

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

SU KANG GAUTHIER, :
 :
Plaintiff-Appellee, : CASE NO. CA2011-05-048
 :
- vs - : OPINION
 : 7/2/2012
 :
FORREST GAUTHIER, et al., :
 :
Defendants-Appellants. :

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 7DR31415

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RINGLAND, J.

{¶ 1} Defendant-appellant, Forrest Gauthier, appeals from the decision of the Warren County Court of Common Pleas, Domestic Relations Division, refusing to impose a jail sentence on plaintiff-appellee, Su Kang Gauthier, for her alleged failure to purge herself of

contempt of court by returning to Forrest certain items of his personal property as required by a previous order of the trial court. For the reasons that follow, we affirm the trial court's judgment in part and reverse it in part, and remand this cause to the trial court for further proceedings on Forrest's motion to impose sentence for Su's alleged failure to purge her contempt.

{¶ 2} On March 3, 2009, Forrest and Su were granted a decree of divorce that contained a provision requiring Su to allow Forrest to retrieve, by April 30, 2009, his personal property from Su's residence, which had been the parties' marital residence. On May 26, 2009, Forrest moved to have Su held in contempt of court for failing to allow him to retrieve his property. A contempt hearing was held before a magistrate over five separate days from September 2009 to April 2010.

{¶ 3} On May 17, 2010, Forrest filed a post-hearing brief in which he stated that he "did not want to be paid for the supposed or estimated value of his property that has not been provided to him" but instead "want[ed] his property back[.]" He therefore requested that a civil fine and/or jail sentence be imposed on Su to coerce her into returning his property to him. He said that if such a civil fine or jail sentence failed to cause Su to return his property, "he will then bring a separate civil action" in which he will seek recovery "for any loss, damage or harm caused to his property." He also said that while he had provided evidence of the value of his property at the contempt hearing, he did not provide such evidence "for the purpose of receiving an award of damages herein at this time, but to help the Court fashion an appropriate civil fine to help coerce [Su's] compliance with the Court's orders."

{¶ 4} On October 4, 2010, the magistrate issued a decision "accept[ing] [Forrest's] position as set forth in his [post-hearing] brief that he is not seeking monetary damages for missing/damaged property." The magistrate added that "even if [Forrest] were pursuing such damages, the evidence submitted was insufficient to justify an award [of such damages.]"

The magistrate found Su in contempt for failing to return certain items to Forrest before the April 30, 2009 deadline. The magistrate found that Su "apparently agree[d] that 17 items of Forrest's personal property were still in her possession." The magistrate ordered the parties to make arrangements to have Su deliver the items to Forrest and ordered Su to search diligently for any additional items Forrest claimed were missing. The magistrate recommended that Su, as a sanction for her contempt, be ordered to pay \$2,500 toward Forrest's attorney fees.

{¶ 5} In his objections to the magistrate's decision, Forrest asserted that under the terms of the parties' divorce decree he was entitled to bring a separate civil action against Su for any loss he sustains if she fails to return his property to him. Forrest also asserted that the magistrate's finding that "even if [he] were pursuing such damages, the evidence submitted was insufficient to justify an award [of such damages]," "is both legally incorrect and inappropriate[.]" since the magistrate's finding was "merely advisory[.]" as the magistrate was not required to have made it to rule on his contempt motion. Forrest stated that "[t]o the extent that the Magistrate made any finding or conclusion of law which may be construed as a denial of [his] right to [bring] a separate action [against Su] for the conversion of his property, the Magistrate's decision is incorrect and [he] objects to it."

{¶ 6} On December 1, 2010, the trial court issued an entry modifying the magistrate's decision by imposing a 30-day jail sentence on Su as an additional sanction for her contempt but allowing her to purge herself by complying with all the terms in the magistrate's decision by December 31, 2010. After noting Forrest's concern that certain findings made by the magistrate could be construed as a denial of his right to pursue a separate civil action against Su, the trial court stated that Forrest "is likely collaterally estopped from proceeding against [Su] on the same issue in a different forum. This is the appropriate forum and [Forrest] had his day in Court." The trial court overruled Forrest's remaining objections to the magistrate's

decision and adopted the decision, as amended, as its own.

{¶ 7} On January 12, 2011, Forrest filed a "Motion to Impose Sentence and Notice of Failure to Comply with Court Order," alleging that Su had delivered to him only two of the 17 items of his personal property that she was required to deliver by December 31, 2010, and thus had failed to purge her contempt. Therefore, Forrest requested that the trial court impose the 30-day jail sentence on Su, as set forth in the trial court's 2010 entry.

{¶ 8} A hearing was held before the magistrate on Forrest's motion. Su, in her written closing argument, raised the defense of "impossibility," asserting that she could not return the items because she already had returned them to Forrest and thus did not have the items or know where they were, and did not hide them, dispose of them or give them away. Forrest, in his written closing argument, asserted that whether Su possessed the remaining 15 items of his personal property was a question that already had been litigated in the 2009-2010 contempt proceedings.

{¶ 9} On February 10, 2011, the magistrate issued a decision finding that (1) the 15 items of Forrest's personal property "could have been delivered before" the date of her 2010 decision; (2) Su's "son and son-in-law both testified that the items were either delivered or attempted to be delivered and that none of the items are currently at [Su's] residence"; and (3) the testimony of the "non-party witnesses," including, presumably, Su's son and son-in-law, was entitled to be accorded greater weight than the testimony of either Su or Forrest, given Su and Forrest's "apparent hostility toward each other and their willingness to engage in protracted litigation over personal property, several items of which are de minimis in nature[.]" The magistrate found "the evidence insufficient to conclude [Su] is still in possession of items belonging to [Forrest,]" and therefore declined to recommend imposition of the 30-day jail sentence on Su.

{¶ 10} On April 20, 2011, the trial court issued an entry overruling Forrest's objections

to the magistrate's decision. The trial court stated it would "defer" to the magistrate's finding "that certain items could have been returned and further that the evidence was 'insufficient to conclude that [Su] is still in possession of items belonging to [Forrest].'" The trial court determined that based on these findings, it could not impose the 30-day jail sentence on Su. The trial court amended the magistrate's decision by imposing a "continuing order" on Su "to look for the items that [Forrest] testified he has not yet received * * * and to immediately convey to him any items that she finds." The trial court then adopted the magistrate's decision, as amended, as its own.

{¶ 11} Forrest now appeals, assigning the following as error:

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT ERRED IN RECONSIDERING AND OVERRULING ITS DECEMBER 1, 2010 DECISION.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT ERRED IN PERMITTING APPELLEE TO RELITIGATE COLLATERALLY ESTOPPED CLAIMS AND IN MAKING IRRELEVANT AND SPECULATIVE FINDINGS.

{¶ 16} Assignment of Error No. 3:

{¶ 17} THE TRIAL COURT ERRED IN FINDING THAT ONLY CONTRADICTORY AND INSUFFICIENT EVIDENCE SUPPORTED THE APPELLEE'S FAILURE TO RETURN APPELLANT'S PROPERTY AND ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO APPELLANT.

{¶ 18} Assignment of Error No. 4:

{¶ 19} THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE DAMAGE CAUSED TO ITEM 10 BY APPELLEE.

{¶ 20} In his first assignment of error, Forrest contends that under cases like *Pitts v.*

Ohio Dept. of Transportation, 67 Ohio St.2d 378 (1981), a trial court is not permitted to reconsider its "final decisions and orders." He further contends that the trial court's 2010 entry finding that there were 17 items of his personal property in Su's possession and ordering her to return them to him was a "final order." He then argues the trial court, in its 2011 entry, effectively reconsidered and reversed its 2010 "final order" in violation of cases like *Pitts*, by determining that there was insufficient evidence to conclude that Su is still in possession of the remaining 15 items of his personal property. We find this argument unpersuasive.

{¶ 21} "Generally, appellate courts have jurisdiction over judgments or 'final orders.'" *Dudley v. Dudley*, 12th Dist. No. CA2010-05-114, 2012-Ohio-225, ¶ 12, citing Ohio Constitution, Article IV, Section 3(B)(2); and R.C. 2505.03(A). "Final orders are generally those that dispose of the whole case or some separate and distinct branch of it, and leave nothing for future determination." *Dudley*, citing *VIL Laser Sys., L.L.C. v. Shiloh Indus., Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, ¶ 8. Conversely, "appellate courts generally have no jurisdiction over 'interlocutory' orders, which are defined 'as "any order other than a final order.'"" *Dudley*, citing *E.B.P., Inc. v. 623 W. St. Clair Ave., L.L.C.*, 8th Dist. No. 93587, 2010-Ohio-4005, ¶ 44, quoting Black's Law Dictionary (9th Ed.2009) 1207.

{¶ 22} A contempt-of-court order is final and appealable only when a finding of contempt has been made *and* a penalty or sanction has been imposed. *Dudley* at ¶ 16, citing *Armstrong v. Armstrong*, 11th Dist. No. 2004-L-010, 2004-Ohio-1521, ¶ 4. However, a contempt order that imposes a jail sentence on a contemnor but provides the contemnor with the opportunity to purge his or her contempt, and thus avoid serving the jail sentence, is *not* a final, appealable order. *Dudley* at ¶ 16, citing *Janecek v. Marshall*, 11th Dist. App. No. 2010-L-059, 2011-Ohio-2994, ¶ 59.

{¶ 23} In this case, the trial court, in its 2010 entry, found Su in contempt for her failure

to comply with the provision in the parties' divorce decree requiring her to permit Forrest to retrieve his personal property from her residence by April 30, 2009. The trial court imposed two sanctions against Su for her contempt. The first required her to pay Forrest \$2,500 toward his attorney fees, which she has done. The other sanction required her to serve 30 days in jail. Su was given the opportunity to purge her contempt, and thus to avoid serving the 30-day jail sentence, by complying with the provisions in the magistrate's 2010 decision. Therefore, the trial court's decision to impose a conditional 30-day jail sentence on Su was not an order that left nothing for the trial court's future determination. *Dudley* at ¶ 12. To finalize its order, the trial court needed to determine whether Su, without proper justification, failed to purge herself of contempt. *Id.* at ¶ 16. Consequently, the trial court's 2010 entry finding Su in contempt and conditionally sentencing her to 30-days in jail was not a final, appealable order but rather an interlocutory order, which the trial court was free to reconsider and revise. See *Pitts*, 67 Ohio St.2d at 379, fn. 1; Civ.R. 54(B).

{¶ 24} Even if the trial court's 2010 entry was a final order, it would not change the result of our decision. Forrest's argument is dependent on his contention that the trial court's 2011 entry effectively reconsidered and reversed its 2010 entry. However, we disagree with Forrest's characterization of the trial court's 2011 entry. The trial court was confronted with a new issue as a result of Forrest's motion to impose sentence, namely, whether it was impossible for Su to comply with the trial court's 2010 entry because she already had delivered to Forrest the items of personal property in question. The trial court found in favor of Su and against Forrest on Su's impossibility defense. Therefore, we reject Forrest's contention that the trial court's 2011 entry merely reconsidered and reversed its 2010 entry in violation of cases like *Pitts*.

{¶ 25} Forrest alleges that "the entire discussion of the 'impossibility' defense is irrelevant" to the issues he is raising in this appeal. We disagree. In its 2010 entry, the trial

court adopted the magistrate's finding that 17 items of Forrest's personal property were in Su's possession and ordered Su to return those items to Forrest by December 31, 2010. Su returned two of the items but alleged that it was impossible for her to return the remaining 15 items because she had already returned them and thus did not have them or know where they were, and did not hide them, dispose of them or give them away. As long as Su was able to present sufficient evidence to prove that it was impossible for her to deliver to Forrest the remaining 15 items of his personal property, then she was entitled to prevail on Forrest's motion to impose sentence for her alleged failure to comply with the trial court's 2010 order. *See e.g. In re Guardianship of Hards*, 11th Dist. No. 2007-L-150, 2009-Ohio-1002, ¶ 36 (discussing affirmative defense of "impossibility of performance").

{¶ 26} In light of the foregoing, Forrest's first assignment of error is overruled.

{¶ 27} Forrest's second assignment of error is comprised of several parts. In the first part, he argues Su should have been precluded under the doctrine of collateral estoppel from re-litigating whether she still possessed the 15 items of his personal property, because that issue already had been litigated by the trial court in its 2010 entry. However, for the reasons stated above, the trial court's 2010 entry imposing a conditional jail sentence on Su was not a final, appealable order but rather an interlocutory order, which the trial court was free to reconsider and revise. Moreover, even if the 2010 entry was a final, appealable order, Forrest's motion to impose sentence presented the trial court with a new issue, i.e., whether it was impossible for Su to comply with the trial court's 2010 order. Therefore, the findings made by the trial court in its 2010 entry cannot be given collateral estoppel effect with respect to the new issue raised by Forrest's motion to impose sentence.

{¶ 28} In the second part of his second assignment of error, Forrest argues Su should have been precluded from re-litigating whether she was still in possession of certain items of his personal property, because she failed to timely object to the magistrate's 2010 decision

under Civ.R. 53(D)(3)(b). However, Su's failure to object to the magistrate's 2010 decision did not preclude her from raising her impossibility defense to Forrest's subsequently filed motion to impose the 30-day jail sentence against Su for her alleged failure to purge her contempt.

{¶ 29} In the third part of his second assignment of error, Forrest raises several arguments. First, he argues the trial court denied him his right to appeal its 2010 entry by effectively reversing that decision and allowing Su to re-litigate whether she still possessed certain items of his personal property. However, for the reasons stated earlier, the trial court's 2010 entry imposing a conditional jail sentence on Su was not a final order, and thus Forrest had no right to appeal from it. Moreover, even if the 2010 entry was a final order, Forrest has failed to offer a convincing explanation as to how he was prevented from appealing that order or how he has been materially prejudiced by not appealing from that order.

{¶ 30} Forrest also argues the trial court relied on or made "irrelevant, vague and speculative" findings of fact in its 2011 entry. In support of this argument, he points to the trial court's statement that it would "defer to the magistrate's decision that certain items [of Forrest's property] *could* have been [already] returned [to him.]" (Emphasis added.) He contends that the trial court's use of the word "could" was "vague and speculative" because "could" "refers to possibility or uncertainty." We find this argument unpersuasive.

{¶ 31} The trial court, in stating that certain items of Forrest's personal property "could" have been returned to him, was adopting the magistrate's finding that the items of Forrest's personal property "could have been delivered" to him before her 2010 decision. The magistrate, after making this finding, reviewed the evidence presented at the purge hearing, including the testimony of Su's son and son-in-law, who testified that they either delivered or tried to deliver the items to Forrest. The magistrate found "the evidence insufficient to

conclude that [Su] is still in possession of items belonging to [Forrest.]" The trial court adopted the magistrate's findings and conclusions on this matter. Thus, when the trial court's findings of fact are viewed in their proper context, it is apparent that the trial court did not speculate on whether Su still possessed items of Forrest's personal property, but instead, upheld the magistrate's findings, which the magistrate had made after weighing the evidence presented on the issue.

{¶ 32} The final argument Forrest makes in the third part of his second assignment is similar to the argument he raises in his third assignment of error, and therefore, we shall address them together. Forrest argues the trial court erred in finding the evidence "insufficient" to conclude that Su was still in possession of any item of his personal property. He further argues the trial court's finding indicates that the trial court inappropriately shifted to him the burden of proof on Su's impossibility defense.

{¶ 33} "Impossibility of performance is a valid affirmative defense to a contempt charge." *In re Guardianship of Hards*, 2009-Ohio-1002 at ¶ 36. Impossibility of performance occurs when an unforeseen event arises that renders a party's performance of an obligation impossible. *Id.* The performance of the obligation must have been rendered impossible without any fault of the party asserting the defense. *Id.* A party who raises the defense of impossibility of performance has the burden of proving it. *Id.* See also *In re Puroola*, 73 Ohio App.3d 306, 313-314 (3rd Dist.1991).

{¶ 34} In this case, the parties agreed that Su delivered to Forrest two of his 17 items of personal property by December 31, 2010. Su argued it was impossible for her to return the remaining 15 items because she already had returned them and thus did not have them or know where they were, and she did not hide them, destroy them, or otherwise dispose of them. As a result, the trial court was required to determine whether Su presented sufficient evidence to prove her affirmative defense of impossibility. However, rather than focusing on

this question, the trial court focused on whether sufficient evidence had been presented to show that any item of Forrest's personal property was still in Su's possession. While it was critical for Su to establish that none of the items listed in the trial court's 2010 entry were still in her possession to prove her impossibility defense, she also needed to show that her inability to return those items to Forrest was caused by reasons that were unforeseeable and no fault of her own. *In re Guardianship of Hards*, 2009-Ohio-1002 at ¶ 36.

{¶ 35} Furthermore, by adopting the magistrate's finding that the evidence was "insufficient to conclude that [Su] is still in possession of items belonging to [Forrest]," the trial court arguably shifted the burden of proof on the impossibility defense from Su, where it belonged, to Forrest, where it did not. *Id.* As stated above, the trial court was required to determine whether *Su* presented sufficient evidence to prove her affirmative defense of impossibility. However, by finding that the evidence was "insufficient" to conclude that Su was in still in possession of any item belonging to Forrest, and thus finding in favor of Su on the question of whether she had failed to purge her contempt, it appears that the trial court placed the burden on *Forrest* to present sufficient evidence to prove that the items of his personal property were still in Su's possession, when the burden of proof on that issue should have remained with Su. *Id.*

{¶ 36} The trial court adopted the magistrate's findings that (1) Su's son, Carl Thompson, and her son-in-law, Chad Randall, "both testified that the items were either delivered or attempted to be delivered [to Forrest] and that none of the items are currently at [Su's] residence[.]" and (2) the testimony of Thompson and Randall was to be accorded greater weight than the testimony of Forrest or Su. The trial court did not make specific findings with respect to the 15 items of Forrest's personal property in question. Despite the problems that we have with the trial court's decision, which we have set forth above, *e.g.*, improper shifting of the burden of proof, we nevertheless conclude that Su presented

sufficient evidence to prove her impossibility defense with respect to the following eight items:

{¶ 37} As to Item 44, a camp folding shovel, which Forrest valued at \$21, both Thompson and Randall testified that they delivered this item to Forrest. Forrest denied that Su had delivered to him any of the 15 items in question and specifically denied that Su had returned the shovel to him. Because the trial court determined that Thompson's and Randall's testimony was entitled to be accorded greater weight than Forrest's testimony, Su presented sufficient evidence to establish her impossibility defense with respect to this item, since there is evidence to show that the camp folding shovel already had been returned to Forrest, and thus it is now impossible for Su to return it.

{¶ 38} As to Item 57, "[s]ix woodwork clamps, iron pipe type," which Forrest valued at \$240, Thompson testified that two of the six clamps were delivered to Forrest and that he could not find the remaining ones. However, Randall testified that two of the clamps were delivered to Forrest and that Forrest had picked up the remaining four clamps. Because the trial court determined that Thompson's and Randall's testimony was entitled to be accorded greater weight than Forrest's testimony, Su provided sufficient evidence to establish her impossibility defense with respect to this item.

{¶ 39} As to Item 58, "[f]our woodwork clamps, Irwin brand," which Forrest valued at \$60, Randall testified that he saw these clamps at the home of Forrest's son, Noel. Because the trial court determined Randall's testimony was entitled to be accorded greater weight than Forrest's testimony, we find that Su presented sufficient evidence to establish her impossibility defense with respect to this item.

{¶ 40} As to Item 88, a "[s]hop pneumatic system — plumbing, fittings, valves, filters," which Forrest valued at \$1,200, Randall testified that Forrest retrieved all of these items. Because the trial court determined that Randall's testimony was entitled to be accorded greater weight than Forrest's testimony, we find that Su presented sufficient evidence to

establish her impossibility defense as to this item.

{¶ 41} As to Item 95, three steel work carts, which Forrest valued at \$300, Thompson testified that they delivered to Forrest the carts that were in Su's residence. Randall testified that they delivered to Forrest two of the carts and that Forrest had already taken the third. Forrest testified that while one of three carts had been returned, albeit in a severely damaged condition, the other two had not been returned. However, because the trial court found that Thompson's and Randall's testimony was entitled to be accorded greater weight than Forrest's testimony, we find that Su presented sufficient evidence to establish her impossibility defense as to this item.

{¶ 42} In addition to the foregoing, there were three other items that Thompson and Randall delivered to Forrest that Forrest agreed were his, but nonetheless insisted that the items were not the ones he was seeking from Su. For example, with respect to Item 68, two five-gallon cans of low volatile, cleaning solvent, which Forrest valued at \$230, Thompson and Randall testified that they delivered to Forrest two, five-gallon containers of solvent. Randall testified that Forrest agreed the two containers were his but stated they were not the ones he was looking for. Given the relatively modest value that Forrest himself placed on this item, Su's apparent good faith effort in trying to return this item to Forrest, and the trial court's determination that Thompson's and Randall's testimony was entitled to be accorded greater weight than Forrest's testimony, we conclude that Su presented sufficient evidence to establish her impossibility defense on this item.

{¶ 43} Likewise, as to Items 73 and 74, two heavy gauge extension cords, one yellow and one orange, which Forrest valued at \$119 each, Thompson and Randall testified that they delivered to Forrest all the heavy duty extension cords that were in Su's residence. Randall recalled that some of the extension cords they delivered were green and that one of them may have been black. Randall testified that Forrest told them the extension cords they

had brought were not the rights ones, but Forrest kept them anyway. Once again, given the relatively modest value of these heavy gauge extension cords, Su's apparent good faith effort to return them to Forrest, and the trial court's determination that Thompson's and Randall's testimony was to be accorded greater weight than Forrest's testimony, we find that Su presented sufficient evidence to establish her impossibility defense on these items.

{¶ 44} As noted earlier, the trial court, by adopting the magistrate's finding that the evidence was "insufficient to conclude that [Su] is still in possession of items belonging to [Forrest]," appears to have improperly shifted the burden of proof on the impossibility defense from Su to Forrest. However, this has no effect on our decision that Su established her impossibility defense as to the eight items discussed above. Whether or not Su, through Thompson and Randall, delivered those eight items to Forrest was a question to be decided by the trier of fact who was in the best position to judge the credibility of the witnesses who testified on the matter. The trial court adopted the magistrate's finding that Thompson's and Randall's testimony was to be accorded greater weight than Forrest's testimony. Therefore, it is clear that there was sufficient evidence to support Su's impossibility defense as to those eight items.

{¶ 45} Nevertheless, it is unclear from this record whether Su presented sufficient evidence to establish her impossibility defense as to the remaining seven items of Forrest's personal property. Consequently, we remand this matter to the trial court for further findings on these remaining seven items.

{¶ 46} As to Item 34, two "North Face" sleeping bags, which Forrest valued at \$916, the evidence showed that Forrest had sought the return of these sleeping bags but that Su attempted to deliver to Forrest an "Eastman" sleeping bag. Forrest refused delivery of the Eastman sleeping bag on the ground that it was an inferior substitute of the North Face sleeping bags. The trial court failed to address the difference in quality and value between

the two North Face bags that Su failed to return to Forrest and the Eastman sleeping bag she attempted to send in their place, and whether it was actually impossible for Su to return the North Face sleeping bags to Forrest. Consequently, this matter must be remanded to allow the trial court to determine whether Su presented sufficient evidence to establish her impossibility defense with respect to the two North Face sleeping bags.

{¶ 47} As to Item 47, a "[c]amp lightweight tent, polls [sic] and fly cover," which Forrest valued at \$569, Thompson testified that he attempted to deliver a "camp tent fly cover" to Forrest but Forrest refused to accept delivery of it, saying "it was the wrong thing." Randall testified that he and Thompson attempted to deliver to Forrest a tent that had been in a storage bin in Su's basement but Forrest refused to accept delivery of the tent because it was not the right one. Forrest testified that he and Su had two tents during their marriage, a large family tent and a small backpack tent. He testified he was seeking to have the small backpack tent returned to him, leaving the large family tent with Su. He testified that the only item delivered to him was the fly cover for the large family tent that belonged to Su, and that the small backpack tent has never been returned to him. Therefore, the trial court will have to address this issue on remand and determine whether Su presented sufficient evidence to establish her impossibility defense with respect to this item.

{¶ 48} As to Item 54, original equipment parts for a 1956 Corvette, which Forrest valued at \$12,000, Thompson testified that he remembered delivering to Forrest some car parts, but did not know if they were Corvette parts. Randall testified that he delivered "all of the original [Corvette] equipment parts" of which he was aware. Forrest acknowledged in his testimony that some of the 1956 Corvette original parts were returned to him but insisted that the "main boxes" of those parts had not been returned. As a result, the trial court will have to address this issue on remand and determine whether Su presented sufficient evidence to prove her impossibility defense on this item.

{¶ 49} As to Item 56, "[s]olvent parts cleaner, pumps, switches and chemicals," which Forrest valued at \$2,100, Item 62, "[s]everal circular saw blades," which Forrest valued at \$150, and Item 75, "[s]mall work clamps, Irwin brand," which Forrest valued at \$75, Thompson and/or Randall testified that they did not see any of these items at Su's residence, and Su provided no other evidence to support her impossibility defense as to these three items. It should also be remembered that the trial court adopted the magistrate's finding that Thompson's and Randall's testimony was to be accorded greater weight than the testimony of *both* Su and Forrest. Therefore, the trial court will have to address these matters on remand and determine whether Su presented sufficient evidence to establish her impossibility defense on these three items.

{¶ 50} As to Item 83, three "[s]hop office white boards," which Forrest valued at \$230 each, for a total of \$690, both Thompson and Randall testified that one shop white board was delivered to Forrest. Forrest acknowledges that one of the shop white boards was delivered to him but contends that the other two were not. Consequently, the trial court will have to address this matter on remand and determine whether Su presented sufficient evidence to establish her impossibility defense on this item.

{¶ 51} If the trial court determines on remand that Su failed to present sufficient evidence to establish her impossibility defense as to any of these items, the trial court is to determine what sanction, if any, should be imposed on Su as a result. The trial court and the parties should keep in mind that Forrest, in the 2009-2010 contempt action, waived his right to recover "for any loss, damage or harm caused to his property[.]" stating that if Su fails to return his property or has damaged it, he will proceed against her in a "separate civil action." We note that the question of whether or not Forrest will be *entitled* to bring such a "separate civil action" is not before us on this appeal, but it is a question that will have to be addressed if Forrest ever brings such an action.

{¶ 52} It should also be noted that during oral arguments, Forrest backed away from his insistence that a jail sentence be imposed on Su, saying that he was never really interested in seeing a jail sentence imposed on her. However, this assertion is belied by the fact that Forrest brought a motion to impose the 30-day jail sentence on Su. Moreover, Forrest asserted in his written closing argument following the hearing held on that motion, i.e., the purge hearing, that Su "will only start to comply with the Court's orders if the [30-day jail sentence] is imposed." In any event, the trial court will have discretion to decide what sanction, if any, to impose on Su if it finds against her on her impossibility defense with respect to the seven items that are the subject of this remand.

{¶ 53} In light of the foregoing, Forrest's second assignment of error is overruled in part and sustained in part, and Forrest's third assignment of error is sustained to the extent indicated.

{¶ 54} In his fourth assignment of error, Forrest argues the trial court erred in failing to address the damage caused to his Korean wooden chest while it was in Su's possession, which Forrest alleges is a valuable antique. During oral arguments, Forrest alleged that the trial court's failure to address this issue constituted "intellectual dishonesty." We disagree.

{¶ 55} Initially, we agree that as a general proposition, a party should be permitted to recover against his or her former spouse for any damage the former spouse intentionally or negligently causes to the party's personal property while it is in the former spouse's possession. However, the record in this case shows that Forrest expressly informed the magistrate that he was *not* seeking recovery for the damages to the Korean wooden chest and that he was only pointing out those damages to prove that Su had no regard for either the trial court's orders or him.

{¶ 56} Forrest, in his opening statement at the purge hearing, told the magistrate that Su had returned two of the 17 items she was required to return to him by December 31,

2010. One of the two items returned was the Korean wooden chest, which had sustained damage during the time it was in Su's possession, apparently, because Su left it where it was exposed to the elements. Forrest told the trial court that those two items "are not in issue[.]" but added:

[t]he only thing we would say is in furtherance of the contempt and disdain she shows for the Court's Orders and for [him] is that she has ruined and completely damaged [the Korean wooden chest]. She left it out in the weather, * * * poured oil all over it [and] it is thoroughly and completely damaged. *We're not seeking recovery for that today, we're not asking for that, but we point that out only to show you that she has no regard for [my] property, even the property that she had to return.* (Emphasis added.)

{¶ 57} Forrest concluded his opening statement by emphasizing that "[t]he only thing * * * for [the magistrate] to decide today is whether or not [Su has failed to return] the items you ordered returned subsequent to your Order, that's it, and there is no other issue that we have raised ... [sic] that's all, that they have not returned the items you ordered to be returned."

{¶ 58} In his objections to the magistrate's 2011 decision, Forrest argued "[t]he magistrate erred in not addressing the destruction of [the Korean wooden chest], which while returned, was returned in a ruined state." However, while Forrest argued in his objections that the trial court erred in not *addressing* the destruction of the Korean wooden chest, he did not allege that the trial court erred in not *awarding* him damages for the alleged "destruction" of the Korean wooden chest. Undoubtedly, Forrest did not expressly ask for an award of such damages because he was aware that he had expressly told the magistrate in his opening statement at the purge hearing that he was "not seeking recovery for [those damages] today" and that he was bringing those damages to the magistrate's attention only to establish that Su had no regard for the trial court's orders or for his property.

{¶ 59} Forrest had a practical reason for attempting to show the trial court that Su had no regard for the trial court's orders or for him: Forrest was seeking, at that time, to have the

30-day jail sentence imposed on Su for her alleged failure to purge herself of contempt. As noted earlier, while Forrest stated during oral arguments that imposition of the jail sentence against Su had never been that important to him, this assertion is belied by the fact that Forrest brought the motion to impose a jail sentence against Su for her alleged failure to purge her contempt. Moreover, Forrest stated in his written closing argument following the purge hearing that Su "will only start to comply with the Court's orders if the [30-day jail sentence] is imposed."

{¶ 60} Additionally, Forrest never presented any evidence as to the reduction in the value of the Korean wooden chest as a result of the damages it sustained while it was in Su's possession. Moreover, Forrest's decision not to seek recovery for the damages to the Korean wooden chest was consistent with his stated intention to seek recovery for any damages to his property in a separate civil action against Su. Under these circumstances, the trial court did not err in failing to "address" the damage caused to the Korean wooden chest while it was in Su's possession.

{¶ 61} Accordingly, Forrest's fourth assignment of error is overruled.

{¶ 62} The judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded to the trial court for further proceedings consistent with this opinion and the laws of this state.

POWELL, P.J., and HENDRICKSON, J., concur.