CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* MICHAEL J. MARSALA (AC 40071)

Alvord, Moll and Eveleigh, Js.

Syllabus

Convicted of the crime of criminal trespass in the first degree, the defendant appealed to this court. He claimed that the trial court improperly declined to instruct the jury on the infraction of simple trespass as a lesser offense included within the crime of criminal trespass in the first degree. The defendant's conviction stemmed from his conduct in entering certain property on which a mall was located, and approaching shoppers and asking for money. After he was banned from the mall property by security officers and was warned of a possible arrest, he returned to the property again, which resulted in his arrest by a police officer on private duty. On appeal, the defendant claimed that because there was sufficient evidence in dispute at trial as to whether he properly received an order not to enter the property by the mall owner or an authorized person, which is a required element of criminal trespass in the first degree, the jury could have found that the order was insufficient to find him guilty of criminal trespass in the first degree, but sufficient to satisfy the knowledge element contained in simple trespass. *Held* that the defendant was not entitled to a jury instruction on the infraction of simple trespass, as the evidence presented before the jury excluded the possibility that he could be found not guilty of criminal trespass in the first degree but guilty of the infraction of simple trespass; under the facts of this case, if the jury rejected the evidence presented by the state that the defendant received an order not to enter the mall property from an authorized person, there was no other evidence, introduced by either the state or the defendant, from which the jury could have found that the defendant knew he was not privileged to enter or remain on

the mall property and it would have had to find the defendant not guilty of the infraction of simple trespass as well, and, therefore, the defendant's claim that the jury could have found that the evidence presented was sufficient to satisfy the knowledge element of the infraction of simple trespass but not criminal trespass was unavailing.

Argued September 13—officially released November 6, 2018

Procedural History

Substitute information charging the defendant with the crime of criminal trespass in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the jury before *Markle, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Laila M.G. Haswell, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, *Matthew R. Kalthoff*, assistant state's attorney, *Laurie N. Feldman*, special deputy assistant state's attorney, and *Brett R. Aiello*, special deputy assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Michael J. Marsala, appeals from the judgment of conviction, rendered after a jury trial, of one count of criminal trespass in the first degree in violation of General Statutes § 53a-107 (a) (1).[1] On appeal, the defendant claims that the trial court

[1] General Statutes § 53a-107 (a) provides in relevant part: "A person is guilty of criminal trespass in the first degree when: (1) 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 not to enter personally communicated to such person by the owner of the premises or other authorized person . . . ."

improperly declined to instruct the jury on the infraction of simple trespass, General Statutes § 53a-110a,[2] which the defendant claims is a lesser included offense of criminal trespass in the first degree. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The Centennial Connecticut Post Mall (mall) is located at 1201 Boston Post Road in Milford (mall property). Currently owned by Centennial Corporation (Centennial), the mall was previously owned by Westfield Corporation (Westfield). Westfield, and later Centennial, has employed Dan Kiley as the mall's general manager. The mall contracts with Professional Security Consultants for security services. Professional Security Consultants employs Thomas Arnone as security director at the mall, and Arnone reports directly to Kiley. Wilfred Castillo, also an employee of Professional Security Consultants, began working at the mall in November, 2014, and had received calls about the defendant on approximately ten to fifteen occasions prior to November 28, 2015. In each call, the defendant was described as a man carrying a red gas can and was present in one of the parking lots at the mall. In response to the calls, Castillo would find the defendant and tell him that panhandling is not allowed on mall property and that he would have to leave.

During the holiday season, from November through January, the mall hires Milford police officers to support the mall security staff and conduct traffic control at the mall's exterior entrances and exits. The mall pays the city of Milford, which pays the police officers' wages, to work what is described as a "private duty

[2] General Statutes § 53a-110a provides: "(a) A person is guilty of simple trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in or on any premises without intent to harm any property.

"(b) Simple trespass is an infraction."

job." On November 27, 2015, Officer Joanna Salati of the Milford Police Department was working for the mall on a private duty job when she observed the defendant walking around on mall property with his gas can.[3] She called for a security officer to come out and confirmed with security that the defendant was banned from the mall property. Salati told the defendant that he had been advised several times before that he was banned from the mall property, and she informed the defendant of the property's boundaries. Salati told the defendant that he would be arrested the next time he was found on mall property. Salati saw the defendant leave the mall property and reported the incident to the Milford Police Department, where a report of the incident was generated.

The next day, November 28, Salati was again working private duty at the mall when her partner, Detective Steve Noss, also of the Milford Police Department, told her that he had observed the defendant on mall property near Sears. Salati, who was working traffic enforcement at the intersection of Boston Post Road and Cedarhurst Road at the time, called for additional officers. She also told mall security to meet her in the Sears parking lot and began walking in that direction, where she observed the defendant approaching customers with his red gas can. The defendant walked away from Salati as she called his name. The defendant eventually stopped walking, Salati arrested him, and he was transported by other officers to the Milford Police Department. The defendant was charged in a long form information with one count of criminal trespass in the first degree in violation of § 53a-107 (a) (1). The defendant elected a jury trial, and evidence was presented on September 14, 2016.

[3] On a prior occasion, while off duty, Salati also had observed the defendant on mall property. After seeing him approach a woman asking for money in the mall parking lot near Target, Salati told him he should not be on the property.

After the close of evidence on September 14, 2016, the court held a charge conference on the record. The court preliminarily discussed the defendant's request to charge the jury on the infraction of simple trespass as a lesser included offense to criminal trespass in the first degree. Defense counsel agreed to submit a revised proposed charge,[4] and the court also indicated that it would afford the state an opportunity to brief its opposition to the defendant's request. The court stated its intention to decide the issue the following day.

The next morning, defense counsel submitted to the trial court a revised written request that the court charge the jury on the infraction of simple trespass as a lesser included offense to criminal trespass in the first degree. In the written request, defense counsel asked that the court give the following charge: "If you have unanimously found the defendant not guilty of the crime of criminal trespass in the first degree, you shall then consider the lesser offense of simple trespass. Do not consider the lesser offense until you have unanimously acquitted the defendant of the greater offense.

"A person is guilty of simple trespass when, knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property. For you to find the defendant guilty of simple trespass, the state must prove the following elements beyond a reasonable doubt: first that he entered the premises. Premises is not defined in the law so it has the common meaning. The second element is that he entered knowing he was not licensed or privileged to do so. To be licensed or privileged the defendant must have either

[4] Although not entirely clear from the record, it appears that an earlier request to charge was reviewed by the court on September 14, 2016, but not filed with the clerk. After the court described it as "a little confusing to the jury," the defendant offered to submit a revised request and did so the next morning.

consent from the owner of the premises or other authorized person or have some other right to be on the premises. A person acts knowingly with respect to conduct when he is aware that his conduct is of such nature or such circumstances exist."

The state filed a memorandum in opposition to the defendant's request to charge as to the infraction of simple trespass, arguing that (1) the claim fails under the second prong of the *Whistnant* test[5] and (2) an infraction should not be submitted to a jury as a lesser included offense of a crime.

The court heard oral argument on the defendant's request to charge after counsel gave closing arguments.[6] The court then issued an oral decision denying the request to charge. The court began its discussion by noting the absence of appellate authority directly on point. With respect to the issue of whether the jury should be permitted to decide the facts of a case as it relates to an infraction, the court read *State* v. *Steinmann*, 20 Conn. App. 599, 607, 569 A.2d 557, cert. denied, 214 Conn. 806, 573 A.2d 319 (1990), in conjunction with *State* v. *Mention*, 12 Conn. App. 258, 261,

[5] See *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980) ("[a] defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) 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" [footnote omitted]).

[6] The court suggested that, rather than leave the jury waiting, it would proceed with closing arguments before taking a recess to hear oral argument on the request to charge and render a decision on that request. The court asked defense counsel whether he was comfortable with that procedure, and he responded that he was.

530 A.2d 645, cert. denied, 205 Conn. 809, 532 A.2d 78 (1987),[7] as "leaning against an infraction being a lesser included offense." The court further found persuasive the state's argument that the infraction of simple trespass fails to satisfy the *Whistnant* test because it contains an added element, specifically that the defendant enter or remain on the premises "without intent to harm any property," which is not required for a conviction of criminal trespass in the first degree. See footnotes 1 and 2 of this opinion. The court then instructed the jury, and the jury retired for deliberations. The next day, the jury reached a verdict, finding the defendant guilty of criminal trespass in the first degree. On October 28, 2016, the defendant was sentenced to one year incarceration, execution suspended after four months, followed by two years conditional discharge. This appeal followed.

On appeal, the defendant claims that the 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. Specifically, he argues that the infraction of simple trespass satisfies all four prongs of the *Whistnant* test. The state responds that the trial court "correctly found that an infraction

[7] The defendant in *State* v. *Steinmann*, supra, 20 Conn. App. 606, argued that his prosecution for simple trespass violated his right to equal protection of the law because "the various trespass statutes create two different classes of trespasser, criminal trespassers and simple trespassers, but only the latter group is denied affirmative defenses and the right to a jury trial." Rejecting the contention that separate classes of trespassers are statutorily created, the *Steinmann* court stated: "In enacting §§ 53a-107 through 53a-110a, the legislature has defined four degrees of trespass with distinguishably different essential elements. For example, simple trespass is not a lesser included offense of any of the three degrees of criminal trespass. *State* v. *Mention*, supra. The statutes therefore define separate violations rather than separate classes of trespasser." Id., 607.

The court in *State* v. *Mention*, supra, 12 Conn. App. 261, however, addressed a different element in the previous version of the simple trespass statute, "enter[ing] the property as a knowing trespasser."

could not be treated as a lesser included offense of a crime." The state argues in the alternative that, even if certain infractions could be submitted to a jury as lesser included offenses of crimes, the infraction of "simple trespass contains an element that criminal trespass in the first degree does not—the lack of intent to harm property." Thus, the state argues that the trial court correctly found that the infraction of simple trespass fails to satisfy the second prong of *Whistnant*. Although we conclude that the defendant's claim fails the third and fourth prongs of *Whistnant*, we also briefly address the defendant's claim as to the second prong.[8]

We first set forth our standard of review. "It is well settled that [t]here is no fundamental constitutional right to a jury instruction on every lesser included offense. . . . [*State* v. *Whistnant*, 179 Conn. 576, 583, 427 A.2d 414 (1980)]. Rather, the right to such an instruction is purely a matter of our common law. A defendant is entitled to an instruction on a lesser [included] offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiates 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." (Internal

[8] We need not reach, and express no opinion on, whether infractions generally may be submitted to juries as lesser included offenses of crimes. See *State* v. *Marsha P.*, 126 Conn. App. 497, 506 n.6, 11 A.3d 1164 (2011) (noting that "the question of whether in general an infraction may be considered a lesser included offense has not been definitively answered in this jurisdiction").

quotation marks omitted.) *State* v. *Langley*, 128 Conn. App. 213, 231, 16 A.3d 799, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011). "The *Whistnant* test is conjunctive, requiring satisfaction of all four prongs." *State* v. *Smith*, 262 Conn. 453, 461, 815 A.2d 1216 (2003).

We begin our analysis by briefly addressing the defendant's claim as to the second prong of *Whistnant*. The defendant argues that the court wrongly construed the phrase "without intent to harm any property" in § 53a-110a (a) as an element of the infraction of simple trespass. The defendant maintains that the phrase is not an element, but rather "[i]ts purpose is to alert the police and prosecution that a defendant who commits a trespass but does not damage property may be charged with simple trespass." The defendant further argues that if *lack* of intent was an element, "the state would be forced to prove beyond a reasonable doubt the defendant's lack of intent to harm the property. The absurd effect of this mandate is that once the state proved the lack of intent, the accused would then be able to successfully defend against the charge by presenting evidence that he or she *did* intend to harm the property." The state responds that "because the lack of intent to harm property is expressly set forth in [§] 53a-110a (a), this court must construe it as an element of simple trespass when contrasting the infraction with criminal trespass in the first degree as alleged in the information." The state relies on the principle of statutory interpretation providing that statutes must be construed so that no clause shall be superfluous, citing, inter alia, *State* v. *Agron*, 323 Conn. 629, 638, 148 A.3d 1052 (2016).

We agree with the defendant and reject the state's argument that the lack of intent to harm property is an element of simple trespass. Reading the statute as the state suggests would lead to the absurd and unworkable result that a defendant could defend against a charge

of simple trespass by merely introducing evidence of an intent to harm property.[9] See General Statutes § 1-2z; *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 554, 46 A.3d 112 (2012) ("we read each statute in a manner that will not thwart its intended purpose or lead to absurd results" [internal quotation marks omitted]). We further reject the state's suggestion that "because the lack of intent to harm property is expressly set forth" in the statute, this court "must construe it as an element" of the infraction. See generally *State* v. *Ray*, 290 Conn. 602, 616, 966 A.2d 148 (2009) (recognizing that phrase "not . . . a drug-dependent person" contained in General Statutes § 21a-278 (b) was not intended to be element of offense); see also *State* v. *Evans*, 329 Conn. 770, 808, 189 A.3d 1184 (2018) (declining to disturb holding in *State* v. *Ray*, supra).

We next turn to the third and fourth prongs of *Whistnant*. "In considering whether the defendant has satisfied the requirements set forth in *State* v. *Whistnant*, supra, 179 Conn. 588, we view the evidence in the light most favorable to the defendant's request for a charge on the lesser included offense. . . . [For purposes of *Whistnant*'s fourth prong,] [e]vidence is sufficiently in dispute where it is of such a factual quality that would permit the finder of fact reasonably to find the defendant guilty on the lesser included offense. This requirement serves to prevent a jury from capriciously convicting on the lesser included offense when the evidence requires either conviction on the greater offense

[9] We also find persuasive the defendant's argument that "forcing the state to prove the lack of intent restricts the state's ability to charge a suspect with simple trespass when there is no evidence of what the defendant's motive was, even if the suspect had not harmed the property. On the other hand, if the phrase is not an element it would allow the prosecutor to apply the charge to very minor trespasses where the accused, without creating mischief or lasting harm, knows he or she is not allowed to be there. It would provide the state the option in appropriate cases to hold the trespasser accountable while avoiding the time and expense of a jury trial."

or acquittal." (Citation omitted; internal quotation marks omitted.) *State* v. *Collins*, 45 Conn. App. 6, 9–10, 692 A.2d 865 (1997). "On appeal, an appellate court must reverse a trial court's failure to give the requested instruction if we cannot as a matter of law exclude [the] possibility that the defendant is guilty only of the lesser offense." (Internal quotation marks omitted.) *State* v. *Langley*, supra, 128 Conn. App. 232.

"Despite being conceptually distinct parts of the *Whistnant* formulation, the third and fourth prongs are subject to the same evidentiary analysis. . . . [A reviewing court] will, therefore, analyze them simultaneously. The third prong of *Whistnant* requires that there [be] some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense. . . . The fourth prong requires that 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." (Internal quotation marks omitted.) Id., 232; see also *State* v. *Hancich*, 200 Conn. 615, 619–20, 513 A.2d 638 (1986).

The defendant directs this court's attention to the element of criminal trespass in the first degree that the trespass take place "after an order to leave or not to enter personally communicated to such person by the owner of the premises or other authorized person." General Statutes § 53a-107 (a) (1). The defendant argues that an examination of the evidence and arguments at trial show that this element was sufficiently in dispute. Specifically, he claims that "there was insufficient evidence that the security department, a separate entity from the mall, had the requisite authority to ban the defendant from the property for any length of time beyond 24 hours." He argues that the evidence established reasonable doubt as to "the authority of security

and, by extension, Officer Salati, for banning the defendant from the property."

The defendant contends that although the criminal trespass statute requires that the defendant obtain his knowledge from a clear, unequivocal order, personally conveyed by the property's owner or his agent, "knowledge under the simple trespass statute can be gleaned from circumstances and does not have to be explicitly communicated." According to the defendant, the jury could have found that the order was insufficient to convey the knowledge required for a conviction of criminal trespass in the first degree but was sufficient to satisfy the knowledge element contained in the simple trespass statute.[10]

Our resolution of the defendant's claim requires a review of the evidence presented at trial as to the element in dispute. The state presented Castillo's testimony that he previously had told the defendant that panhandling is not allowed on mall property and that he would have to leave. The state also presented Salati's testimony that she told the defendant, on the day before he was arrested, that he was banned from the mall property and that he would be arrested the next time he was found there.

The defendant's defense at trial was that the state had failed to present evidence that the owner of the property had given either Salati or Castillo authority to ban the defendant from the mall property. The defendant introduced into evidence a "Lesson Plan," which was provided by Professional Security Consultants' corporate office to Arnone for purposes of training his staff. That document provides, under the heading of "Temporary Suspension," as follows: "Suspend the privilege of being on the property for an amount of time

[10] We note that the defendant does not claim on appeal that there was insufficient evidence to support his conviction.

that is determined by the severity of the incident and local and state ordinance. Any suspension for more than 24 hours must [be] approved [by] the Center Manager."[11] Relying on this evidence, defense counsel argued in closing argument that the written policies only allowed security to ban the defendant for the remainder of the day, and posited that the defendant was possibly aware of that policy. He further argued that the state had failed to present evidence that Westfield, the owner of the mall property, gave authority to ban the defendant.

Arnone testified that, although there was no other written procedure, the "Lesson Plan" did not guide the day-to-day practices at the mall. Specifically, he stated that the "Lesson Plan" was "not the end all be all of the policy or what we are expected to do as a security staff as far as banning goes." Arnone testified that security can ban someone from the property for either six months or one year and that bans are reviewed by

[11] The document further provides, under the heading of "Reason to suspend:" "1. Only those individuals who have committed a crime at Shopping Center will be considered for banning and as in compliance with local, state and federal ordinances. 2. The Director of Security, Assistant Director of Security or Security Supervisor can only temporarily ban suspects for the remainder of the business day. 3. After a temporary ban by security, on the next business day, the Director of Security must provide documentation supporting the banning to the General Manager of the Shopping Center. 4. The Center's General Manager will make a decision on the length of time the ban will stay in [e]ffect; this will be after completing an investigation of the violation. (Based on the guidelines below) The General Manager will send a certified letter to the banned subject with the status of his/her banning. 5. The General Manager will provide a copy of the banning documentation to the Director of Security, the Director of Security will input the information of the ban into CASE Global. 6. When a Security Officer observes a banned individual on the Shopping Center's property, the officer will notify his/her supervisor; only the supervisor will approach the individual and confirm his/he[r] identity as being the banned individual. The Security supervisor will politely ask the banned subject to leave the center's property. 7. If a banned subject refuses to leave the center's property, the Security Supervisor will retrieve all documentation of the banned subject, Security will contact the local police department, and have him/her arrested for trespassing."

Arnone or his assistant, or Dan Kiley, the general manager of the mall.[12] Arnone testified: "[W]e [issue] anywhere from 360 to 370 [bans] a year." Arnone stated that a ban notice is created for each ban, which notice includes "basic information on the person as well as a photo, if one is able to be obtained, as well as the time period that they are banned, the start date, end date, as well as their offense that they've committed, and whether or not we were able to obtain a signature from the individual." Arnone testified that the forms "are finalized through me or my assistant, and then they go one step further and are further finalized and reviewed by the general manager" of the mall. When Castillo was asked whether he had any personal knowledge as to whether the defendant signed a ban notice in this case, he responded: "No, by the time I got there he was already in the back of the police car so I couldn't have him sign it." Castillo testified that the defendant "was already banned previously." Specifically, he said that the defendant was banned from mall property on July 9, 2015, and that the ban was in place for one year.

Arnone further testified that there were two ban notices on file in the security office for the defendant, dated July 9, 2015, and November 28, 2015. Arnone, however, was not present when either form was created and could not say whether the defendant received either form. No ban notice was introduced into evidence, and no further detail of any incident occurring on July 9, 2015, was presented to the jury. Based on the July 9, 2015 ban notice, both Arnone and Castillo testified that the defendant was not permitted to be on mall property in November, 2015.

The defendant also challenged Salati's authority, introducing into evidence the Milford Police Department "General Orders" regarding "Off Duty Arrest Powers." That policy provides in part, under the heading

[12] Castillo also testified that he was permitted to issue a one year ban.

"Permitted Off-Duty Arrests," as follows: "When off-duty and within the legal jurisdiction of this law enforcement agency, an officer may make an arrest only when . . . (ii) There is an immediate need to prevent a crime or apprehend a suspect; especially those crimes involving the infliction of physical injury to another . . . ." It further provides, under the heading "Prohibited Off-Duty Arrests," as follows: "Officers of this Department may not make an arrest off-duty: . . . (iii) When the arrest is made solely as enforcement of a minor traffic regulation, or the violation is minor in nature and does not require an in-custody arrest for the violation." Lastly, under the heading "Off-Duty Responsibilities," it provides: "Except as allowed by this policy off-duty officers should not enforce minor violations such as harassment, disorderly conduct, or other nuisance offenses. On-duty personnel shall be contacted to respond to the situation where an off-duty officer becomes aware of such violations." When asked whether she violated that policy in arresting the defendant, Salati testified: "I guess you can say that."

Arnone testified that Milford police officers working on private duty for the mall are permitted to ask individuals to leave mall property. He further testified, however, that he prefers that his security staff initiate any interaction with patrons and customers and that the police officer who is working private duty support the security staff if necessary. When asked whether mall security policy is that security takes the lead on interactions with people on mall property, Salati responded: "I don't know what their policy is."[13]

Our Supreme Court has held that, in order to satisfy the third prong of *Whistnant*, "there must be sufficient

[13] Although there was evidence of mall policies posted at the entrance to the mall building, none of the witnesses testified that they had ever seen the defendant inside the mall. He was always observed in one of the parking lots.

evidence, introduced by either the state or the defendant, or by a combination of their proofs, to justify a finding of guilt of the lesser offense," and has "rejected the proposition that a defendant is entitled to instructions on lesser included offenses based on merely theoretical or possible scenarios." (Internal quotation marks omitted.) *State* v. *Arena*, 235 Conn. 67, 78, 663 A.2d 972 (1995). In *Arena*, the defendant sought an instruction on robbery in the second degree as a lesser included offense of robbery in the first degree. Id., 70. The difference between robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and robbery in the second degree in violation of General Statutes § 53a-135 (a) (2), as codified at the time of the offense, was that, in order to convict the defendant of the former, he must have "display[ed] or threaten[ed] the use of what he represent[ed] by his words or conduct to be a . . . firearm," while conviction of the latter required only that the defendant have "display[ed] or threaten[ed] the use of what he represent[ed] by his words or conduct to be a deadly weapon or a dangerous instrument." Id., 68 n.1, 72 n.6. The evidence at trial was that the defendant had entered a convenience store and told the cashier to put "all the money in a bag," as he placed an opaque plastic shopping bag on the counter with his hand at the top of the bag. Id., 69. The defendant appeared to be gripping an object inside the bag, which he pointed at the cashier, who, along with a second cashier, thought the object looked like a gun. Id., 69–70. During trial, the second cashier testified that the object in the bag could have been a club. Id. 78.

Our Supreme Court, explaining that the actual contents of the bag were irrelevant and that the state "only had to prove that the defendant *represented* by his conduct that he had a firearm," found no evidence in the record that the defendant "represented by his words or conduct that he had something other than a firearm."

(Emphasis in original.) Id., 79. Put another way, "a victim's acknowledgment that [the object], in fact, could have been something other than a firearm, namely, a bludgeon or other dangerous instrument, is not evidence that the defendant represented that the object he was carrying was something other than a firearm." Id. Thus, there was insufficient evidence to justify the defendant's request for instructions on robbery in the second degree. Id.; see also *State* v. *Hancich*, supra, 200 Conn. 621 (defendant was not entitled to lesser included offense instruction, where evidence presented at trial provided no factual basis for jury to conclude that defendant was not under influence of intoxicating liquor but operated her vehicle while impaired); *State* v. *Langley*, supra, 128 Conn. App. 233–34 (defendant was not entitled to lesser included offense instruction where, from evidence presented, jury reasonably could have concluded only that defendant intentionally lit victim on fire or that she had nothing to do with victim's injuries, evidence excluded possibility that defendant could be found guilty only of criminally negligent homicide but not murder or manslaughter in the first degree).

In *State* v. *Hancich*, supra, 200 Conn. 621, our Supreme Court found no error in the trial court's refusal to give a lesser included offense instruction, where the evidence introduced at trial was such as to "exclude completely the possibility" that the defendant could be found not guilty of the greater offense, but then be found guilty of the lesser offense. The defendant in *Hancich* was charged with driving while under the influence of intoxicating liquor in violation of General Statutes § 14-227a and requested that the court provide the jury with a lesser included offense instruction on the infraction of driving while impaired in violation of General Statutes § 14-227a (b).[14] Id., 616, 619. Our Supreme

[14] The court explained the difference between the applicable statutes as follows: "While 'legal' impairment is conclusively established where a person's blood alcohol percentage falls between .07 and .1 percent, the version

Court explained that "an instruction on the lesser included offense of operating while impaired would not have been appropriate unless there were some factual basis—some evidence introduced at trial—which would have supported a jury finding that the defendant was impaired, but not under the influence . . . ." Id., 621. The arresting police officer testified that he followed the defendant for approximately one mile with his lights and siren activated before she pulled her vehicle over. Id., 618. He further testified that she was unable to recite the alphabet beyond the letter "F" and could not stand without assistance. Id., 618. The court concluded that this testimony indicated that, irrespective of her blood alcohol level, the defendant was "quite intoxicated." Id., 621. The defendant did not introduce evidence to rebut the officer's testimony, and therefore "the evidence introduced at this trial was such as to exclude completely the possibility that the defendant was not under the influence of intoxicating liquor, and operated her vehicle while merely impaired." Id., 621–22. Accordingly, the defendant was not entitled to a

of General Statutes § 14–227a (d) (4) in effect when this offense was committed did not create a similar presumption of guilt, based on blood alcohol percentage, with respect to the crime of operating a motor vehicle while under the influence of intoxicating liquor as defined in General Statutes § 14-227a (a). The former § 14-227a (d) (4) provided that a blood alcohol level of 'ten-hundredths of one per cent or more . . . shall be prima facie evidence that the defendant was under the influence of intoxicating liquor within the meaning of this section.' That section thus created only a rebuttable presumption that a person was 'under the influence of intoxicating liquor' where his or her blood alcohol level was found to equal or exceed .1 percent. While evidence of such an alcohol level was sufficient to establish the state's prima facie case, the defendant was formerly allowed to introduce evidence to show that, despite a blood alcohol level equal to or greater than .1 percent, he or she had not been *under the influence* of intoxicating liquor at the time of arrest. Thus, although in the present case the defendant's blood alcohol level was measured at .165 percent, the possibility that she was merely impaired, and not under the influence, cannot be excluded as a matter of law under the former General Statutes § 14-227a (d) (4)." (Emphasis in original; footnote omitted.) *State* v. *Hancich*, supra, 200 Conn. 620–21.

lesser included offense instruction under *State* v. *Whistnant*. Id., 622.

We have thoroughly reviewed the evidence and disagree with the defendant's argument that the jury could have found that the evidence presented in this case was sufficient to satisfy the knowledge element of the infraction of simple trespass but not criminal trespass in the first degree.[15] As the defendant argues, "[a] person acts 'knowingly' with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." General Statutes § 53a-3 (12). He claims that the state "did not produce any evidence that the defendant was told how long he was banned from the property" and points to his argument at trial that the defendant "may have thought each order to leave lasted only . . . until the end of the day." If the jury was to credit that argument, it then could not have found that the defendant knew he was not privileged to be on mall property on November 28, 2015, because the jury was not presented with any other source of knowledge from which the defendant could become aware that he was not privileged to enter or remain on mall property.

Accordingly, we conclude that the evidence introduced during the trial was such that the jury could not have found that the defendant knew that he was not privileged to enter or remain on mall property; see General Statutes § 53a-110a; if he had not received "an order to leave or not to enter personally communicated to

[15] As further support for his argument that he challenged the knowledge element of criminal trespass in the first degree, the defendant references his argument that "Salati was not totally credible because she was especially preoccupied with ejecting the defendant from the property." We fail to see how any preoccupation on Salati's part could affect a jury finding as to whether the defendant knew that he was not privileged to enter or remain on mall property.

[him by an] authorized person." See General Statutes § 53a-107 (a) (1). Specifically, under the facts of this case, if the jury was to reject the evidence presented by the state that the defendant received an order not to enter from an authorized person, i.e., Castillo or Salati, there was no other evidence, introduced by either the state or the defendant, from which the jury could have found that the defendant knew he was not privileged to enter or remain on mall property.

Indeed, one potential outcome of the trial was that the jury credited the documentary evidence in the form of the Lesson Plan and Off Duty Arrest Powers documents to conclude that the state had not proven that the owner of the property had authorized Castillo and/or Salati to personally communicate an order to the defendant to leave or not to enter.[16] The jury accordingly

[16] See *State* v. *LoSacco*, 12 Conn. App. 172, 176, 529 A.2d 1348 (1987). In *LoSacco*, this court concluded that there was insufficient evidence to sustain the defendant's conviction for criminal trespass in the first degree on the basis that the state had failed to prove that the defendant had been "ordered personally by the owner of the premises, or other authorized person, not to enter the building." Id. Although a tenant of the building previously had personally communicated to the defendant an order not to enter the building, there was no evidence that the building superintendent or any other agent of the owner had conferred authority on the tenant to order the defendant not to enter the public lobby of the apartment complex. Id., 177–78. The court stated that although the jury could have concluded that the building superintendent had conferred such authority upon a police officer who responded to a previous incident involving the defendant, that officer did not testify, and the defendant denied that the officer issued an order to him. Thus, there was "no evidence of the words spoken" between the officer and the defendant. Id., 178.

Moreover, although the jury could have found that the police officer who responded to the incident for which the defendant was charged ordered the defendant not to enter the building, "[t]he mere fact that he is a police officer does not, however, under these circumstances, authorize him to [issue such an order]." Id. The officer testified that he had not spoken to the building superintendent, and, therefore, could not have obtained authorization directly from him. "While [the superintendent] could have authorized the police department to issue the order, thus transferring his authority to the officer dispatched, there was no evidence that [he] ever did so." Id. Thus, the state had failed to prove that the person issuing the order was authorized. Id., 179.

could have found the defendant not guilty of criminal trespass in the first degree. However, if the jury credited that documentary evidence and disbelieved the testimony of Arnone and Castillo that they, and by extension Salati, possessed authority to issue a one year ban, there would be no factual basis for the jury to find that the defendant knew that he was not privileged to be on mall property. The jury would have had to find the defendant not guilty of the infraction of simple trespass as well. Therefore, the defendant was not entitled to a lesser included offense instruction under *Whistnant*.

In sum, we conclude, as a matter of law, that the evidence presented before the jury excludes the possibility that the defendant could be found not guilty of criminal trespass in the first degree, but then be found guilty of the infraction of simple trespass. Accordingly, the defendant was not entitled to a jury instruction on the infraction of simple trespass.

The judgment is affirmed.

In this opinion the other judges concurred.

In *State* v. *Marsala*, 116 Conn. App. 580, 586, 976 A.2d 46, cert. denied, 293 Conn. 934, 981 A.2d 1077 (2009), this court held that there was sufficient evidence from which the jury could conclude that a Trumbull Shopping Park security guard had authority to ban the defendant from the mall. The court noted the testimony of the mall's operations manager that he considered the security guards to be his agents. The court concluded that evidence supported the jury's finding that the banning guidelines, which provided in part that security could only ban individuals for the remainder of the business day, were suggestions rather than mandatory procedures that security guards must follow. Id., 584–86. The court also stated that it was reasonable for the jury to infer that the guard had implied authority to act, in that he was acting in the operations manager's best interest by ordering the defendant to leave the mall in response to patrons' complaints. Id., 587.

WIOLETTA KRAHEL *v.* MARIUSZ CZOCH
(AC 40521)

DiPentima, C. J., and Keller and Elgo, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain financial orders. During the dissolution proceedings, the defendant failed to comply with a discovery order that sought financial documents relating to his personal finances and construction business for several years. Thereafter, the trial court granted the plaintiff's motion to preclude the defendant from providing evidence in the form of documents and records relating to the discovery order. During trial, the defendant attempted to provide testimony related to the financial matters contained in the preclusion order, but the court sustained the plaintiff's objections thereto, effectively entering a sanction against the defendant. As part of the dissolution judgment, the court had ordered the parties to submit to binding arbitration if they were unable to divide their personal property by agreement. Subsequently, after trial, the court granted the plaintiff's motion for an order to effectuate the judgment and ordered the parties to submit to mediation, in lieu of arbitration, if they could not reach an agreement regarding the division of personal property. On appeal to this court, the defendant claimed, inter alia, that the trial court improperly sanctioned him for violating the discovery order, and improperly entered orders for arbitration and mediation regarding the parties' personal property. *Held:*

1. The trial court properly entered an order of sanctions for the defendant's violation of the discovery order: that court's finding that the defendant violated the discovery order was not clearly erroneous, as the defendant effectively conceded that the discovery order was reasonably clear, it was undisputed that he failed to produce several documents by the deadline set forth in the order, and the defendant's counsel admitted at trial that it was the defendant's duty to provide the requested information; moreover, the sanction imposed was proportional to the violation and did not reflect an abuse of the trial court's discretion, as the noncompliance with the order was attributed to the defendant rather than legal counsel, the plaintiff would have been prejudiced if the preclusion order had not been entered, and the defendant's claim that the sanction of precluding documents would have been more appropriate than precluding testimony was unavailing.
2. The trial court's order of mediation was an effectuation of the existing judgment, rather than a modification of it, as it was proper for the court, upon the plaintiff's motion, to protect the integrity of its original ruling by fixing the error regarding the order of arbitration, for which the court

lacked the authority to issue: nevertheless, because the trial court failed to distribute the personal property and left the parties without a remedy for the distribution of their personal property, the court erred in entering the mediation order to the extent that the order was silent as to whether the court retained its authority to resolve any dispute in the event the mediation proved unsuccessful, as courts do not retain continuing jurisdiction over orders of property distribution, the trial court here did not expressly reserve jurisdiction as requested by the plaintiff in her motion, and although mediation may have been an appropriate mechanism for the court to utilize after trial and prior to rendering judgment, the court was not relieved of its duty to make the ultimate determination of distributing personal property at the time of judgment as mandated by statute (§ 46b-81); accordingly, the trial court erred only to the extent that it failed to reserve final judgment until there was a resolution of the distribution of the remaining items of personal property.

3. The trial court did not abuse its discretion in awarding the defendant a chose in action for $495,000; although the defendant claimed that the court erred in awarding him an uncollectable debt because there was no evidence from which the court could reasonably have concluded that he could collect $495,000 from the plaintiff's father, the evidence in the record to support the court's finding that the asset had a value of $495,000 was the defendant's own financial affidavit, in which he averred that such sum of money was due to him, the court was entitled to rely on the defendant's sworn affidavit as to the value of that claimed asset and the defendant failed to present any admissible evidence to challenge that value.

4. The trial court did not abuse its discretion in entering a financial order requiring the defendant to pay a debt in the amount $67,500 to his father-in-law; the defendant's claim that he did not have any means to make the payment was not substantiated by evidence in the record, and his claim that it was illogical to order him to pay a debt to a person who owed him more money was not supported by case law.

Argued May 14—officially released November 6, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford and tried to the court, *Gould*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Gould J.*, granted the plaintiff's motion for an order to effectuate the judgment, and the defendant filed an amended appeal with this court. *Reversed in part; further proceedings.*

Jeffrey D. Ginzberg, for the appellant (defendant).

Yakov Pyetranker, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Mariusz Czoch, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Wioletta Krahel. On appeal, the defendant claims that the court improperly (1) sanctioned him for violating a discovery order that precluded him from testifying about his current financial condition and business, (2) entered orders for arbitration and mediation relative to personal property leaving the dispute unresolved at the time of judgment, and (3) awarded a chose in action and obligation to repay a debt. We agree in part with the defendant's second claim and, accordingly, reverse in part the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The parties, who both immigrated to the United States from Poland, married in Stamford on January 26, 2005. There are two minor children born issue of the marriage. Neither child support nor custody of those children is at issue in this appeal.

Before emigrating from Poland, the plaintiff was employed as an attorney. At the time of dissolution, she was employed by International Fund Services, LLC, with an annual salary of $106,217. The defendant, at that time, was self-employed in the construction industry. The name of his business is Champion Development, LLC (Champion). Fifty percent of Champion is owned by the defendant's son from a previous relationship. According to the defendant's April 11, 2017 financial affidavit, his net weekly income is $1,597.73, which includes income from Champion, "side work," and weekly rental income from one of the two marital properties.

Those two properties are both located on Soundview Drive in Stamford. At the time of trial, the plaintiff resided at 72 Soundview Drive and the defendant, along with tenants, resided at 80 Soundview Drive. The plaintiff was the sole owner of both properties. The 72 Soundview Drive property had a fair market value of $525,000 and was encumbered by a mortgage of $351,414.20. The 80 Soundview Drive property had a fair market value of $625,000, subject to a $436,742.60 mortgage. The plaintiff also owned property in Poland valued at $150,000, and the defendant owned property in Poland that was valued at $200,000.

In March, 2015, the plaintiff filed the present dissolution action, claiming that the parties' marriage had broken down irretrievably. Following a trial, the court, on May 18, 2017, dissolved the marriage. The court found that the defendant was more at fault for the breakdown of the marriage and that the plaintiff was more credible regarding the reasons for its breakdown.

In its memorandum of decision, the court issued several financial orders related to property distribution and assignment of debt.[1] The parties agreed on a shared parenting plan, which the court approved and incorporated by reference into the judgment of dissolution. The court did not award alimony to either party. The court awarded the two Soundview Drive properties to the

[1] On August 30, 2017, the defendant filed a motion for articulation, which the court summarily denied on September 8, 2017. The defendant filed a motion for review of the denial of his motion for articulation with this court on September 18, 2017. This court granted the defendant's request in part and ordered the trial court to articulate the value of the personal property delineated in its memorandum of decision. In its articulation, the court stated that the valuation of that property was "to be as the parties stated in their sworn financial affidavits." On appeal, the parties do not contest the value of the assets that were awarded to each party. Moreover, we note that the court primarily utilized the phrase "shall retain" when issuing financial orders reflecting that assets of the plaintiff and the defendant were predominately separately owned.

plaintiff and awarded each party their respective properties in Poland. The plaintiff also was awarded a 2010 BMW 750IL motor vehicle, her jewelry, and her 401(k) accounts.[2]

In addition, the court awarded the defendant "the asset listed [on his financial affidavit] as money due to defendant from father-in-law" and his interest in Champion. According to the financial affidavits submitted by the defendant, $495,000 was due to the defendant for work and improvements that he performed on his father-in-law's property in Poland. The defendant was also awarded a 2003 Dodge Ram motor vehicle, a 2005 Sea Ray Sundancer vessel, a 2008-2009 Sea Ray 340 Sundancer vessel, a Polaris snowmobile, a 2006 Bennington catamaran, and two pianos.[3]

Each party was awarded the balance of their separate bank accounts, as reflected on their respective financial affidavits. In addition to the aforementioned financial orders, the court ordered that, if the parties were unable to divide their personal property by agreement, they were to submit to binding arbitration with a mutually agreed upon arbitrator.[4] On June 6, 2017, the defendant

[2] According to the parties' financial affidavits, the value of the plaintiff's BMW is $24,000, the value of the jewelry is $4000, and the value of the two 401(k) accounts is $8644. The defendant did not list any of the aforementioned assets on his financial affidavit although he lists a second BMW valued at $17,000 located in Poland. Pursuant to the court's order granting the plaintiff's motion for clarification, the court effectively ordered that the plaintiff shall retain the BMW with a VIN number ending in 1247. No order was issued regarding the BMW in Poland.

[3] On cross-examination, the defendant admitted that one of the pianos was purchased at a cost of $65,000 from the account of the defendant's company, Champion, and was not listed on the defendant's financial affidavit. Acknowledging no commercial use for the piano, the defendant testified that he and his son owned the piano.

[4] The court's order stated in relevant part: "The parties shall divide their personal property by agreement, and, if they are unable to do so, will submit to binding arbitration with a mutually agreed upon arbitrator. If they are unable to agree on an arbitrator, the court will make the appointment."

filed the present appeal from the judgment of dissolution. The plaintiff subsequently filed a motion for an order to effectuate the judgment, in which she requested a referral of the remaining personal property issues to mediation. In response, the court amended its order to state that "[t]he parties shall divide their personal property by agreement, and, if they are unable to do so, shall participate in mediation before a family relations counselor in the absence of such agreement." The court also ordered that the parties would be equally responsible for certain loans they had obtained from the plaintiff's father, which totaled $135,000. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly sanctioned him for violating a discovery order that precluded him from testifying about his current financial condition and business. Specifically, the defendant argues that the discovery order was not violated, the remedy of preclusion was disproportionate to the harm, and the court's preclusion adversely affected the result of the trial.[5] In response, the plaintiff argues that the

[5] In his brief the defendant argues several other issues within this claim, including a general argument that the court must consider the present financial circumstances of the parties, that the defendant was deprived of a right to cross-examine, and that the defendant was denied his due process right to make an offer of proof. We need not review these assertions as they are either inadequately brief or subsumed under the defendant's overarching theory that the court erred in precluding his testimony.

"It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

defendant committed a clear violation of the court's order, that the preclusion order was proportionate to the failure to comply with the court's order, and that no harm resulted from the preclusion. We agree with the plaintiff.

The following additional facts are relevant to this issue. On June 13, 2016, the plaintiff served a supplemental request for disclosure and production on the defendant. Prior to trial, the plaintiff, on March 21, 2017, filed a motion for order of compliance pursuant to Practice Book §§ 13-14 and 25-32A, due to the defendant's failure to comply with the plaintiff's supplemental request. That motion identified numerous outstanding discovery requests including, most notably, his 2014, 2015, and 2016 individual income tax returns and those of Champion. In addition, the defendant failed to produce a current sworn financial affidavit, any general ledgers for Champion, any profit and loss statements for Champion, bank statements, and several other financial statements.

On April 10, 2017, the court held a hearing on those discovery issues. At that hearing, the plaintiff requested an order precluding the defendant from offering any evidence at trial that would be within the scope of the

The defendant cites to General Statutes § 46b-81 for the principle that the court must consider the present financial circumstances of the parties and, by precluding testimony from the defendant, failed to do so. The defendant, however, provides no analysis beyond the assertion of that principle. To the extent that the defendant argues that he was deprived of a right to cross-examine a witness, the record is clear that the defendant was not precluded from cross-examining any witnesses at trial. Instead, it appears that the defendant improperly equates the limited preclusion of his testimony with his due process right to cross-examine witnesses, a proposition we summarily reject because the issue of preclusion is properly before this court. With respect to his claim that he was deprived of making an offer of proof, the defendant has failed to demonstrate that he was prejudiced because the record is inadequate to address his underlying claim that the court improperly precluded his testimony. See *Casalo* v. *Claro*, 147 Conn. 625, 631,165 A.2d 153 (1960). Accordingly, our analysis of the preclusion order will address only such arguments that are briefed properly.

document request with which he had failed to comply. Although the defendant was not present for the hearing, his counsel represented that "the defendant had an accountant who fired him right around the time that this action started. I believe it was . . . in 2015 or 2016. At that point in time [the defendant] had not filed any tax returns. The last return he had filed was 2013. He's found a new account[ant] who has had to play catch up for the last three years in putting all of these documents together." The defendant's counsel then assured the court that the defendant would furnish the documents in question by Monday, April 17, 2017. The defendant's counsel stated that "it is [her] understanding from [the defendant] . . . that those documents are being prepared and should be ready by Monday to be provided . . . to [her] so that [she] can in turn provide to the plaintiff."[6]

At the conclusion of the hearing, the court ordered production of the outstanding documents by Monday, April 17, 2017, and reserved the issue of sanctions for the trial judge.[7] The defendant, however, failed to produce the requested financial documents by the April 17

[6] As the court addressed each request, the defendant's counsel continued to reiterate to the court that the documents requested were being prepared and would be available on Monday, April 17, 2016. The following exchange occurred:

"The Court: All right. Six, you're looking for a general ledger and a [profit and loss statement] for [Champion] for 2014, 2015, 2016.

"[The Defendant's Counsel]: And again, Your Honor, these are documents, which I understand from my client, are being compiled along with the tax returns by his accountant. . . . And should be among the documents that are provided on Monday."

[7] At the discovery hearing, the following colloquy occurred:

"The Court: So then, [counsel for the plaintiff], you're asking that there be some preclusion order entered for failure to produce.

"[The Plaintiff's Counsel]: Well, Your Honor, I guess I have to wait to see what we get.

"The Court: I think you do.

"[The Plaintiff's Counsel]: Then, Your—I suppose Your Honor has the discretion to say that the trial court can take up issue of sanctions . . .

"The Court: Yes.

deadline.[8] The plaintiff thus filed a motion to preclude and for sanctions, which sought to preclude the defendant from offering any testimonial or documentary evidence with respect to the substance of those financial matters.

On the first day of trial, April 18, 2017, the court heard from the parties regarding the motion to preclude. The plaintiff represented that the defendant's compliance with the order was wholly inadequate and that the plaintiff did not receive any documents related to the defendant's income, the defendant's business, or the defendant's bank statements. The defendant's counsel then stated: "[M]y client's position is that the accountant failed him. The accountant was supposed to get it done. She said that . . . she was going to get it done and then Monday came and the accountant didn't get it done." In response, the court noted that the defendant was obligated to provide the requested financial information and emphasized that the discovery request had been pending since June, 2016.

The court then asked the plaintiff to identify the particular documentation that she had not received in contravention of the court's production order. The plaintiff at that time detailed several missing documents, including (1) the personal income tax returns of the defendant for tax years 2014, 2015, and 2016; (2) Champion's income tax returns for tax years 2014, 2015, and 2016; (3) 1099 tax forms for tax years 2015 and 2016; (4)

"[The Plaintiff's Counsel]: . . . if there's a claim of failure to comply.

"The Court: Right. And I think that would properly go before the trial court . . . ."

[8] According to the plaintiff's motion to preclude, "[o]n April 17, 2017 at 3:03 p.m., the [d]efendant provided partial compliance with the [p]laintiff's supplemental request for production. The [d]efendant['s] compliance only included an amended financial affidavit, a mortgage statement, documents regarding capital improvements, a passport, two handwritten receipts for children's expenses, photographs of the children, and a membership letter from Stepping Stone Children's museum."

Schedule K-1 tax forms for the defendant or Champion for years 2014, 2015, and 2016; (5) a general ledger for Champion for years 2014, 2015, and 2016; (6) a profit and loss statement for Champion for years 2014, 2015, and 2016; (7) account statements for a Bank Polski account; (8) account statements from a People's United Account associated with Champion from July 1, 2015, to the present; (9) any documents related to the defendant's properties in Poland; (10) any documents related to wire transfers sent to or received from Poland; and (11) receipts from travel expenses and expenses associated with their children. The plaintiff thus asked the court to preclude the defendant "from offering any evidence, by way of his testimony, or through records" with respect to those matters. The court granted the plaintiff's motion to preclude any such evidence as to accounts, statements, and records listed by counsel as related to those matters.

Days later, during trial, the defendant's counsel asked the defendant about Champion's hiring practices without giving a specific time frame. The plaintiff objected to the question, claiming that any testimony regarding the years for which the defendant failed to produce the company's financial information was precluded. The court sustained the plaintiff's objection. The defendant's counsel nevertheless continued to ask questions about the defendant's business during the 2014 to 2016 time period and attempted to provide an offer of proof. In response, the court continued to sustain the plaintiff's objections on the basis of its outstanding preclusion order and, as a result of that conduct, ultimately entered a futher order of sanctions against the defendant preventing him from offering testimony related to matters referenced by the preclusion order. The defendant now challenges the propriety of the preclusion order.

In *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 776 A.2d 1115 (2001), our Supreme Court set forth the legal standard governing appellate review of a court's order of sanctions for a discovery order violation. "In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met. First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." Id., 17–18.

We first address whether the discovery order was reasonably clear. On appeal, the defendant does not contest the clarity of the discovery order. He also has not suggested that he was uncertain regarding the fact or nature of his obligations. Having failed to address the first prong of *Millbrook*, the defendant effectively concedes that the order was reasonably clear. See *Yeager* v. *Alvarez*, 302 Conn. 772, 785, 31 A.3d 794 (2011).

Under the second prong of the *Millbrook* test, we examine the record to determine whether the discovery order was violated. "If an appellate court is called upon to review the findings of the trial court we apply our clearly erroneous standard, which is the well settled standard for reviewing a trial court's factual findings. . . . A factual finding is clearly erroneous when it is

not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Faile* v. *Stratford*, 177 Conn. App. 183, 200, 172 A.3d 206 (2017).

The defendant claims that he did not violate the court's discovery order because the documents that he failed to produce did not exist, as his accountant had not created them yet and "[o]ne cannot produce what does not exist." The defendant, therefore, argues that violating the discovery order was impossible. At trial, however, his counsel duly admitted that it was the defendant's duty to provide the requested information:

"The Court: Whose responsibility is it to talk to the accountant, your client, right?

"[The Defendant's Counsel]: Obviously, I mean, you know.

"The Court: Whose responsibility is it to provide the information, your client, right?

"[The Defendant's Counsel]: Yes.

"The Court: Okay."

Moreover, during the discovery hearing, the defendant's counsel repeatedly represented that the defendant would produce the requested documents in accordance with the court's discovery order. It nonetheless is undisputed that the defendant failed to produce several documents by the deadline set forth in that order. We, therefore, cannot conclude that the court's finding that the defendant violated its discovery order was clearly erroneous.

We next address the third prong of the *Millbrook* test, under which we utilize the abuse of discretion standard

to determine whether the sanction imposed was proportional to the violation. "In reviewing a claim that [the] discretion [of the trial court] has been abused, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) Id., 201. When reviewing the reasonableness of a trial court's imposition of sanctions for violation of a discovery order, we employ the following factors: "(1) the cause of the [disobedient party's] failure to respond to the posed questions, that is, whether it is due to inability rather than the willfulness, bad faith or fault of the [disobedient party] . . . (2) the degree of prejudice suffered by the opposing party, which in turn may depend on the importance of the information requested to that party's case; and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct." (Internal quotation marks omitted.) *Yeager* v. *Alvarez*, supra, 302 Conn. 787.

An analysis of the three factors set forth in *Yeager* supports the court's decision to preclude the defendant's testimony. With respect to the first factor, the defendant claims that the failure to produce the requested documents was "not due to willfulness; but rather inability to comply." The defendant repeatedly asserts throughout his brief that the documents did not exist because his accountant "failed" him and his new accountant "had not had time to prepare the defendant's tax returns or his profit and loss statements." The plaintiff, by contrast, argues that the defendant's conduct in failing to produce the requested documents was wilful or, at the very least, complicit. In so doing, she emphasizes that the defendant admitted at trial that it was his

responsibility, and not his accountant's responsibility, to produce the requested documents.

The defendant attempts to analogize the sanctioned conduct in this case to the sanctioned conduct in *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 165 Conn. App. 737, 761, 140 A.3d 321 (2016), aff'd, 328 Conn. 60, 176 A.3d 1167 (2018). In *Ridgaway*, this court reversed the trial court's rendering of a judgment of nonsuit against a party for its noncompliance with a court order because the judgment of nonsuit was disproportionate to the noncompliance. Id. The sanctioned noncompliance in *Ridgaway*, however, is clearly distinguishable from this case because it was attributed solely to the attorney's conduct. Id., 760–61. Here, the noncompliance is attributed to the defendant rather than legal counsel. Furthermore, the severity of the sanction of nonsuit in *Ridgaway* is more severe than a sanction precluding testimony. See *Yeager* v. *Alvarez*, supra, 302 Conn. 781.

With respect to the second *Yeager* factor, we look to the degree of prejudice suffered by the plaintiff had the preclusion order not entered. Although the defendant argues that "the plaintiff didn't suffer such harm that she needed an order of preclusion," his argument overlooks the importance of the requested documents and the harm to the plaintiff as a result of the defendant's failure to produce such documents. The documents requested by the plaintiff, including tax documents and statements from the defendant's business, were crucial financial documents related to the current financial situation of the defendant. It is axiomatic that the party's finances are material to dissolution of marriage actions. Here, the defendant failed to present any documentation regarding his income, other than that stated in his financial affidavit. As the plaintiff notes in her brief, had the preclusion order not entered, the defendant would have had the ability to testify as

to his income outside of the information set forth in his financial affidavit and the plaintiff would not have had the ability to confirm the accuracy of such testimony.

With respect to the third factor, the defendant argues that "the sanction of limited preclusion of tax accounting documents would have sufficed; and the sanction of preclusion of testimony was overkill." The defendant essentially argues that the sanction precluding documents would have been more appropriate than precluding testimony. The alternative sanction suggested by the defendant would not have been an appropriate response to the defendant's failure to produce the requested documents. Such an alternative sanction would have defeated the purpose of discovery and precluded the very documents which the plaintiff requested. "[T]he purpose of the rules of discovery is to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Internal quotation marks omitted.) *Tessmann* v. *Tiger Lee Construction Co.*, 228 Conn. 42, 50, 634 A.2d 870 (1993). We, therefore, conclude that the sanction imposed in the present case was proportional to the violation and does not reflect an abuse of the court's discretion. In accordance with the principles set forth in *Millbrook* and *Yeager*, the court properly entered an order of sanctions for the defendant's violation of the discovery order.[9]

[9] Because we conclude that the court's order of sanctions was proper, we need not address whether the court's preclusion adversely affected the result of the trial. We find it necessary to note, however, that the defendant was unable to articulate how much he earned when asked by the plaintiff's counsel. For example, at the April 20, 2017 hearing, the following colloquy occurred:

"[The Plaintiff's Counsel]: Sir, you have not been candid or honest on what your income has been on any paper you filed with this court, have you?

"[The Defendant]: I have no idea. I'm not an accountant.

"[The Plaintiff's Counsel]: Right. You have no idea and because you don't have any idea, nobody in this courtroom has any idea of what you really earn; isn't that right?

"[The Defendant]: As well as you don't. Yes. That's correct."

II

The defendant next claims that the court failed to enter a property distribution order with respect to various items of personal property, leaving him without a remedy for that property. He raises several issues related to this claim, contending that the court improperly (1) ordered arbitration, (2) modified a property order postjudgment, (3) deprived the defendant of his right to be heard, (4) abdicated its judicial function by ordering arbitration and ultimately mediation to resolve the personal property distribution, and (5) failed to value the personal property prior to entering its order requiring arbitration. Furthermore, the defendant claims that the entirety of the trial court's ruling requires reversal because "the court committed error that cannot be rectified by merely having a trial on personal property in a vacuum."

The following additional facts are relevant to the defendant's claim. Paragraph 10 of the court's memorandum of decision originally stated: "The parties shall divide their personal property by agreement, and, if they are unable to do so, will submit to binding arbitration with a mutually-agreed-upon arbitrator. If they are unable to agree on an arbitrator, the court will make the appointment." The parties, however, had not entered into a voluntary arbitration agreement. Accordingly, the plaintiff subsequently filed a motion for an order to effectuate the court's judgment, in which she requested that, in lieu of arbitration, the court issue an order referring the distribution of personal property to the family relations division of the Superior Court for mediation. The plaintiff further requested that the court retain jurisdiction over that referral. The defendant filed an objection to the plaintiff's motion, claiming that the change would be an impermissible modification of the judgment. Neither party requested oral argument.

On October 17, 2017, the court granted the plaintiff's motion and amended paragraph 10 of its memorandum of decision to state: "The parties shall divide their personal property by agreement, and, if they are unable to do so, shall participate in mediation before a family relations counselor in the absence of such agreement." In so doing, the court did not expressly reserve jurisdiction over the referral.

As a preliminary matter, we note that both parties acknowledge that the court did not have the authority to order the parties to submit to arbitration in the absence of an agreement.[10] We need not address this issue at length because, as we will explain further, the court subsequently amended its order to require mediation rather than arbitration.[11]

On appeal, the parties disagree about the propriety of the court's order amending the method of dispute resolution from arbitration to mediation. The defendant

[10] "A court does not . . . have the authority to order parties to submit such issues to arbitration absent a voluntary arbitration agreement executed between the parties. Arbitration is a creature of contract and without a contractual agreement to arbitrate there can be no arbitration. . . . [T]he basis for arbitration in a particular case is to be found in the written agreement between the parties. . . . Parties who have contracted to arbitrate certain matters have no duty to arbitrate other matters which they have not agreed to arbitrate. Nor can the courts, absent a statute, compel the parties to arbitrate those other matters." (Citations omitted; internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 649, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015).

[11] To the extent that the defendant argues that he was deprived of his right to be heard because the court failed to grant a hearing on the plaintiff's motion to effectuate the court's judgment, we reject this claim. Oral argument on such motions is not a matter of right. The record in the present case reflects that the defendant (1) filed an objection and, thus, his position was before the court, (2) did not request oral argument pursuant to Practice Book § 11-18 (f), (3) has not claimed and cannot demonstrate that the motion before the court was arguable as of right pursuant to subsection (a) of § 11-18, and (4) did not seek reargument after the court's ruling. His claim, therefore, is unavailing.

claims that the court's mediation order was a modification of an existing judgment for which it lacked authority. The plaintiff argues that because the court's mediation order was intended to permit the parties to resolve their personal property dispute with the assistance of a third party, the order simply effectuated the existing judgment. We agree with the plaintiff.

It is well established that "[a]lthough the court does not have the authority to modify a property assignment, a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. This court has explained the difference between postjudgment orders that modify a judgment rather than effectuate it. A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Citations omitted; internal quotation marks omitted.) *Richman* v. *Wallman*, 172 Conn. App. 616, 620–21, 161 A.3d 666 (2017); see also *Roberts* v. *Roberts*, 32 Conn. App. 465, 471–72, 629 A.2d 1160 (1993) (order to auction property when judgment required sale of property constituted effectuation of judgment).

It is undisputed that the parties did not agree to arbitration and, in the absence of an agreement, the court lacked the authority to order them to submit to binding arbitration. Because, as we discuss later in this opinion, the court can order the parties to mediation, the court could properly protect the integrity of its original ruling by fixing an error upon motion of a party. "We have recognized that it is within the equitable powers of the trial court to fashion whatever orders [are]

required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) Id., 471; see also *Commissioner* v. *Youth Challenge of Greater Hartford, Inc.*, 219 Conn. 657, 670, 594 A.2d 958 (1991). On the particular facts of this case, we are persuaded that the court's order of mediation was an effectuation of the existing judgment, rather than a modification of it.

The order effectuating the judgment, however, did not expressly reserve jurisdiction as requested by the plaintiff.[12] Thus, we address the defendant's argument that the order is improper because the court failed to distribute the personal property and left the parties without a remedy for the distribution of their personal property.[13]

Pursuant to the court's order, the parties were to "divide their personal property by agreement." In the

[12] With respect to the defendant's fifth claim, we note that the court was not required to value the contested personal property. The defendant claims that the court failed to find values of personal property that it ordered to be arbitrated and by distributing some, but not all of the property, the court did not consider the impact of the economic value on the parties' estates. The defendant's claim is governed by the abuse of discretion standard and, considering that "the trial court must consider the value of the assets, but need not assign them specific values"; *Burns* v. *Burns*, 41 Conn. App. 716, 721, 677 A.2d 971, cert. denied, 239 Conn. 906, 682 A.2d 1011 (1996); we cannot conclude that it was an abuse of the court's discretion not to assign specific values to the personal property items.

[13] The personal property subject to the mediation order was contested personal property that the court did not distribute—namely, certain furnishings that the plaintiff valued at $2500 and the defendant valued at $15,000. On appeal, the defendant suggests that ownership of the his BMW automobile in Poland, which the court did not specifically address, also was unresolved. The plaintiff, however, never claimed an interest in that vehicle. Her financial affidavit plainly indicates that she claimed ownership over only one BMW and that the court's order stated that the plaintiff "shall retain" the 2010 BMW 750IL with a VIN number ending in 1247. Unlike the 2005 Sea Ray Dancer vessel, in which the plaintiff claimed a 50 percent ownership interest and which the court awarded to the defendant, the defendant's title to the BMW in Poland was unaffected by the judgment. As such, we conclude that only the parties' furnishings were contested and subject to the mediation order.

event that the parties were unable to agree, the court ordered them to "participate in mediation before a family relations counselor." The court's order nonetheless is silent as to whether the court retained its authority to resolve any such dispute in the event that mediation proved unsuccessful. As such, the court did not expressly "reserve jurisdiction" as requested by the plaintiff in her motion for an order to effectuate the court's judgment. We, therefore, turn to the issue of whether the court, in entering the mediation order, relegated the parties to a state of "legal limbo," as the defendant contends.

At its core, the failure to resolve the distribution of personal property at the time of judgment and the referral to mediation implicate the issue of whether the court improperly delegated its judicial authority. That issue involves a legal question over which we exercise plenary review. See *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010); *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018). "It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority." (Citation omitted; internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 371–72, A.3d (2018); see also *Keenan* v. *Casillo*, 149 Conn. App. 642, 660, 89 A.3d 912, cert. denied, 312 Conn. 910, 93 A.3d 594 (2014).

"We have consistently held that the trial court is without jurisdiction to delegate the authority to resolve divisions of personalty in dissolution actions." *Casey* v. *Casey*, 82 Conn. App. 378, 388, 844 A.2d 250 (2004).

In *Casey* v. *Casey*, supra, 82 Conn. App. 388, this court held that the trial court did not err in ordering the parties to mediation for specified items of personal property, although we looked unfavorably on the judgment to the extent that it left the distribution of personal property unresolved. The trial court's order in that case failed to address items of personal property not subject to its mediation order and "thereby relegated [the] ownership [of such property] to a state of perpetual limbo," a result we characterized as "untenable." Id. In so doing, we emphasized that "when parties submit an issue to the court for resolution, they are entitled to have that issue considered, absent jurisdictional defects or other substantive impairments." Id.

What this court did not address in *Casey* is whether the mediation order itself, if mediation is unsuccessful, also improperly leaves the parties in a state of perpetual limbo, especially in the context of General Statutes § 46b-81, which requires the court to distribute property at the time of the dissolution judgment.

"[C]ourts have no inherent power to transfer property from one spouse to another; instead, that power must rest upon an enabling statute. . . . The court's authority to transfer property appurtenant to a dissolution proceeding rests on . . . § 46b-81. That section provides in relevant part: At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either [spouse] all or any part of the estate of the other. . . . Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage." (Citation

omitted; internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 131 Conn. App. 352, 358, 29 A.3d 159 (2011).

Unlike orders for the periodic payment of alimony, the court does not retain continuing jurisdiction over orders of property distribution nor can it expressly reserve jurisdiction with respect to matters involving lump sum alimony or the distribution of property. As our Supreme Court explained in *Smith* v. *Smith*, 249 Conn. 265, 273, 752 A.2d 1023 (1999), "[o]n its face, the statutory scheme regarding financial orders appurtenant to dissolution proceedings prohibits the retention of jurisdiction over orders regarding lump sum alimony or the division of the marital estate. . . . General Statutes § 46b-82 . . . provides that the court may order alimony [a]t the time of entering the [divorce] decree . . . . General Statutes § 46b-86, however, explicitly permits only modifications of any final order[s] for the *periodic payment of permanent alimony* . . . . Consequently, the statute confers authority on the trial courts to retain continuing jurisdiction over orders of periodic alimony, but not over lump sum alimony or property distributions pursuant to § 46b-81." (Emphasis in original; internal quotation marks omitted.) Moreover, in *Bender* v. *Bender*, 258 Conn. 733, 761, 785 A.2d 197 (2001), our Supreme Court, albeit in dicta, expressly rejected the practice of reserving jurisdiction over personal property. Cf. *Cunningham* v. *Cunningham*, 140 Conn. App. 676, 686, 59 A.3d 874 (2013) (having determined formula for division of assets received by the defendant pursuant to nonqualified plan, court had discretion to retain jurisdiction to effectuate its judgment).

It is axiomatic that an order for mediation ultimately may not resolve matters in a given dispute, because the resolution of such matters necessarily is dependent on the willingness of the parties both to participate meaningfully and to agree to some ultimate resolution. As

contemplated by our rules of practice, court-ordered mediation to a family relations officer is ordinarily a resource utilized prior to a final hearing and judgment. As Practice Book § 25-60 (a) states, "[w]henever . . . the Court Support Services Division Family Services Unit has been ordered to conduct mediation . . . *the case shall not be disposed of* until the report has been filed as hereinafter provided, and counsel and the parties have had a reasonable opportunity to examine it prior to the time the case is to be heard, unless the judicial authority orders that the case be heard before the report is filed." Significantly, the language in this provision specific to the court's order to conduct mediation was not in effect when *Casey* was decided.[14] Thus, although under *Casey*, mediation may be an appropriate mechanism which the court may utilize after trial and prior to judgment entering, we conclude that the court is not relieved of its duty to make the ultimate determination of distributing personal property at the time of judgment as mandated by General Statutes § 46b-81. As such, we conclude that the court erred only to the extent that it failed to reserve final judgment until there was resolution of the distribution of the remaining items of personal property.[15]

Because we must remand this case to the trial court with direction to open the judgment and resolve the outstanding personal property dispute, we are required

[14] The analogous Practice Book provision in effect in 2004 stated in relevant part: "Whenever, in any family matter, an evaluation or study has been ordered, the case shall not be disposed of until the report has been filed as hereinafter provided, and counsel and the parties have had a reasonable opportunity to examine it prior to the time the case is to be heard, unless the judicial authority shall order that the case be heard before the report is filed . . . ." Practice Book (2004) § 25-60 (a).

[15] In so holding, we reject the plaintiff's original entreaty to the trial court that it "reserve jurisdiction" postjudgment, as it is clear that a reservation of jurisdiction for property matters is improper under *Bender* v. *Bender*, supra, 258 Conn. 761.

to address the further question of whether the court's error implicates the mosaic rule, which the defendant, in his fifth claim of error, alludes to by asserting that the court cannot "distribute just the personal property without reference to the whole, or in a vacuum of information."

Under Connecticut law, "courts are empowered to deal broadly with property and its equitable division incident to dissolution proceedings. . . . Generally, we will not overturn a trial court's division of marital property unless it misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *Greco* v. *Greco*, 275 Conn. 348, 355–56, 880 A.2d 872 (2005). Respecting the complex nature of the court's determinations, we have applied what has become known as the "mosaic rule" when we have determined that there has been error in the trial court's financial orders. *Tuckman* v. *Tuckman*, 127 Conn. App. 417, 425–26, 14 A.3d 428 (2011), aff'd, 308 Conn. 194, 61 A.3d 449 (2013).

"We previously have characterized the financial orders in dissolution proceedings as resembling a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Accordingly, when an appellate court reverses a trial court judgment based on an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all of the financial orders. . . . We also have stated, however, that [e]very improper order . . . does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order

is severable if its impropriety does not place the correctness of the other orders in question. Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Citations omitted; internal quotation marks omitted.) *Tuckman v. Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013).

Having found error only with respect to the court's orders regarding the parties' furnishings, which, at most, are valued at $15,000; see footnote 13 of this opinion; we do not conclude that the mosaic rule is implicated here. The record before us indicates that, as to the property duly distributed by the court, the value of the plaintiff's property totaled more than $550,000, less $67,500 owed in debt from the loan the parties received from her father, while the defendant retained his property, which the defendant in his financial affidavit had valued at more than $750,000, including the asset described in that affidavit as "[m]oney due to defendant from father-in-law," less $67,500. The assets awarded to the defendant also include his interest in Champion, which he retains free from any claim of the plaintiff. The court's order as to the furnishings is thus clearly severable given the nature of the personal property at issue and its relative value as compared to the other assets distributed by the court.

III

The defendant's final claim is that the court abused its discretion in awarding the defendant a chose in action for $495,000 and ordering him to pay $67,500 to his father-in-law.[16] We disagree.

[16] The defendant vaguely claims that the court made a disproportionate award of assets because the $495,000 was uncollectable and without the $495,000 award, his award was disproportionate to the plaintiff's award. Because we conclude that the award of the chose in action was proper, we need not address that argument.

In its memorandum of decision, the court awarded the defendant "the asset listed as money due to defendant from father-in-law." (Internal quotation marks omitted.) The defendant's financial affidavits repeatedly listed an asset of $495,000 that was due to the defendant for work and improvements that he performed on his father-in-law's property in Poland.

Our review of the propriety of that award is well established. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

A

The defendant first claims that, because there is no evidence from which the court could reasonably have

concluded that he could collect $495,000 from the plaintiff's father, it was error for the court to award him an uncollectable debt.[17] We disagree.

In his brief, the defendant asserts that he testified at trial that his father-in-law would never pay him back and that it would be impossible to collect the money because it would require a lawsuit, which would be unsuccessful. The defendant further argues that he "brought to the court's attention the fact that the $495,000 is uncollectable and the court assigned an uncollectable debt to the defendant's side of the ledger." Our review of the transcript, however, reveals no such testimony. The alleged testimony that the defendant refers to was stricken and remains unchallenged on appeal.[18] As a result, no evidence of the defendant's inability to collect the debt was properly before the court.

[17] The parties do not dispute that a chose in action is a property interest subject to distribution. See *Mickey* v. *Mickey*, 292 Conn. 597, 623, 974 A.2d 641 (2009).

[18] At trial, the following colloquy occurred:

"[The Defendant's Counsel]: Turning to page two of your financial affidavit, if you would, please? There was some testimony yesterday, on page two, the very last line item in the asset section says money due to defendant from father-in-law. Do you see that?

"[The Defendant]: Yes.

"[The Defendant's Counsel]: Now do you know what you would have to do in order to try and collect that money?

"[Defendant]: As of right now, I have to file a lawsuit against [the plaintiff's] father, which is pretty much impossible because they changed their company name already.

"[The Plaintiff's Counsel]: Move to strike, judge.

"[The Defendant]: So I cannot collect this money at all.

"[The Plaintiff's Counsel]: Move to strike.

"[The Defendant's Counsel]: You can't talk.

"[The Plaintiff's Counsel]: And I object to the question on the ground of relevance, Your Honor. This is his debt on his affidavit.

"The Court: The portion of the answer indicating that he needs to file a lawsuit against the plaintiff's father may stand. The rest may be stricken and the objection to the question is overruled."

The court's findings of fact are clearly erroneous when there is no evidence in the record to support them. The evidence in the record to support the court's finding that the asset had a value of $495,000 is the defendant's own financial affidavit, in which he averred that such sum of money was due to him. The court was entitled to rely on the defendant's sworn affidavit as to the value of that claimed asset and the defendant failed to present any admissible evidence to the contrary. Accordingly, the court was well within its broad discretion in awarding the chose in action to the defendant.

B

The defendant also argues that the court improperly ordered him to pay $67,500 to his father-in-law because he does not have any means to make the payment and "there is no logical rationale for ordering the defendant to pay a debt to the same person that owes him considerably more in money."

The defendant's sworn affidavit dated April 11, 2017, lists his total net monthly income as $6870.26. Furthermore, insofar as the defendant claims that he does not have the means to make payment, we note that the defendant was awarded assets including two pianos that, alone, have a total value of over $73,000. In addition to the Dodge Ram vehicle, the pianos, multiple properties, and multiple boats, the defendant was awarded his interest in Champion. The value of his interest in Champion remains unknown due to the fact that the defendant failed to provide the current financial records of the company, in contravention of the court's discovery order.

The defendant's argument that there is no logical rationale for ordering him to pay a debt to the same person that owes him more money is not supported by any case law. The defendant's contention that he does

not have the means to make payment is not substantiated by evidence in the record.[19] Accordingly, we cannot conclude that the court abused its discretion in entering such a financial order.

The judgment is reversed only as to the order concerning the personal property subject to the mediation order and the case is remanded to the trial court with direction to open the judgment and resolve the distribution of property still outstanding; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[19] The defendant states that he has been left unable to comply with financial orders similar to the defendants in *Valentine* v. *Valentine*, 149 Conn. App. 799, 808, 90 A.3d 300 (2014), and *Greco* v. *Greco*, supra, 275 Conn. 362–63. "In *Valentine*, this court held that the trial court abused its discretion in issuing excessive financial orders that left one party with little to no income to sustain his basic welfare. . . . After determining that the defendant's net weekly income was $957.52, the [trial] court ordered him to make payments in excess of his financial capacity. It imposed a weekly obligation of $600 toward child support and alimony payments, and an additional $200 toward prior court orders until he satisfied the outstanding amount of $61,392. This $800 weekly sum alone constituted more than 80 percent of the defendant's net weekly income, and left him with a mere $157.52 to satisfy his weekly living expenses." (Citation omitted; emphasis omitted.) *Wood* v. *Wood*, 160 Conn. App. 708, 724–25, 125 A.3d 1040 (2015).

In *Greco*, our Supreme Court held that the trial court's financial orders constituted an abuse of discretion because, "[u]nder the trial court's order, the defendant was forced to the brink of abject poverty by his obligations to pay the required alimony and insurance premiums, and then stripped of any means with which to pay them by the disproportionate division of the marital assets." *Greco* v. *Greco*, supra, 275 Conn. 363.

We conclude that this case is distinguishable from *Valentine* and *Greco* because, here, the court awarded the defendant valuable assets, giving him the means both to comply with the disputed financial order and to sustain his basic welfare. See *Wood* v. *Wood*, supra, 160 Conn. App. 725. Furthermore, the defendant in this case was ordered to pay the presumptive amount in child support and no alimony payments.