintiffs claimed that they were harmed as a result of the defendant's practice of performing digital rectal examinations during their annual physical checkups. The defendant moved for summary judgment on the negligence claims, arguing that they were time barred under the three year statute of limitations for negligence actions contained in General Statutes § 52-584. In objecting to summary judgment, the plaintiffs argued that their claims were governed by General Statutes § 52-577d, which provides that "no action to recover damages for personal injury to a person under twenty-one years of age, including emotional distress, caused by sexual abuse, sexual exploitation or

sexual assault may be brought by such person later than thirty years from the date such person attains the age of twenty-one.” The plaintiffs argued that their negligence claims were inextricably intertwined with their sexual abuse claims and therefore that the negligence claims were timely under § 52-577d. The trial court rendered summary judgment for the defendant on the negligence claims, ruling that they were time-barred under § 52-584. The court determined that those claims sounded in negligence and did not allege “sexual abuse, sexual exploitation or sexual assault” as contemplated by § 52-577d. The court acknowledged that the statute of limitations under § 52-577d had previously been applied to negligence claims, but it noted that those claims had been brought against third parties who had various relationships to the alleged perpetrator of prohibited sexual conduct. The trial court distinguished the plaintiffs’ claims by observing that they had been brought directly against the alleged perpetrator. The plaintiffs subsequently withdrew their sexual abuse and intentional infliction of emotional distress claims, and they appeal, challenging the judgments for the defendant on their negligence claims. The Supreme Court will decide whether the trial court erred in declining to apply the statute of limitations contained § 52-577d to the negligence claims.

STATE *v.* RICHARD ROLON, SC 20423
Judicial District of Hartford

Criminal; Search and Seizure; Whether Police Authorized to Detain Person Who Parked in an Apartment Building’s Parking Lot as Police Were Executing a Search Warrant for an Apartment in the Building. After conducting an investigation into suspected drug trafficking by Richard Rivera, the police obtained a warrant to search Rivera’s apartment at 12-14 South Street in Hartford and warrants for his arrest. The police planned to execute the warrants on January 31, 2017, and throughout that day they engaged in street camera surveillance of the building’s parking lot. During the surveillance, the police observed Rivera drive into the lot, get out of his car and speak with the defendant, who had exited the apartment building and approached Rivera’s car. After a brief exchange, both men got into their cars and drove out of the lot. Later that day, Rivera was arrested on Franklin Avenue and, on learning of his arrest, a team of police convened near 12-14 South Street and prepared to execute the search warrant for Rivera’s apartment. Just before the police arrived at 12-14 South Street, the defendant returned to the lot and parked his car. Before the defendant or his passenger could get exit the car, the police drove their vehicles into the driveway of 12-14 South Street, and four or five police

officers exited their vehicles and approached the defendant's car. The police detected the smell of marijuana as they reached the car and they observed a marijuana cigarette and what appeared to be bags of heroin in plain view in the vehicle. The defendant and the passenger—the defendant's girlfriend, Yashira Espino—were taken into custody, and the police learned that Espino was the tenant of an apartment in 12-14 South Street and that the defendant often resided with her there. The police obtained a warrant to search Espino's apartment, and the search yielded evidence of illegal drug activity. The defendant and Espino were arrested and charged with multiple drug crimes. The defendant filed a motion to suppress the drug evidence, claiming that his initial detention by the police violated his fourth amendment rights because the police did not have a reasonable and articulable suspicion that he was engaged in criminal activity under *Terry v. Ohio*, 392 U.S. 1 (1968). The trial court denied the motion to suppress, concluding that, while the police did not have a reasonable and articulable suspicion that the defendant was engaged in criminal activity, his initial detention was nonetheless constitutional under *Michigan v. Summers*, 452 U.S. 692 (1981), which held that “a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” The trial court determined (1) that the parking lot was in the “immediate vicinity” of the premises to be searched; (2) that the defendant was a “person in the immediate vicinity of [the] search whom the police ha[d] an articulable basis to connect to the premises to be searched, or to the residents of those premises”; and (3) that the defendant's initial detention had been “limited, in both time and manner, to the minimum intrusion necessary for officers to reasonably ensure their safety.” The defendant appeals after entering a conditional plea of *nolo contendere*. The Supreme Court will decide whether the trial court properly denied the defendant's motion to suppress on the ground that his detention was legal under *Michigan v. Summers* where he argues that he was neither in the “immediate vicinity” of the premises to be searched nor an “occupant” of the premises as contemplated by *Summers*.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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