COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

RUSSELL ELLIS	:	
Plaintiff	:	**CASE NO. 2017 CVH 00885**
vs.	:	**Judge McBride**
JENNIFER GORDON	:	**DECISION/ENTRY**
Defendant	:	

Mark Eckerson, counsel for the plaintiff Russell Ellis, 1 Crestview Drive, Milford, Ohio 45150.

Bradford C. Weber, counsel for the defendant Jennifer Gordon, 300 Pike Street, Suite 500, Cincinnati, Ohio 45202.

This cause came before the court for trial on February 1, 2018. After receiving written closing arguments from the parties on March 23, 2018, the court took the issues raised by the parties during the trial under advisement.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

PRELIMINARY EVIDENTIARY ISSUE

On April 30, 2018, the plaintiff Russell Ellis filed a motion to strike factual references made in the defendant Jennifer Gordon's closing statement that refer to facts

not in evidence, namely to facts from an affidavit filed on February 2, 2018 that was not before the court at trial. The defendant did not file a response. The court will only consider evidence and testimony that was presented at trial. To the extent that the defendant's closing statement refers to facts not in evidence, the motion is granted.

FACTUAL BACKGROUND

This case involves a dispute between two individuals who were in a long-term, romantic relationship that recently ended, but who cannot agree on the division of property and debts. The plaintiff and the defendant dated for roughly 13 years and were cohabitants for 11 or 12 of those years. At some point, they were engaged as well. In January of 2017, they broke off their engagement and physically separated.

The plaintiff now lives at 7024 Number Five Road, Pleasant Plain, Ohio 45162. The defendant continues to live in a home that the parties had under a land contract together at 6656 State Route 1333, Pleasant Plain, Ohio 45162.

The parties were owners of a bar- the Rusty Nail- at the time of separation. Upon separating, they entered into written agreements whereby the defendant transferred her ownership in the Rusty Nail to the plaintiff, and the plaintiff agreed to relinquish his interest in the land contract to the defendant. The parties have been unable to agree on the return of each other's personal property, as well as how to dispose of their joint property, which they accumulated through their years of being cohabitants.

The plaintiff owns a flooring business, RS Complete Flooring, for which he does work locally and in neighboring states. The parties largely used the business's checking account as a personal account to acquire most of their personal belongings during their relationship.

During their relationship, the plaintiff employed the defendant at RS Complete Flooring. The parties disagree as to the extent of the work she did for the company. The defendant claims that her duties included preparing and issuing invoices and estimates, preparing payroll, and running errands. The plaintiff claims that her duties were limited to invoicing, payroll, and errands, which he says only required her to work two days per week.

The defendant claims that she cared for the plaintiff's children while he was working as well. The plaintiff contends that due to the age of his children and the help of their mother, the defendant was not often required to care for the children. The plaintiff earned $14,072 in 2013, $17,180 in 2014, and $15,700 in 2015. The defendant values her child care labor at $10 per hour. She estimates that during the course of her employment at RS Complete Flooring she was owed $149,057, but is requesting $15,000 in back wages, based on a value of $5,000 per year from 2013 to 2016.

There are multiple jointly owned pieces of property for which the parties cannot agree as to how to dispose of the items involved. This includes a 1969 Chevy Corvette, titled in both parties' names, which is presently in the plaintiff's possession. The plaintiff claims that the defendant has retained various engine parts for the Corvette, including a carburetor, intake, valve covers, and heads, among others. He believes the value of these parts are approximately $4,000. The plaintiff has since purchased a new engine for the Corvette. The plaintiff wants to have sole ownership of the Corvette, as would the defendant.

The parties jointly own a 2008 F-350 truck, and both are on the title. It is secured by a loan from GE Credit Union. The defendant was a guarantor on the loan. The plaintiff has possession of this truck and uses it for his flooring business. The plaintiff has made several late payments on the GE Credit Union loan, which the defendant maintains

negatively impacted her credit score. The defendant wants money damages for the impact to her credit score, but does not know how to place a monetary value on it. The defendant also wants to have her name taken off of the GE Credit Union loan on the truck or to have it paid off. The plaintiff requests that the defendant transfer her interest in the vehicle to him when the loan is paid off.

The plaintiff gave the defendant an engagement ring, which she still possesses. The plaintiff has requested its return.

There are several trailers in dispute: a 24-foot trailer in the plaintiff's possession, which he uses for work and for moving the Corvette; an 18-foot trailer that is not often used and which the plaintiff claims the defendant moved off of her property, but for which the defendant claims she does not know its whereabouts; and a small, enclosed trailer that the plaintiff claims is intended for use in his business, but which the defendant claims is used for her daughter's horse gear, which she has possession of. As of November 15, 2017, the 24-foot and 18-foot trailers are titled in the plaintiff's name. The defendant presented evidence that the she purchased the 24-foot trailer, whereas the plaintiff claims that RS Complete Flooring purchased the trailer. The defendant wants to solely own and have possession of the 24-foot trailer.

The parties have several debts together that they cannot agree on how to divide. They have a loan in both of their names from Sharefax Credit Union, using the defendant's Suburban as collateral. The parties disagree as to what the money from the loan was ultimately used for. The Suburban was subsequently totaled in a vehicular accident. There is a remaining balance of $2,485.41 on the loan. At trial, the plaintiff requested that this debt be divided equally.

The parties disagree as to the payment of certain household expenses. While they lived together, the household expenses were shared. After their separation, the

defendant agreed to pay the household expenses moving forward. She claims that the plaintiff never paid his portion of the bills for Duke Energy Electric, Western Water, and Time Warner Cable. She claims that these bills amount to $1,075.64, and she is asking that these bills be divided equally. The plaintiff claims these bills are solely her responsibility.

The defendant has a Choice Privilege Visa credit card, and she avers that the plaintiff signed on the account and used the card. As of January 12, 2017, the account had a balance of $3,003.10, which the defendant claims resulted from expenses of RS Complete Flooring incurred while the plaintiff was travelling for work. The defendant wants the plaintiff to pay for the entirety of this debt. The plaintiff disputes that he incurred these charges. The plaintiff's position is that he should not be responsible for any part of this debt.

The defendant has a Victoria's Secret credit card. She spent $616.71 purchasing Christmas presents in 2016 for her three daughters and the plaintiff's three daughters. She wants to split this debt, and the plaintiff wants the defendant to be solely responsible for it.

The parties had a credit card from HH Gregg/Synchrony Bank. The defendant claims that the balance owed was $1,820 at the time of their separation, which was incurred from the purchase of household items, including a washer and dryer, which she now possesses. The defendant wants this debt split evenly, and the plaintiff wants the defendant to be solely responsible for it.

The parties had a credit card from Care Credit/Synchrony Bank. The defendant claims that the balance of $1,321.71 was incurred when the parties had to put their dog to sleep. She wants this debt to be split evenly, and the plaintiff wants the defendant to be responsible for it.

The defendant claims that the plaintiff has additional personal property that he refuses to return to her. This includes three work benches from her grandfather, collector teddy bears from her mother, a dinner bell from her grandparents, miscellaneous 1979 body style Camaro body parts, die cast cars from her father, a vanity license plate, and various camping gear. The plaintiff claims he no longer has any of her personal property. The defendant wants this property returned.

The defendant claims that the plaintiff removed joint property that they purchased for the yard of their shared home, which should remain with her as her property. This includes a lawn mower, an industrial backpack blower, and a weed eater. The defendant is asking for this property, and the plaintiff maintains that he does not have it.

The plaintiff claims that the defendant shut down his email account that he uses for RS Complete Flooring, rscompleteflooring@netscape.com, when the parties separated, and that he can no longer reestablish it. The defendant claims that the plaintiff shut down that account, along with her account, when he closed certain bank accounts. The plaintiff believes he lost business opportunities as a result of being unable to access his email account, but he is unable to place a value on the monetary damage.

The plaintiff took video footage in several videos of the defendant while the parties were engaged in sexual acts. The defendant claims that she was unaware that the plaintiff was filming the acts and did not give him permission to do so. The plaintiff claims that the defendant knew that he was filming the acts and gave permission to him to do so. The plaintiff still has possession of the videos. During the trial, the parties agreed that the plaintiff would destroy the videos and not distribute them to others.

PROCEDURAL BACKGROUND

It is difficult to discern what, if any, causes of action the plaintiff and defendant claim in their respective pleadings. The plaintiff filed his complaint on July 18, 2017. In Count I, which does not name the cause of action, the plaintiff alleges:

> "1. Plaintiff and Defendant cohabitated from 2005 through early 2017.
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> 2. At the time of separation the parties owned and continue to own two (2) vehicles that are jointly titled, a 1969 Chevrolet Corvette and a 2005 Ford F-350 pick-up truck.
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> 3. At the time of separation the parties had and continue to have several joint financial obligations including credit cards.
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> 4. During June, 2017, the Defendant entered the Plaintiff's property and removed $4,000 of Corvette engine parts that were purchased solely by the Plaintiff through his business.
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> 5. During July, 2017, the Defendant again came to Plaintiff's residence and removed a paddle boat and his 12 year old daughter's bicycle.
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> 6. The Plaintiff has tools and other personal property at the Defendant's current residence at 6656 State Route 133, Pleasant Plain, Ohio.
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> 7. Unless restrained the Defendant may sell, damage, or encumber property in which Plaintiff has an ownership interest.
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> 8. Plaintiff is willing to have a determination of what, if any, financial interest Defendant may have in the property in his possession and to pay Defendant a reasonable sum for her interest.
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> 9. Plaintiff purchased and delivered an engagement ring valued at $4,000 to Defendant, for a marriage that did not take place."

In connection with Count 1, the plaintiff asks the court to (1) restrain the defendant from selling or damaging joint property or the plaintiff's property, (2) order that the plaintiff be the sole titled owner of the Corvette and truck, (3) order the return of the plaintiff's

separate property that is in the defendant's possession, (4) determine the ownership of any other disputed property, and (5) order that the defendant return the engagement ring.

In his second cause of action, which is also unnamed, the plaintiff prays for money damages in excess of $25,000 based on the allegation that the defendant made it impossible for him to log into his business email address, causing him to lose revenue and income for his business.

The defendant filed a counterclaim on August 18, 2017, alleging one unnamed count. The defendant alleges that the plaintiff possesses certain personal property belonging to the defendant which he refuses to return to her including: a lawn mower, industrial blower, weed eater, camping supplies, the 1969 Corvette, a car trailer, work benches, toys and stuffed animals, a dinner bell, and car parts for a 1979 body style Camaro. She claims that the plaintiff is responsible for his portion of the credit card charges and utilities and payments the defendant made on the plaintiff's F-350 truck. In the same counterclaim, the defendant alleges that the plaintiff has a private and personal video of the two of them, and that she has been damaged by his failure to pay her $149,057 in lost wages for work done for his company, RS Complete Flooring. The defendant seeks $166,246 in damages; an order that all of her property be returned to her; a determination as to the ownership of the property described above and of the boat, car trailer, and engagement ring; and order for the destruction of the intimate video; reasonable costs and attorney fees; and punitive damages.

Neither party requested a jury trial. The court held a bench trial on February 1, 2018. At the close of trial, the court requested that the parties make their closing arguments in writing and that they provide a detailed list of the relief they are seeking and citations to legal authorities supporting their requests.

The parties submitted their written closing arguments on March 23rd. On April 30th, the plaintiff filed a motion to strike all references the defendant made in her closing argument to facts not in evidence at the trial.

LEGAL ANALYSIS

In his closing argument, the plaintiff avers that "[n]either party has claimed the existence of a partnership, for relief via replevin, for a partition, for unjust enrichment, or for breach of contract."[1] Instead, the plaintiff maintains that "[b]oth parties' pleadings are in effect a request to declare the legal status and rights of each."[2]

In her closing argument, the defendant claims that this is a case involving the court's equitable powers to partition personal property.[3] She further posits that "[t]his lawsuit involved the disposition of the remainder of the parties' assets and liabilities incurred during the relationship."[4]

A trial court cannot divide the property of cohabitants as a domestic relations court would for married parties.[5] "[P]roperty division, *per se*, applies only to marriages."[6] With limited exception, common law marriages after October 10, 1991 have been prohibited in Ohio.[7] It is undisputed that the parties in this case were not legally married or in a common law marriage before October 10, 1991.

Furthermore, the Twelfth District Court of Appeals has observed that "[t]here is no precedent in Ohio for dividing assets or property based on mere cohabitation without

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[1] Pls. Mem., pg. 3.
[2] Pls. Mem., pg. 3.
[3] Defs. Mem., pg. 1.
[4] Defs. Mem., pg. 4.
[5] *Purdy v. Purdy*, 12th Dist. Butler No. CA92-10-207, 1993 WL 185580, *2 (June 1, 1993).
[6] *Seward v. Mentrup*, 87 Ohio App.3d 601, 603, 622 N.E.2d 756 (12th Dist. 1993), citing *Lauper v. Harold*, 23 Ohio App.3d 168, 170, 492 N.E.472 (12th Dist. 1985).
[7] R.C. 3105.12(B)(1).

marriage and we think it is advisable not to start or follow a trend to the contrary."[8] Trial courts "simply [have] no authority to divide property absent a marriage contract or similar agreement * * *."[9]

Likewise, courts have declined to divide personal property between two unmarried individuals under conversion theories as well.[10] And courts have declined to find that individuals who are cohabiting can recover under a constructive trust theory for contributions to a relationship.[11] Moreover, under Ohio's "heart balm" statute, amatory actions are barred.[12] The "heart balm" statute, R.C. 2305.29, provides: "No person shall be liable in civil damages for any breach of a promise to marry * * *."[13]

Notwithstanding the above, a trial court can divide personal party of cohabitants when they have previously entered into a partnership with a partnership agreement in place.[14] However, there is no evidence of such a partnership agreement in this case.

Additionally, although courts "are unwilling to recognize a separate status for unmarried persons who are living together, [they] acknowledge that in any type of relationship * * * there exists the possibility that one party may become unjustly enriched at the expense of another."[15] Courts have examined unjust enrichment in several

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[8] *Seward*, 87 Ohio App.3d at 603. *See Ogle v. Disbrow*, 6th Dist. Lucas Nos. L-04-1373, L-05-1102, 2005-Ohio-4869, ¶ 18, quoting *Lauper*, 23 Ohio App.3d at 170 ("Ohio courts have observed that "[t]here is no precedent in Ohio for dividing assets or property based on mere cohabitation without marriage and we think it advisable not to start or follow a trend to the contrary."); *Tarry*, 98 Ohio App.3d at 542, quoting *Lauper*, 23 Ohio App.3d at 170 ("Additionally, there is 'no precedent in Ohio for dividing assets or property based on mere cohabitation without marriage.").

[9] *Seward*, 87 Ohio App.3d at 603. *See McCall v. Sexton*, 4th Dist. Jackson No. 06CA12, 2007-Ohio-3982, ¶ 15.

[10] *See Ogle*, 2005-Ohio-4869 at ¶ 19.

[11] *Tarry v. Steward*, 98 Ohio App.3d 533, 541-542, 649 N.E.2d 1 (9th Dist. 1994).

[12] *Dixon v. Smith*, 119 Ohio App.3d 308, 315, 695 N.E.2d 284 (3d Dist. 1997).

[13] R.C. 2305.29.

[14] *Purdy*, 1993 WL 185580 at *2.

[15] *Seward*, 87 Ohio App.3d at 603, citing *Lauper*, 23 Ohio App.3d at 170. *See Hatten v. Shaw*, 4th Dist. Lawrence No. 99 CA 30, 2000 WL 670305, *2 (May 15, 2000) (internal citations omitted.) ("While we agree with appellant that Ohio law does not have any provision for allocating property among unmarried, cohabitating individuals, * * * we do not agree that the trial court was without authority to make an award to appellee for personal property that rightfully belonged to him" under a theory of unjust enrichment); *Dixon*, 119 Ohio App.3d at 316 (explaining that, in spite of the

circumstances involving unmarried individuals who have separated and moved apart, including in situations where one partner made uncompensated improvements to the other's home,[16] where one partner made payments for a car titled in the other's name and that the other still owns,[17] and for unpaid household services provided by one partner.[18] However, from reviewing the complaint and the written closing argument memoranda, it is clear that neither party has made a claim for unjust enrichment.

I. PLAINTIFF'S CLAIMS

A. COUNT I

As described above, the plaintiff argues that "[n]either party has claimed the existence of a partnership, for relief via replevin, for a partition, for unjust enrichment, or for breach of contract."[19] Instead, the plaintiff maintains that "[b]oth parties' pleadings are in effect a request to declare the legal status and rights of each."[20] He goes onto argue that the court should issue a declaratory judgment.

"A declaratory judgment action provides a means by which parties can eliminate uncertainty regarding their legal rights and obligations."[21] "The purpose of a declaratory

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heart balm statute, "a recovery of property transferred in reliance on a promise to marry is permitted upon the equitable theory of preventing unjust enrichment").

[16] *See Seward*, 87 Ohio App.3d at 604.

[17] *See Lauper*, 23 Ohio App.3d at 171.

[18] *See Messer-Bailey v. Bailey*, 5th Dist. Knox No. 14CA21, 2015-Ohio-1195, ¶¶ 14-20.

[19] Pls. Mem., pg. 3.

[20] Pls. Mem., pg. 3.

[21] *Schreyer v. Preble Cty. Bd. of Commrs.*, 12th Dist. Preble No. CA2012-12-018, 2013-Ohio-3087, ¶ 11, quoting *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, paragraph two of the syllabus.

judgment action is to dispose of 'uncertain or disputed obligations quickly and conclusively.'"[22]

Trial courts may issue declaratory judgments under R.C. 2721.01(A): "* * * courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. * * *"[23]

Indeed, "[t]rial courts are given broad latitude in determining whether to proceed with a declaratory judgment action."[24] To issue a declaratory judgment, three requirements must be satisfied: "(1) a real controversy between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties."[25]

For there be a justiciable question, "[t]he danger or dilemma of the plaintiff must be present, not contingent upon the happening of hypothetical future events * * *, and the threat to his position must be actual and genuine and not merely possible or remote."[26]

There is a controversy when "* * * there is a genuine dispute between the parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[27]

A complaint for a declaratory judgment is dismissed when a declaratory judgment will not terminate the uncertainty or controversy.[28] Specifically, R.C. 2721.07 provides

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[22] *Schreyer*, 2013-Ohio-3087 at ¶ 11, quoting *Mid-Am. Fire & Cas. Co.*, 2007-Ohio-1248 at paragraph two of the syllabus.
[23] R.C. 2721.01(A).
[24] *Burchwell v. Warren Cty.*, 12th Dist. Warren No. CA2013-09-079, 2014-Ohio-1892, ¶ 9, citing *Trinity Health Sys. v. MDX Corp.*, 180 Ohio App.3d 815, 2009-Ohio-417, ¶ 38 (7th Dist.).
[25] *Burchwell*, 2014-Ohio-1892 at ¶ 9, citing *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677, 681 (10th Dist. 2000).
[26] *Schreyer*, 2013-Ohio-3087 at ¶ 13, quoting *Mid-Am. Fire & Cas. Co.*, 2007-Ohio-1248 at ¶ 9.
[27] *Schreyer*, 2013-Ohio-3087 at ¶ 13, citing *Brewer v. City of Middletown*, 12th Dist. No. CA91-02-039, 1992 WL 185691, *4 (Aug. 3. 1992).
[28] *Burchwell*, 2014-Ohio-1892 at ¶ 9, citing *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 12th Dist. Warren No. CA2003–12–115, 2004–Ohio–4526, ¶ 13.

that trial courts may "* * * refuse to render or enter a declaratory judgment or decree under this chapter if the judgment or decree would not terminate the uncertainty or controversy giving rise to the action or proceeding in which the declaratory relief is sought."[29] Additionally, a declaratory judgment cannot "be used to determine isolated questions of fact."[30] A declaratory judgment is inappropriate when "a resolution of a controversy depends greatly upon a determination of facts of the case."[31]

After considering the law on issuing on declaratory judgment, the court concludes that it cannot issue one in this case, nor can it grant the remainder of the relief requested by the plaintiff.

To begin with, the plaintiff, through his complaint and closing argument, requests relief that goes beyond the scope of a declaratory judgment. As described above, a declaratory judgment is declaration of the rights, status, or other legal relations between the parties. Although the plaintiff denies requesting replevin, many of his requests are just that.

"A replevin action is aimed at the recovery of possession of specific personal property by one who claims an interest in or a right to it as against its possessor."[32] Indeed, it provides "the only means to obtain possession of personal property that one has a right to possess, but is in someone else's possession."[33] For example, "[a] plaintiff would bring a replevin action if he wanted his neighbor to return the lawnmower he

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[29] R.C. 2721.07.
[30] *Kregan v. Sneed*, 12th Dist. Butler No. CA2000-02-029, 2000 WL 1530879, *3 (Oct. 16, 2000), quoting *Travelers Indemn. v. Cochrane*, 155 Ohio St. 305 (1951), paragraph two of the syllabus. *See Patterson v. Blanton*, 109 Ohio App.3d 349, 352-354, 672 N.E.2d 208 (10th Dist. 1996) (finding that gifts made in contemplation of marriage may be recovered by the donor under a theory of unjust enrichment if a marriage does not ensue, irrespective of fault).
[31] *Kregan*, 2000 WL 1530879 at *3, quoting *Therapy Partners of America v. Health Providers, Inc.*, 129 Ohio App.3d 572, 578 (10th Dist. 1998).
[32] *Southern Wisconsin Cattle Credit Co. v. Crowe*, 12th Dist. Brown No. CA85-01-001, 1986 WL 1396, *3 (1986).
[33] (Emphasis added.) *Neighbor v. Nalepka*, 8th Dist. Cuyahoga No. 89984, 2008-Ohio-2174, ¶ 6, citing *McCall*, 2007-Ohio-3982.

borrowed."[34] So too, when people live together and one person wrongfully retains the others' personal property, replevin is the proper theory of recovery.[35]

In the present case, the plaintiff has requested the return of multiple items of personal property, but he has not filed an action for replevin. Thus, under the cause of action that the plaintiff has argued, the court cannot grant the return of any personal property he owned independently of the defendant.

The plaintiff also desires to have the court find that he owns various items of joint property by issuing a declaratory judgment to this effect. However, as explained, a declaratory judgment cannot "be used to determine isolated questions of fact."[36] Nor can a declaratory judgment be used when "a resolution of a controversy depends greatly upon a determination of facts of the case."[37] For instance, the plaintiff in his closing argument requested that the court find that his 24-foot work trailer is his sole property. He claims that he owns his work trailer, whereas the defendant claims she owns it. Both parties presented opposing evidence on this point. This is purely a question of fact.

Other contested items are undisputedly jointly owned, and issuing a declaratory judgment to that effect would not would not terminate the uncertainty or controversy giving rise to this action. For example, in his complaint the plaintiff admits that: "At the time of separation the parties owned and continue to own two (2) vehicles that are jointly titled, a 1969 Chevrolet Corvette and a 2005 Ford F-350 pick-up truck." The testimony from both parties corroborates this. To have the court issue a declaratory judgment stating that both parties own the truck and Corvette, however, does nothing to resolve the dispute about who *should* own them moving forward, which is what the parties actually want.

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[34] *Southern Wisconsin Cattle Credit Co.*, 1986 WL 1396 at *3.
[35] *McCall*, 2007-Ohio-3982 at ¶ 15.
[36] *Kregan*, 2000 WL 1530879 at *3, quoting *Travelers Indemn.*, 155 Ohio St. at paragraph two of the syllabus; *Patterson*, 109 Ohio App.3d at 352-354.
[37] *Kregan*, 2000 WL 1530879 at *3, quoting *Therapy Partners of America*, 129 Ohio App.3d at 578.

Indeed, the plaintiff prays that the court order that the plaintiff is the sole owner of both vehicles.[38] But to do this, there must be some kind of legal authority, under some kind of legal cause of action, for the court to take property that belongs to both parties and order that it now belongs to the plaintiff alone. However, the plaintiff has disavowed Count I as a cause of action for partition or unjust enrichment. He has neither pled nor argued a legal theory of recovery or established his right to solely enjoy joint property. Hence, the court is not able to take joint property, like the Corvette and truck, and order that the plaintiff owns it and has an exclusive right to it.

A similar example of this misapplication applies to the engagement ring. The evidence shows that the plaintiff gave the defendant an engagement ring, that they did not get married, and that she retained the ring. To receive the ring back, the plaintiff would need to succeed on an unjust enrichment claim or a complaint in replevin. "In the absence of an agreement between the parties to the contrary, [an] engagement ring must be returned to the donor upon termination of an engagement regardless of fault."[39] This is so because "[a]n engagement ring is given as a unique type of conditional gift, given in contemplation of marriage; when the condition of marriage is not fulfilled, the ring or its value should be returned to the donor."[40] To receive an engagement ring back, the plaintiff can plead in replevin or make a claim for its value under a theory of unjust enrichment.[41]

Stated differently, the evidence shows that the plaintiff gifted the defendant with an engagement ring. To change the ownership of the ring, the plaintiff needs to succeed on an action in replevin or a claim for unjust enrichment so that the court can exercise its

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[38] Compl., ¶ B.
[39] *Neighbor*, 2008-Ohio-2174 at ¶ 6, citing *Phillips v. Newsome*, 8th Dist. Cuyahoga No. 56724 (Apr. 19, 1990).
[40] *Neighbor*, 2008-Ohio-2174 at ¶ 6, citing *Philips*, No. 56724.
[41] *See Neighbor*, 2008-Ohio-2174 at ¶¶ 1, 6 (examining whether the defendant was required to return an engagement ring in a replevin action).

equitable orders to find that the plaintiff should own the ring and the defendant must return it. That has not happened here.

In sum, the plaintiff wants the court to issue a declaratory judgment so that he can receive his sole property back and have the right to solely own the parties' joint property. First, a declaratory judgment is not the same as an order for the return of property, i.e. an action in replevin. It is a statement of rights based on the law. Second, declaratory judgments are not used to determine purely factual issues. To the extent that both parties claim sole ownership over certain property, it would require the court to make the purely factual determination about whether it believes the plaintiff purchased the property or whether the defendant purchased the property. It does not involve a legal question. Third, to the extent that the plaintiff wants joint property to become his sole property, he has disavowed all legal causes of action that would allow the court to do so. Absent some kind of legal authority, the court cannot simply order property that belongs to both parties to be henceforth owned only by one. For these reasons, the court does not find in the plaintiff's favor on Count I and all claims for relief are denied.

B. COUNT II

In his second cause of action, the plaintiff prays for damages in excess of $25,000 based on his claim that the defendant lost him business by making it impossible for him to log into his business email account. The complaint does not state what type of cause of action this is (e.g. intentional interference with business relationships, etc.), and the court cannot discern one from reading it. Further, the plaintiff's closing argument memorandum does not identify what kind of cause of action Count II is for. Finally, even if the court could identify a cause of action, the evidence in trial did not establish that the

plaintiff has suffered an injury. His testimony that he has lost business was purely speculative. For all of these reasons, the court finds against the plaintiff as to Count II.

II. DEFENDANT'S COUNTERCLAIM

As mentioned, the defendant claims that this is a case involving the court's equitable powers to partition personal property.[42] She further posits that "[t]his lawsuit involved the disposition of the remainder of the parties' assets and liabilities incurred during the relationship."[43] In her single counterclaim, the defendant also requests that the plaintiff be ordered to destroy an intimate video of her with the plaintiff, and she makes a claim for lost wages for work performed for RS Complete Flooring and for her childcare services to the plaintiff.

A. DESTRUCTION OF VIDEOS

During the trial counsel for the plaintiff agreed that the plaintiff would destroy the intimate videos and not distribute them. Accordingly, the court grants this relief and orders the plaintiff to destroy any videos he has depicting the defendant engaging in sexual relations with him. Furthermore, he shall not make copies or distribute these videos to others.

B. PARTITION OF PROPERTY

[42] Defs. Mem., pg. 1.
[43] Defs. Mem., pg. 4.

"The general rule is that personal property of every class may be subject to compulsory partition."[44] "A partition action is, by nature, an equitable action."[45] "[W]hile there is no statute in Ohio authorizing proceedings for the partition of personal property, the absence of such statute does not mean that such action cannot be maintained."[46] Further, although partition may not have been requested in a party's complaint, that remedy may still be available as an alternative form of relief when tried with the express or implied consent of the parties.[47]

Even so, as the court has explained, "[t]here is no precedent in Ohio for dividing assets or property based on mere cohabitation without marriage and we think it advisable not to start or follow a trend to the contrary."[48] Trial courts "simply [have] no authority to divide property absent a marriage contract or similar agreement * * *."[49]

In spite of this, the defendant argues that the court can partition the parties' joint property. The defendant's citation to *McCall v. Sexton*, 4th Dist. Jackson No. 06CA12, 2007-Ohio-3982, is unpersuasive. Although in that case the court did divide the property of people who had lived together, it is distinguishable from this case in this significant respect:

> "The parties are apparently attempting to divide property for which they each, individually, expended their own funds for the purchase of that property. This situation is different than situations in which unmarried, cohabitating couples have attempted to divide property acquired by either party during the course of their relationship much like a domestic relations property division proceeding. We recognize that Ohio law

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[44] *Wetli v. Denny*, 6th Dist. Lucas No. L-13-1043, 2014-Ohio-1009, ¶ 11, quoting *Crowthers v. Gullett*, 150 Ohio App.3d 419, 2002-Ohio-7051, ¶ 13 (5th Dist.).
[45] *Purdy*, 1993 WL 185580 at *2, citing *Sword v. Sword*, 12th Dist. Madison Nos. CA92-07-016 and CA9208-019 (Feb. 1, 1993).
[46] *Wetli*, 2014-Ohio-1009 at ¶ 11, quoting *Crowthers*, 2002-Ohio-7051 at ¶ 13.
[47] *McCall*, 2007-Ohio-3982 at ¶ 16, citing Civ.R. 15(B).
[48] *Seward*, 87 Ohio App.3d at 603. *See Ogle*, 2005-Ohio-4869 at ¶ 18, quoting *Lauper*, 23 Ohio App.3d at 170; *Tarry*, 98 Ohio App.3d at 542, quoting *Lauper*, 23 Ohio App.3d at 170.
[49] *Seward*, 87 Ohio App.3d at 603. *See McCall*, 2007-Ohio-3982 at ¶ 15.

> does not provide a means by which courts may simply divide property between unmarried, cohabitating individuals."[50]

Thus, the court cannot partition the parties' property simply because they lived together and acquired joint property that they now cannot agree upon dividing. The defendant has not included a cause of action for unjust enrichment in her answer and counterclaim, nor has she argued in her closing statement memorandum that she has a claim for unjust enrichment.[51] Under the defendant's cause of action for partition, the court cannot order the parties to sell their joint property and divide the profits evenly.

Furthermore, the defendant has not filed a replevin action for the return of property solely belonging to her. As stated, the defendant has identified her cause of action as one for partition. As such, the court cannot order the plaintiff under that cause of action to return to her property that belongs solely to her, such as her die casts, teddy, bears, dinner bell, etc.

The defendant also claims she is owed wages from working for the plaintiff's business and providing childcare for him while he worked. Again, however, because there is no claim for unjust enrichment, there is no cause of action under which the court can grant such relief.

For these reasons, the remainder of the defendant's claim is denied.

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[50] (Emphasis added.) *McCall*, 2007-Ohio-3982 at ¶ 1, fn. 1, citing *Dixon*, 119 Ohio App.3d 308, *Tarry*, 98 Ohio App.3d 533, *Seward*, 87 Ohio App.3d 601, and *Lauper*, 23 Ohio App.3d 168.

[51] To succeed on a cause of action for unjust enrichment, a plaintiff must demonstrate the following: "(1) he conferred a benefit upon a defendant, (2) the defendant had knowledge of the benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment." *RG Long & Assocs., Inc. v. Kiley*, 12th Dist. Warren No. CA2014-10-129, 2015-Ohio-2467, ¶ 14, citing *Estate of Everhart v. Everhart*, 12th Dist. Fayette Nos. CA2013-07-019 and CA2013-09-026, 2014-Ohio-2476, ¶ 46. "[U]njust enrichment is a quasicontractual theory of recovery." *Bender v. Logan*, 2016-Ohio-5317, 76 N.E.3d 336, ¶ 66 (4th Dist.), quoting *Dailey v. Craigmyle & Sons Farms, L.L.C.*, 177 Ohio App.3d 439, 2008-Ohio-4034, 894 N.E.2d 1301, ¶ 20 (4th Dist.). An unjust enrichment cause of action compensates the plaintiff for the benefit it conferred on the defendant. *Bender*, 2016-Ohio-5317 at ¶ 67, quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21.

CONCLUSION

Due to the plaintiff's willingness to agree to destroy intimate, sexual videos taken of the defendant, the court orders the plaintiff destroy any videos he has depicting the defendant engaging in sexual relations with him. Moreover, he shall not make copies or distribute these videos to others.

With that exception, the court finds that neither party has succeeded in prevailing on his/her claims in this case. Judgment is granted to the defendant on the plaintiff's claims and to the plaintiff on the defendant's counterclaims.

IT IS SO ORDERED.

DATED: 9-21-18

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 21st day of September 2018 by e-mail to Mark D. Eckerson, Attorney for the Plaintiff, at droflim1@msn.com, and to Bradford C. Weber, Attorney for the Defendant, at bcweber@byhlaw.com. Because counsel for the Plaintiff has filed a motion to withdraw from his representation in this case, a copy has also been sent by regular U.S. Mail to the Plaintiff Russell Ellis, 7024 #5 Road, Pleasant Plain, Ohio 45162.

Judicial Assistant to Judge McBride