2013 IL App (2d) 120139-U
No. 2-12-0139
Order filed February 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF DENNIS F. RADWANSKI,	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
	)	No. 08-P-309
(Daniel Radwanski and Dennis F. Radwanski,	)	
Petitioners-Appellees and Cross-Appellants, v.	)	Honorable
Sherry Radwanski, Respondent-Appellant and	)	Thomas C. Dudgeon,
Cross-Appellee).	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in: (1) granting respondent wife partial summary judgment on issue of ownership of incorporated businesses; and (2) determining, following trial, ownership of various assets. Affirmed.

¶ 2 Decedent, Dennis F. Radwanski, died intestate in 1999. Nine years later, a probate estate was opened and the Public Administrator was ultimately appointed as independent administrator of decedent's estate. Prior to trial on two citations to recover assets (the first brought by the Public Administrator and the second brought by petitioners Dennis and Daniel Radwanski, decedent's sons) against respondent wife, Sherry Radwanski, the trial court granted Sherry partial summary judgment on the issue of ownership of a family corporate entity. Subsequently, following a bench trial on both

citations, the court entered findings on the ownership of various family and business assets. Sherry moved to reconsider, and the court denied her motion. Sherry appeals, and petitioners cross-appeal. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Decedent, Dennis F. Radwanski, died intestate on January 6, 1999, at age 57 after sustaining injuries in a tow truck accident. He was survived by his wife, respondent Sherry Radwanski, his sons, petitioners Dennis A. Radwanski and Daniel A. Radwanski, and his daughter, Michelle Radwanski (who is not a party to this appeal).

¶ 5 From about 1970, decedent worked in the towing business and started a business known as District, which was run as a sole proprietorship. In 1986, decedent incorporated some of his operations into District Equipment, Inc., which was renamed District Crane, Inc., one year later. Decedent was the sole shareholder of District Crane; Sherry was a director and secretary. In 1994, decedent incorporated other aspects of his business into several companies: District Auto Rebuilders, Inc., District Towing, Inc., and District Auto Parts, Inc. All of these companies were fully owned by District Enterprises, Inc. At this time, decedent did not incorporate other aspects of the business, specifically, District Recovery or Justice Suzuki.

¶ 6 Between 1994 and 1998, the District companies did not have corporate books, stock certificates, or corporate registers. In late 1998, decedent and Sherry met with attorney Richard Janci on two occasions to discuss business planning.[1] Janci testified at his deposition that decedent's corporate records were "a mess" and "essentially nonexistent or next to nonexistent." Janci stated that decedent "told me and he was the man [*sic*], he was the president and that his wife Sherry was

[1]Dennis and Daniel also attended one meeting.

the secretary and that the two of them owned the District companies." When Janci asked decedent who owned District Enterprises, decedent answered, "I don't know. Sherry and I own it." When asked how they owned it, decedent could not answer. Janci gave decedent a primer on joint tenancy and testified that he was not absolutely certain that decedent understood the concept ("He seemed to"), but "he did indicate to me that his major investments besides the business, his house, and it turns out later that the real estate that the businesses were located on were owned by him and his wife, and he indicated to me it was in joint tenancy with rights of survivorship." Janci prepared the corporate books to reflect this desire. At neither meeting did anyone state that Dennis or Daniel had an ownership interest in the businesses. Janci's understanding was that the stockholders, officers, and directors of the corporations did not change from the time of their incorporation through decedent's death. He came to this conclusion from conversations with decedent and Mark Halper, the couple's accountant and the person who handled the corporate work, and from reviewing the businesses' articles of incorporation and annual reports. According to Janci, Halper confirmed that decedent and Sherry were the owners of District Enterprises and the other District companies.

¶ 7 Stock certificate No. 1 for District Enterprises lists decedent and Sherry as owning 1,000 shares in joint tenancy with rights of survivorship. Janci could not recall if he retroactively prepared the certificate or if it was an original, but stated that he would not have added the designation "JTWROS." He cancelled certificate No. 1 after decedent died. In Janci's view, the certificate memorialized the fact that a joint tenancy "pre-existed, as told to me by [decedent] and by Halper." Stock certificate No. 2, which Janci prepared, reflects that Sherry owned 1,000 shares as of November 4, 1999. (The meeting minutes and stock register also showed decedent and Sherry owning 1,000 shares in joint tenancy.)

¶ 8 By the end of 1998, Janci had updated the corporate books for the corporations, excluding District Recovery. Janci arranged a drop-off and told decedent that he would leave the records (for decedent to sign) with the security guard in the lobby of Janci's building. Someone picked up the documents. (At about the same time, Janci also incorporated District Recovery and updated its books and left the books for decedent to pick up.) After decedent's death, Janci inquired with Sherry if the documents had been signed and she stated that they had. Janci testified that he spoke with Sherry on the telephone soon after decedent passed away: "I'm sure, because of the timing involved, that when I heard about Dennis' death, that I said, 'I hope he signed all those papers that I got to him,' and my recollection was she said he had." Sherry was very upset at this time. In the minutes for the 1999 annual meeting of District Enterprises, the document notes that decedent had passed away and that the sole remaining shareholder, Sherry, would carry on the business.

¶ 9 Janci received back the signed corporate books after decedent's death. At the time he prepared the pre-1999 corporate records, Janci omitted decedent's middle name from the documents; he believed that Dennis's name contained the "Jr." suffix.

¶ 10 Both before and after decedent's death in 1999, Dennis and Daniel worked at the business. Sherry fired Dennis in February 2008 and, later, Daniel quit.

¶ 11 On April 3, 2008, nine years after decedent's death and two months after his termination, Dennis petitioned for letters of administration for decedent's estate.

¶ 12 On June 5, 2008, in a separate matter, Dennis and Daniel sued Sherry and some District entities (chancery case No. 08-CH-2122), alleging, *inter alia*, conversion of District (*i.e.*, Enterprises, Rebuilders, Recovery, Towing, and Crane) stock and other real and personal property. Specifically, in count II, they alleged that, following decedent's death, Sherry converted property (namely, District

stock) that would have been in decedent's estate at the time of his death to her own use and has attempted to change title to property to her own name and use it to the exclusion of Dennis and Daniel. This was based, according to decedent's sons, on an alleged oral contract between them and Sherry, whereby Sherry agreed to convey a 1/3 interest in District to each of them if they agreed to work for District.

¶ 13 In the present matter, Sherry moved to dismiss, on the basis of *laches*, the petition for letters of administration, arguing that granting the petitions would be a useless act because the applicable limitations period for the recovery of any property in decedent's estate had run and that none of the property can be recovered. On July 28, 2008, the trial court denied Sherry's motion to dismiss.

¶ 14 On September 19, 2008, Sherry cross-petitioned for letters of administration to be issued to John Kapecki, her brother, arguing, *inter alia*, that the probate statute gives preference to her (over her children, the only other heirs) nomination choice. On July 30, 2009, in an agreed order, however, the trial court appointed petitioner, the Public Administrator, Thomas Leinenweber, as administrator of decedent's estate. The court also declared that decedent died intestate and left as his only surviving heirs Sherry and the couple's three children: Michelle, Dennis, and Daniel.

¶ 15 In his inventory submitted to the court, the Public Administrator noted that the heirs disputed ownership of District Enterprises, which Dennis had estimated was worth $3 million, certain real and personal property (including four airplanes, several automobiles, a yacht, and a crane (1986 P&H T300 crane)), and $700,000 in cash kept at the family residence. He estimated that the estate was worth about $4 million (including District Enterprises, but excluding commercial property in Justice). Further, on October 22, 2009, the Public Administrator petitioned for the issuance of a citation to discover assets and obtain information against Sherry concerning District Towing, LLC,

and its subsidiaries as well as other estate assets. 755 ILCS 5/16-1 (2008). Sherry responded that *laches* and the statute of limitations barred recovery of the property by citation or otherwise. The administrator replied that *laches* did not apply to the estate (because it was a separate legal entity created in 2008) and that there is no statute of limitations concerning the filing of a petition for letters of administration. On December 22, 2009, the trial court ordered that the citation to discover assets be issued against Sherry, including the records of District Enterprises and its subsidiaries for the years 1993 through 2009. The citation was entered on May 10, 2010.

¶ 16 On June 17, 2010, the Public Administrator petitioned for the issuance of a citation to *recover* assets against Sherry. He argued that decedent was the sole owner (either sole shareholder or sole proprietor) of District Enterprises and its subsidiaries and was in the process of updating the corporate records, which had been neglected for years, but died prior to completing the task. The Public Administrator also took the position that the airplanes, automobiles, $700,000 in cash, and two parcels of real estate in Monee belonged to the estate.

¶ 17 In a February 8, 2011, agreed order, the parties agreed to the disposition of certain assets, including the yacht, automobiles, and aircraft. On February 28, 2011, the Public Administrator petitioned for fees and contribution (with Sherry paying one-half of his fees and Dennis and Daniel paying one-half).

¶ 18 On March 9, 2011, Dennis and Daniel moved the court to hear *their* citation to recover assets against Sherry, requesting that she turn over to the Public Administrator stock in all of the District companies, Justice Suzuki and its assets, the 1986 P&H T300 crane, tools, and that she pay the estate $700,000 in cash that allegedly belonged to decedent. (The Public Administrator's amended citation, filed on the same day, made an identical request.) In her response, Sherry stated that no response

was required (because it alleged a legal conclusion) to the allegation that decedent never had a partner. Sherry further asserted that, to the extent it purported to allege facts, she denied that allegation "in so far as 'partner' includes a co-sole proprietor such as Sherry was with Decedent."[2]

¶ 19 On April 8, 2011, the trial court granted the Public Administrator's petition for fees and costs and approved $28,519 to be paid from the estate's assets.

¶ 20 On July 1, 2011, Sherry moved for partial summary judgment as to the Public Administrator's amended citation to recover assets, arguing that she was entitled to summary judgment as to the District Enterprises stock because the stock was either owned by Sherry and decedent in joint tenancy or that decedent was never a stockholder in the company; Sherry maintained that the stock could not have been part of the estate. She further argued that the estate's claim to the crane and various tools was barred by the five-year statute of limitations in section 13-205 of the Code of Civil Procedure. 735 ILCS 5/13-205 (West 2010). (On July 5, 2011, Sherry moved for partial summary judgment on Dennis and Daniel's citation to recover assets, raising the same arguments.) The Public Administrator responded that the following material factual questions precluded summary judgment: (1) were the shares placed in joint tenancy prior to decedent's death; (2) if so, whether they were certificated or uncertificated; and (3) did decedent properly execute and authorize the shares? In an affidavit attached to Dennis and Daniel's response, Dennis averred that none of decedent's signatures in the corporate books or stock certificates were actually his father's

[2]The Public Administrator also alleged that there are no valid documents reflecting that anyone other than decedent owned District. In her response, Sherry asserted that the foregoing allegation required no response because it alleged a legal conclusion. She further responded that, to the extent the allegation alleged facts, she denied them.

signatures. Dennis stated that he signed the documents at Sherry's direction based on her representation that Dennis would be an owner of District. In another affidavit attached to their response, Tam Kaiden, a forensic document examiner, stated that she examined the District Enterprises corporate book and stock certificate No. 1. She opined that decedent did not sign the documents.

¶ 21 On August 22, 2011, the trial court granted in part Sherry's motion for partial summary judgment on the stock ownership issue.[3] The court determined that a key indicator of ownership is not the issuance of a stock certificate, but of registration on the corporation's stock registry. It found that the District registry clearly showed that 1,000 shares were held by decedent and Sherry in joint tenancy prior to decedent's death. The court found that the absence of decedent's signature on the books was a "red herring" because the authentication page did not state that the decedent's signature was required to be effective. Also, the court stated that, to the extent the records needed to be certified, Sherry's signature as the corporation's secretary was sufficient. Thus, the court found that Sherry, as the surviving joint tenant, "automatically" became the sole owner of the stock upon decedent's death. The court further noted that the issuance of a new stock certificate in Sherry's name, therefore, was not a transfer of ownership because she, as a joint tenant, previously owned 100% of the shares as an undivided interest. Next, as to the statute of limitations argument, the court granted the Public Administrator's motion to strike that affirmative defense. (The issue of ownership of the pre-incorporation entities was not addressed at this stage of the proceedings.)

[3]Dennis and Daniel and the Public Administrator, challenge, *inter alia*, this ruling in their cross-appeals.

¶ 22 On the same day, Sherry moved *in limine* to bar use of various of the couple's joint tax returns[4] because they had been produced only one week earlier at Sherry's deposition. After brief argument, it was determined that the returns had been produced during Dennis' deposition, but had been given to the court reporter, who retained them. Sherry's counsel had not retrieved them and had forgotten that they had been produced. Accordingly, Sherry withdrew her motion *in limine*. During trial, Dennis and Daniel utilized a binder of proposed trial exhibits, which included as exhibits Nos. 10, 11, and 12, Sherry's joint returns for the years 1994-1996 (and to which her motion had been directed). (At trial, no witnesses were questioned about the exhibits, they were never offered into evidence, and they were not admitted into evidence.)[5]

¶ 23 On August 23, 2011, a nine-day bench trial commenced on the two citations to recover assets against Sherry. Sherry testified that she met decedent in 1969 or 1970. At that time, he worked at his company, called District, which he had started as a sole proprietorship. Decedent performed towing and body work. Sherry was responsible for the paperwork for the company. At the time of

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[4]Sherry claimed that she did not have copies of the documents and that her sons took her copies in early 2008 and never returned them.

[5]Further, when the court reviewed with counsel the documents that were admitted into evidence, neither the parties nor the court mentioned that exhibit Nos. 10, 11, or 12 had been admitted. Also, when attorney Bruce Rose (Sherry's counsel) attempted to question Elaine Moeller, an accountant at Klesman and Halper (the couple's accounting firm), about a purported transfer of assets to the corporations and marked (a different copy of) the 1994 District Enterprises return as respondent's exhibit No. 1, the court sustained an objection to the questioning and that exhibit was never admitted into evidence. Sherry does not appeal this ruling.

decedent's death, there were several corporations, including a holding company known as District Enterprises and several subsidiaries. After decedent's death, Sherry continued to run the businesses. Dennis and Daniel worked for the businesses. Sherry was their supervisor, although, sometimes, they were "their own bosses." She fired Dennis in February 2008, and Daniel quit.

¶ 24 A. $700,000 Cash

¶ 25 Addressing the $700,000 in cash, Sherry testified that she kept this money in a cardboard box in the basement of the family home in Downers Grove. The box was located in a 20-inch-wide corridor between an exterior side wall of the built-in swimming pool and the basement wall. The corridor is lined with shelves containing miscellaneous supplies. The house had an alarm system, and few people had the code to it. Sherry last saw the cash in December 2007/February 2008; she could not recall if it was there at the time of decedent's death in 1999. Both Sherry and decedent put the money there, and now it is gone. Sherry does not know where the money went. Only she and decedent knew about the money, and, after he died, "[n]obody, but my children, my boys knew there was money in the house." Sherry never reported the missing money to police, filed any insurance claim, or told anyone else that the money was missing. Sherry never contacted the police because there was no evidence of forced entry, the alarms were not activated, and no locks were broken. "It had to be someone on the inside that took it." She asked Dennis about the money, and he told Sherry that they would talk about it at a later time. However, at her deposition, she stated that she did not talk to her sons about the money.

¶ 26 Sherry believes that her sons took the money because there was no forced entry and they had keys to the house and knew the alarm code; also, after decedent's death, they knew cash was kept in the house. Neither Dennis nor Daniel admitted to her that they took the money. Sherry denied

changing the locks at her home in November 2007; she explained that there was work done on the alarm system at that time to replace the electrical beams. Sherry also testified that her brother, John Kapecki, had keys to her house, but did not have the alarm code. About the time the money went missing, Sherry had work done on the house, including roofing work, plumbing, and satellite television. In February 2008, Sherry fired her sons from District. She was upset and angry with them. Sherry met Rick Rubin, her boyfriend, in 2006. Her sons do not get along with Rubin. Rubin had access to Sherry's residence in late 2007 and early 2008; however, she was always present. The only other persons with access to the residence were Sherry and her sons.

¶ 27 If she had work performed on the house, she was always present. Sherry changed the garage security code after February 2008. Various family members had their own key codes for the alarm system to enable them to enter the house. The purpose of this arrangement was so that Sherry could check the keypad to learn who came in and out of the house. When the $700,000 went missing, Sherry did not check the keypad to ascertain whether her sons or someone else had ever entered the house. After February 2008, Dennis and Daniel still had the garage opener. She did not see them in the house after February 2008, except on two occasions after February 2008, while Sherry was in the house, her sons came to the house to pick up personal items and, on the second occasion, to show a potential buyer an aircraft. She explained that, if someone could get into the garage, they could get into the area where the cash was kept.

¶ 28 Sherry denied that she ever had a coin collection or that her coin collection was ever stolen from her home; she also denied ever telling her sons that District employees came into her basement and stole her coin collection. After decedent's death, Sherry started gambling at a gambling boat. She denied that she gambled away the $700,000. Sherry explained that gambling "was something

to do to relax." On balance and over time, she has broken even. She denied that she ever gambled three to five times per week; according to Sherry, she gambled twice per week for one or two years after decedent died. Currently, she gambles "[o]nce in a while."

¶ 29 Sherry explained that the cash was District money (*i.e.*, all of the District entities). Taxes were paid on the cash; however, instead of depositing the money in a checking account, the couple kept it at home. Sherry and decedent never deposited the cash into a bank because decedent "didn't like banks" and, after his death, Sherry did not do so because she "didn't like banks either." "We didn't need it, we put it aside." Sherry and decedent began putting the money aside in the 1980s or 1990s. Sherry would repay, without interest, to the box any money she took out of it. Decedent would sometimes take money from the cash horde and use it for personal reasons. Sherry kept a ledger, and these informal loans from the corporations would be repaid. Pre- and post-incorporation funds were kept together, and monies were taken from both as needed.

¶ 30 Sherry denied that the reason the money was kept at the residence was to avoid paying taxes on it. She explained that her accountants told her that, so long as taxes were paid on the money, it could be kept at home. She could not name the accountant who told her so, other than naming the firm (Klesman, Halper & Co., P.C.). Sherry testified that the $700,000 was not reflected on any single tax return because it was accumulated over several years. Sherry agreed that the $700,000 is not shown on the 1999 corporate tax return for District Enterprises. Over several years, Daniel lent District $380,000 to buy several pieces of equipment. They did not use the $700,000 in the basement because it was "easier" to take it from Daniel and repay him. "That way we wouldn't have to deplete all the money in the District savings account."

¶ 31 Sherry denied that one of the primary purposes of the cash was to pay inheritance taxes. Sherry did not recall receiving a letter from her attorney to that effect and explained that her attorney "might have misunderstood" her; according to Sherry, she told attorney Bruce Rose that, if she did not have sufficient personal funds, she could use some of the basement money to pay inheritance taxes because it was already in cash form. In 2000, she was concerned about estate taxes, as reflected in a letter to attorney Tim Carroll concerning estate and business matters he was handling.

¶ 32 In 1998, Sherry and decedent met with attorney Janci to review their corporate books and discuss corporate affairs. Janci reviewed the corporate records and corrected errors. Janci prepared records and stock certificates that were dated 1994 and provided them to Sherry in 1998. According to Sherry, decedent did receive income from District and used that income to cover family expenses. However, that money was kept separate from the basement cash box, such as in his pocket or the bedroom.

¶ 33 A wrongful death action was brought by decedent's estate for his accidental death. Sherry received $175,000 in settlement, and her children waived receipt of any of the proceeds in her favor. Attorney Burton Weinstein was the estate's attorney in that case. In November 2001, Halper, the couple's accountant, sent Weinstein a letter (and copied Sherry), informing him that "the Radwanskis" would draw money out of the companies and the accountants would reclassify it as various forms of income, including rental income, interest income, and salary (1994 through 1998).

¶ 34 Sherry testified that Dennis and Daniel helped run the businesses, but were not officers of any of the corporations, even though the 2000 corporate tax return for District Enterprises lists them as such. According to Sherry, the tax return is incorrect. In filling out a 2001 towing list application

with the Cook County sheriff's police department, Sherry listed herself, Dennis, and "Dan" as owners of District Recovery.

¶ 35 Sherry testified that decedent had no business partners. She later clarified that, when she stated that decedent had no partners in the business, she meant to exclude herself because she considered herself a co-owner. Sherry never paid any estate taxes on decedent's estate.

¶ 36 In late 1993, Sherry and decedent met with Halper, their accountant. Prior to Janci's hire, Halper handled the companies' corporate affairs. At the meeting, the parties discussed the creation of the District corporations and that it was going to be accomplished by exchanging the business assets of the unincorporated business for stock in District Enterprises.

¶ 37 Finally, Sherry's testimony addressed her daughter Michelle. Sherry testified that, in 2009, she threatened to take back and sell Michelle's house, which Michelle was given in settlement (of, presumably, decedent's estate).

¶ 38 Michelle testified that the locks at the Downers Grove residence were changed between Thanksgiving and Christmas 2007. Michelle's boyfriend, Mike, went to the store with her uncle John Kapecki to purchase new locks for the house around Thanksgiving. Michelle has a key to the front door of Sherry's residence, but does not know the alarm code. Michelle agreed that the only lock that was changed in November 2007 was that to the outside door of the "maid's" room (which is located in the airplane hangar).

¶ 39 Until the suits were filed in this case, Michelle was unaware of the $700,000 in her mother's house. Michelle did not take the money from the house and does not know who did. The only asset Michelle has received from her father's estate is a Winnebago motor home; she is also due to receive $30,000 from her brothers as part of an earlier resolution of part of the case.

¶ 40 Elaine Moeller, an accountant at Klesman and Halper, testified that she has prepared tax returns for the District companies since 2005. Prior to that time, she may have assisted in gathering information and preparing returns for the companies. Since 2005, Sherry has provided information to Moeller to prepare returns. Addressing exhibit No. 49, the 1999 corporate tax return for District Enterprises and its subsidiaries (which was admitted into evidence over no objection), Moeller testified that Sherry never told her about $700,000 in cash that District Enterprises had that was kept in a cardboard box. If she was aware of that cash, she would have listed it on the return. The cash assets actually listed on the 1999 return are only $93,433. She also explained that retained earnings are not the same as cash, but could be cash. The 1999 corporate return for District Enterprises reflects at Schedule M-2 $164,208 of retained earnings at the end of the year. (These are an accumulation of the earnings, net of any adjustments, like distributions of the corporation.) These are not cash. Moeller further explained that, if a draw was taken out and considered a loan to a shareholder, it would be listed on line 7 (loans to stockholders). On the 1999 return, no amount is listed on that line for the beginning of the year.

¶ 41 Dennis testified that he was about 23 or 24 years old when decedent died and that Daniel was age 21. Prior to decedent's death, Dennis worked at the District companies, helping with sales, driving trucks, operating a crane or tow truck, and picking up parts. After decedent's death, Dennis's role "drastically" changed. He ran the day-to-day operations with Daniel and Sherry; he was in charge of hiring and firing employees and of negotiating and entering into contracts. Sherry's role remained the same; she was in charge of the paperwork and monies. Prior to his termination, Dennis worked about 80 to 100 hours per week at District; sometimes, he slept in his truck or in the

apartment over the shop. Prior to terminating him, Sherry told him "numerous times" that he was an owner of the corporation.

¶ 42 Dennis further testified that he was unaware his parents kept cash in the house. He did not take the money and has no knowledge that anyone did so. Prior to Thanksgiving 2007, Dennis attempted to enter Sherry's home, but could not gain entry to the maid's door. Prior to February 2008, if he used his garage door opener, he could still not access the interior of the house because he could not unlock the doors; he also needed an alarm code. When Dennis was a teenager, Sherry mentioned that her coin collection was stolen from the basement; she suspected some heating-and-air-conditioning workers. Dennis further testified that, after decedent died, Sherry began going to gambling boats three to five times per week. She continued to do so up until the time she terminated Dennis.

¶ 43 Daniel testified that he lived at his parents' Downers Grove residence until 2006 or 2007. After decedent's death, Daniel worked for District, doing towing and logistics of the heavy-duty towing, light-duty towing, purchasing equipment, "specking out" trucks, and hiring and firing drivers. He and Dennis ran District from 1999 through February 2008. Addressing a state tollway contract, Daniel testified that he, Sherry, and Dennis were all present at the tollway offices in Downers Grove on August 28, 2001, to sign the contract and that all three signed at the same time on the company's behalf.

¶ 44 Daniel denied taking the $700,000 and is unaware who took it. In the early 1990s, Sherry mentioned to the family that her coin collection had been stolen and that she suspected that a worker who had worked on the house had taken it. Around Thanksgiving 2007, Daniel was locked out of

Sherry's house. After decedent's death, Sherry asked Daniel to make loans to District to purchase equipment. She repaid the loans. Sherry represented to Daniel that District did not have the money.

¶ 45 B. Tools

¶ 46 Sherry testified decedent was mechanically inclined and liked tools. There were tools in the residence's basement and the hangar. Decedent also kept tools at the shop in Justice (where District and its subsidiaries were located). Decedent was primarily responsible for the tool purchases; however, the head mechanic, Bob Zollner, purchased tools, as did other workers in the body shop. Decedent's favorite brands were Snap-on and Craftsman. The Snap-on tool truck would come to the shop (never the residence) every one or two weeks; decedent would pay by cash or (business) check. Currently, there are a lot of tools in the basement of the residence, including woodworking tools. If decedent used his woodworking tools at the shop, he would bring them back home after he completed a project. Sherry further testified that her sons used the tools, including occasionally after decedent died. Sherry does not repair aircraft or cars. Addressing exhibit No. 39, which Dennis prepared, listing various tools he believed were decedent's personal tools, Sherry testified that 99% of the tools on the list were purchased with a District check. However, she did not produce any such checks. Invoices were submitted to the accountants for a business tax deduction.

¶ 47 Addressing the tools, Sherry did not prepare a list of the tools in her home on the day decedent passed away. The items in exhibit No. 39, with the exception of the drill press and the Snap-on 2000 toolbox (of which there are two; one of which is located at the business), are located at the residence. Sherry explained that certain carpentry and woodworking machinery on the list was purchased by her and decedent; she clarified that she meant they purchased the machines with District funds (because she assumed that decedent and herself "would be District"). Sherry denied

that she started claiming that the items belonged to District after her sons filed their citation to recover assets.

¶ 48 According to Sherry, a few years before his death, decedent remodeled the second floor offices of District to create an efficiency apartment. He "probably" used District funds to purchase tools to perform the work. For some time, there was a machine shop in the basement of the auto parts entity. Decedent used the machinery and tools for District work. However, the location was damp, and, after decedent passed away, the machines were moved to the Downers Grove home. Also, decedent had concerns about theft from the offices.

¶ 49 Dennis testified that decedent kept tools at decedent's home. Decedent purchased Craftsman and Snap-on brand tools for personal use (and kept them in the residence's workshop and hangar areas). He did not purchase tools of those brands for use at the District companies; the mechanics and tow truck drivers at the shop were required to use their own tools. Any tools that decedent purchased for District were of a lesser quality than his personal tools, which were primarily aircraft and woodworking tools, not automotive or towing tools. Dennis was present when decedent purchased many of the items and observed that decedent paid cash for them. All but one of the items (*i.e.*, a hot dog wagon cart, which was at the shop) were at the residence at the time of decedent's death. Whenever the District companies purchased tools, they purchased them through District Auto Parts so that they could obtain the "jobber's price." Dennis, who has a pilot's license, testified that District did not own any aircraft and that none of the District companies did woodworking as part of their business; thus, there would be no reason for them to own any such tools.

¶ 50 Addressing exhibit No. 39, Daniel agreed that the items on the list belonged to decedent and not to District. With the exception of the hot dog wagon carts, all items were located in decedent's

home when Daniel lived there. Further, all items were used by decedent for his personal use. Decedent always paid cash for his tools.

¶ 51 John Lesmeister, a truck driver and public safety officer, testified that he grew up knowing the Radwanski family and that decedent taught him about the towing business. Lesmeister observed decedent buying Snap-on tools; he purchased them for his business. He sold to decedent woodworking tools and saw decedent use them to remodel the District offices; however, he did not observe decedent using them to do other work at the District offices. Lesmeister also helped decedent move the tools to decedent's home in the early 1990s. For four or five years before that, he observed the tools being used in the course of District's business. However, he conceded that woodworking was not District's business.

¶ 52 C. 1986 P&H T300 Crane

¶ 53 Addressing the 1986 P&H T300 crane, Sherry stated that District Crane owned about two cranes (possibly including a P&H T300 crane) at the time of decedent's death. The entity still owns cranes. Occasionally, Dennis and Daniel operated the cranes; they are more familiar with their operation than is Sherry. Addressing a manufacturer's certificate of origin for the T300, Sherry stated that it is like a title document and is sufficient evidence of ownership of a crane. The document reflects that the purchaser was District Crane, Dennis Radwanski on October 29, 1985. (District Crane was incorporated in 1986.)

¶ 54 Sherry further testified that decedent exclusively owned District Crane prior to its incorporation. The crane was never transferred out of his name. Sherry denied that decedent kept the crane in his name to protect it from a lawsuit against District Crane. As to the T300 crane, Sherry testified that she did not own any part of it when it was purchased in 1985. Sherry denied

ever hearing decedent say that it was a good thing that he never signed over the T300 crane to District Crane.

¶ 55 Dennis testified that he had conversations with decedent about the transfer of title of the crane. Decedent stated that it was a good thing that the crane was in his name because a wrongful death suit had been filed against District Crane and the family feared losing the crane.

¶ 56 D. Justice Suzuki Auto, Inc., and Vehicles

¶ 57 Sherry testified that Justice Suzuki, Inc., was incorporated in August 1999 (*i.e.*, after decedent's death); prior to its incorporation (and at the time of decedent's death), decedent owned Suzuki as a sole proprietorship. On the parties' 1997 joint return, decedent is listed as the owner of Justice Suzuki. Currently, District Enterprises is Suzuki's sole shareholder. Because it buys and sells automobiles and motorcycles, Suzuki has a dealer's license. When it was a sole proprietorship, the license was in decedent's name; when it was incorporated, the license remained in decedent's name until after February 2008. Sherry continued to use the same logbook that was used when the company was a sole proprietorship. Sherry also continued to use the dealer's license that was in decedent's name for the newly incorporated Justice Suzuki Auto until about 2009 or 2010 when she changed it to her name.

¶ 58 Sherry is unaware what Suzuki's assets were at the time of decedent's death or if it owned any automobiles, except a Chevy Monte Carlo. The company had a checking account, but Sherry is unaware of the balance in the account at the time of decedent's death. There was a flood (she could not recall when) in the auto parts store's basement, and the checkbooks and accounts were destroyed. However, at her deposition, Sherry testified that she could not locate the checkbook, not

that there was any flood. Sherry could not recall who worked at Justice Suzuki at the time of decedent's death.

¶ 59 Michelle testified that she worked for District Auto Parts until January 2011. She also kept the logbook and checkbook for Justice Suzuki and is familiar with the dealer's license for the company. The license was changed about one year before trial: it was changed from decedent's name to the corporation's name. Michelle testified that the bills of sale for Suzuki were kept in a filing cabinet on the main floor of the auto parts store, not in the basement. Also, the checkbook was not kept in the basement, but in the filing cabinet. The basement of the auto parts store did flood, but the checkbook for Suzuki did not get destroyed in the flood; she saw it after the flood. Monies were deposited into the same account after the company was incorporated. Checkbook statements were sent to the accountant each month.

¶ 60 According to Michelle, the family drove Suzuki vehicles with open titles/dealer plates, including a 1998 Blazer Tahoe and an older Monte Carlo. Older checkbooks and registers were given to the accountants. Sherry does not know how to transfer title to a vehicle. After the other District entities acquired vehicles, some would get transferred to Suzuki to be sold; Suzuki would be reimbursed for fees and costs; and the balance wold be paid to the corporation (of which Sherry was in charge). The logbook/Secretary of State log is kept to show the dealer's inventory at any given time.

¶ 61 Dennis testified that bills of sale for vehicles sold by Suzuki were kept in a filing cabinet in the District office on the main floor. After a checkbook was completely filled in, it would be boxed and stored in either the basement of the parts store, on a shelf, or in the break room above the shop. The parts to a 1957 Chevy automobile were kept next to the storage boxes in the parts store

basement. Dennis identified a photograph, taken March 7, 2011, that depicted bankers' boxes on the bottom shelf of a basement storage unit and that contained the old check registers for Justice Suzuki. The first shelf is off of the floor. Only vehicles actually sold by Justice Suzuki would be entered into the logbook; open-titled items would not be listed. Exhibit 47 is the title to a Chevy Camaro. Decedent (on behalf of Justice Suzuki) purchased the vehicle for Daniel from Hinsdale Bank in February 1998. It is in open title. Sherry kept the titles to the vehicles held in open title. Some were kept in a file drawer in the District office and some are in a safe. Dennis also identified documents reflecting open titles (*i.e.*, in Suzuki's name) to a Chevy Blazer/Tahoe that decedent drove prior to his death and a certificate of origin to a 1987 Monte Carlo Super Sport that was transferred to Suzuki.

¶ 62 Richard Rubin, a homicide detective with the Chicago police department and Sherry's boyfriend, testified that, prior to his police career, he owned a towing service, used car lot, and a service station: he also had a dealer's license. Rubin is familiar with the Secretary of State's logs for new and used vehicle dealers. Several weeks before trial, at his request, Sherry provided Rubin with the Suzuki logbook, which covered the period from the early 1980s to 2011. Rubin and Sherry examined the contents of boxes in shelving units in the Suzuki basement. He did not discover any bills of sale for vehicles shown in the Suzuki logbooks. He did not look in the office that is upstairs from the auto parts store.

¶ 63 Sherry testified that the documents in the upstairs office did not relate to Suzuki. Sherry further testified that there were two to five boxes upstairs from the District offices that Sherry did not inspect; she became tired. Vehicles owned by Suzuki that have not been sold were not entered

into the logbook. However, the parties stipulated that the Monte Carlo appears in the logbook; it has not been sold.

¶ 64 E. Trial Court's Ruling and Subsequent Proceedings

¶ 65 After the parties submitted written closing arguments, the trial court, on September 30, 2011, found that the: (1) $700,000 is an estate asset[6] and that Sherry was not negligent for its loss; (2) tools listed on exhibit No. 39, excluding the Snap-on tools hot dog cart that is kept on District premises, are estate property; (3) T300 crane is an estate asset; and (4) three vehicles (1997 Chevy Camaro, 1987 Chevy Monte Carlo, and 1997 Chevy Tahoe) were estate assets.

¶ 66 On October 28, 2011, Sherry moved to reconsider and, separately, to substitute complete copies of Dennis and Daniel's exhibit Nos. 10-12 (joint tax returns for the years 1994-1996) "so the record contains the true versions of the documents instead of the heavily redacted ones submitted at trial." Also on October 28, 2011, the Public Administrator filed his second petition for fees and expenses and, on November 11, 2011, Dennis and Daniel filed their own petition for fees and expenses. Sherry filed a response in opposition to Dennis and Daniel's petition, arguing that they did not show that the request had first been submitted to the Public Administrator and that the

[6]The court found that decedent was the sole owner of the *pre-incorporation* businesses: "Prior to 1994 when the businesses were incorporated, the funds were the personal property of Dennis Sr., as the businesses had no separate legal identity during those years." (Again, in its summary judgment ruling, the trial court found only that, *upon his death* in 1999, the various District *corporations* were jointly owned by both decedent and Sherry and that Sherry was the sole owner of the stock upon decedent's death.)

petition did not break out what work had been performed for the estate versus for Dennis and Daniel (because many entries appeared to duplicate those in the Public Administrator's petition).

¶ 67 On February 1, 2012, the trial court denied Sherry's motion to reconsider, finding that the: (1) partnership argument (*i.e.*, that decedent and Sherry were partners pursuant to the partnership statute) was a legal theory raised for the first time in her motion;[7] and (2) $700,000 cash was an estate asset, is now lost, and Sherry was not negligent as to its loss. Also on that day, the trial court: (1) denied the motion to substitute exhibits, finding that the request was tardy and was in essence a motion to reopen proofs; (2) granted Dennis and Daniel's petition for fees and expenses in the amount of $40,177.32 (after subtracting $2,543.75 that related to work on the summary judgment motions; the court found that Dennis and Daniel's counsel "conducted most of the heavy lifting" at trial); and (3) granted the Public Administrator's petition in the amount of $24,021.05 (apportioned 55.56% to Sherry and 22.22% each to Dennis and Daniel; the court found that apportionment was proper because both sides of the family contributed to the need to appoint the Public Administrator).

¶ 68 II. ANALYSIS

¶ 69 A. Statute of Limitations

¶ 70 Sherry first raises the statute of limitations she pleaded in her summary judgment motion and argues that the trial court erred in striking that affirmative defense (and denying that portion of her

[7]When the court inquired of Sherry's counsel as to whether he had in fact raised the issue during trial or in closing argument, counsel replied: "I did not make the legal argument, judge, because the facts seemed apparent so." When further pressed as to whether he mentioned it in his written closing argument, counsel replied: "Other than the reference to the businesses being quote, unquote, their businesses, no, not as a legal argument."

summary judgment motion). She claims that, once the limitations period ran, title in the personal property in her possession that was once decedent's vested in Sherry or District. We reject her argument.

¶ 71 According to Sherry, the premise underlying petitioners' citations to recover assets is that Sherry maintained exclusive possession and control of decedent's personal property (*i.e.*, the crane and tools) since his death more than nine years before his estate was opened. She concedes that there is no express statute of limitations in the Probate Act of 1975 (Probate Act). 755 ILCS 5/1-1 *et seq.* (West 2010). However, Sherry argues that petitioners' claims are barred by the five-year limitations period in section 13-205 of the Code of Civil Procedure, which provides that:

> "actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2010).

¶ 72 Sherry argues that *In re Estate of Lashmett*, 369 Ill. App. 3d 1013, 1018 (2007), in which the Fourth District held that section 13-205 of the Code of Civil Procedure did *not* apply to bar recovery of an estate asset, was wrongly decided. She contends that *Lashmett*: (1) contains no discussion or analysis of its holding; and (2) is contrary to the rationale behind statutes of limitations and their establishment of finality as to legal title. We disagree.

¶ 73 First, the *Lashmett* court did explain its rationale. After noting that a citation on behalf of an estate pursuant to section 16-1 of the Probate Act (755 ILCS 5/16-1 (West 2010) (citation on

behalf of estate)) is utilized as a vehicle by which the court can order the return to the estate of wrongfully withheld property, the court stated that:

> "The trial court's jurisdiction sitting in probate extends to all property of the decedent, no matter where it may be found *or when*. *** To allow the statute of limitations to bar recovery of an asset of the estate would serve to defeat the jurisdiction of the probate court and effectively restrict the statutory and common-law power of the court to supervise the administration and disposition of estates." (Emphasis added.) *Id.*

¶ 74 Second, as to Sherry's argument that *Lashmett* precludes finality of probate proceedings, we note, as petitioners suggest, that an undesirable result of applying the limitations period in section 13-205 of the Code of Civil Procedure is that it could encourage fraud, delay, and concealment in the administration of estates. For example, a person who possesses the personal property of a decedent could wait and conceal those assets from an heir or beneficiary for five years or delay the opening of an estate for five years and thus deprive the estate of its right to collect those assets. Thus, it is not clear that application of a limitations period itself is without concerns.

¶ 75 Further, we reject Sherry's argument that the Probate Act provides that Article XIII of the Code of Civil Procedure applies to all proceedings under the Probate Act. Sherry misstates the statute. Section 1-6 of the Probate Act states that the "Civil Practice Law" applies to all proceedings under the Probate Act. 755 ILCS 5/1-6 (West 2010). The Civil Practice Law is only Article II of the Code of Civil Procedure and is not synonymous with the entire code. 735 ILCS 5/2-101 through 5/2-2201 (West 2010); see also 735 ILCS 5/1-101(b) (West 2010) ("Article II [of the Code of Civil Procedure] shall be known as the 'Civil Practice Law' and may be referred to by that designation").

¶ 76 In summary, we reject Sherry's claim that the statute of limitations in section 13-205 of the Code of Civil Procedure bars petitioners' claims.

¶ 77 B. Ownership of Pre-incorporation Businesses

¶ 78 Next, Sherry argues that the trial court's finding following trial that decedent was the sole owner of the *pre-incorporation* businesses was against the manifest weight of the evidence. We reject this claim.

¶ 79 The objectives of a citation proceeding under the Probate Act are to obtain the return of personal property belonging to the estate but in the possession of, or being concealed by, others or to obtain information to recover estate property. *In re Estate of Kolbinger*, 175 Ill. App. 3d 315, 322 (1988). The probate court is empowered to determine the title and right of property and enter such order as the case requires. *Id.* To recover property in a citation proceeding, an executor, for example, must initially establish a *prima facie* case that the property at issue belongs to the decedent's estate; the burden then shifts to the respondent to prove by clear and convincing evidence his or her right to possession. *In re Estate of Casey*, 155 Ill. App. 3d 116, 121-22 (1987). A trial court's finding that certain property belongs to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence, as the trial court in such proceedings is authorized to determine all questions of title, claims of adverse title, and property rights. *In re Estate of Joutsen*, 100 Ill. App. 3d 376, 380 (1981); see also *In re Estate of Teall*, 329 Ill. App. 3d 83, 88 (2002). A trial court's ruling is against the manifest weight of the evidence only if it is unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evident from the record. *In re Estate of Savio*, 388 Ill. App. 3d 242, 247 (2009). Under the manifest-weight standard, we give

deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and the witnesses. *In re D.F.*, 201 Ill. 2d 476, 498-99 (2002).

¶ 80 Here, after trial, the court found that, prior to 1994 (when they were incorporated), the District companies "had no separate legal identity apart from the decedent." It further found that, in 1985, District Crane was a sole proprietorship or business name for decedent and did not become a separate legal entity apart from decedent until it was incorporated in 1994. Finally, the court also specifically determined that Justice Suzuki was a sole proprietorship at the time of decedent's death.

¶ 81 Sherry argues that the trial court's finding as to the pre-incorporation ownership (of District Enterprises, which is the primary focus here[8]) was erroneous and led to further erroneous findings, such as those concerning ownership of the tools, the $700,000, and the crane. She maintains that there was no evidence that decedent was the sole owner of the businesses and that the evidence (particularly her testimony) actually supported a finding that she and decedent jointly owned the pre-incorporation businesses. Sherry points to testimony reflecting that, both before and after the businesses' incorporation, both she and decedent worked at the businesses; Sherry did the paperwork and managed the finances, and decedent performed towing and crane work. She also points to exhibit No. 16, the accountant's 2001 letter, which states that "the Radwanskis" drew monies out

[8]As to Justice Suzuki, Moeller testified that the 1997 joint return (exhibit No. 13) lists decedent as the owner of Justice Suzuki. Similarly, Sherry testified that decedent owned Justice Suzuki as a sole proprietorship prior to its incorporation. Finally, as to District Crane, Sherry testified that decedent exclusively owned District Crane prior to its incorporation in 1986 (and was the sole shareholder after incorporation).

of the businesses and they would be reclassified as income to them (rental income, interest, and then salary) and reported on their tax returns.

¶ 82 Sherry further contends that she and decedent were partners in the pre-incorporation businesses. She also claims that this (*i.e.*, the partnership-law based argument) was not, as the court determined, actually a new legal theory raised for the first time in her motion to reconsider. Sherry argues that this theory *necessarily flows* from the evidence adduced at trial and is consistent with her express denial in her pleadings that decedent was the sole owner of the pre-incorporation businesses and their assets. Petitioners (Dennis, Daniel, and the Public Administrator), respond that: (1) Sherry forfeited this argument because she failed to raise it until she filed her motion to reconsider; and (2) the evidence overwhelmingly supported the court's finding.

¶ 83 We agree with petitioners that Sherry has forfeited her partnership argument and we further conclude that the court's findings were not against the manifest weight of the evidence. As to the partnership argument, Sherry argued for the first time in her motion to reconsider that she and decedent were partners as a matter of law under the Uniform Partnership Act (1997) (805 ILCS 206/100 *et seq.* (West 2010)). However, after the trial court announced its ruling denying Sherry's motion to reconsider because she raised it for the first time in her posttrial motion, her counsel acknowledged that he "did not make the legal argument" (because it was essentially, in his view, obvious from the facts, a position we reject outright as it would require the trial court to speculate as to parties' potential theories of recovery) and also conceded that he did not raise it in his closing argument. Because she raised the issue for the first time in her motion to reconsider, Sherry has forfeited her right to raise this issue on appeal. *Krueger v. Lewis*, 359 Ill. App. 3d 515, 520 (2005); see also *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008) (arguments presented to a trial court

for the first time in a motion to reconsider are deemed waived); *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572 (2006) (improper to raise either new legal theories or new factual arguments in motion for rehearing).

¶ 84 As to the court's findings concerning the pre-incorporation ownership, it is undisputed that, prior to meeting Sherry, decedent started a towing business known as District and ran it as a sole proprietorship. Sherry's testimony as to her status after she met and married decedent was not consistent and we cannot conclude that the trial court erred in finding that Sherry was generally not credible. Sherry testified both that decedent had no business partners and, later, that she meant to exclude herself (from this statement) because she considered herself a co-owner. Further, her testimony contained no specific facts that reflected that she was co-owner with decedent; other than the fact that the couple shared income from the businesses, she merely testified in conclusory fashion that she was a co-owner of the pre-incorporation businesses. We reject Sherry's argument that decedent's accountants, Klesman and Halper, corroborated her testimony, as she relies on statements they made at their depositions and not at trial (*i.e.*, Sherry never elicited any such testimony from them at trial). Further, the accountant's letter is dated 2001 and we decline to read into it anything with respect to the pre-incorporation period. We also reject Sherry's argument, which is based on substitute copies of exhibit Nos. 10 through 12, that joint assets were transferred in 1994 to District Enterprises and that this reflects the couple's joint ownership of the pre-incorporation businesses. First, neither the actual nor substitute exhibit Nos. 10 through 12 were utilized at trial or admitted into evidence. Second, any asset transfer, among other things, reflects only an intent that the *incorporated* businesses were jointly owned and has no bearing on the pre-incorporation ownership of the entities. (Sherry did not produce any pre-1994 tax return.) Furthermore, the couple's 1994

through 1996 joint returns list decedent's occupation as self-employed and Sherry's as housewife. In a Schedule C (Profit or Loss from Business) attached to several of the returns, Sherry is listed as proprietor of a business named "Sherry Radwanski" that provides only office services.

¶ 85 C. Ownership of $700,000

¶ 86 Next, Sherry argues that the trial court erred in finding that all of the missing $700,000 belonged to decedent's estate. She contends that there was no evidence of how much of the money was accumulated prior to the incorporation of the businesses, between the time of incorporation and decedent's death, or from decedent's death to the theft in early 2008. We reject her argument.

¶ 87 The trial court found that the missing $700,000 was an asset of decedent's estate at the time of his death, that he accumulated the monies over many years, that it was originally cash that he collected from customers (initially as sole proprietorships and later as corporations), and that the funds were decedent's personal property prior to the businesses' incorporation because "the businesses had no separate legal identity during those years." The court further found that decedent did not report the cash that he accepted for work and that he regularly brought home cash from the businesses. It found incredible Sherry's testimony that the cash transactions were all reported to her and that she maintained meticulous records for the accountants. "Neither the couple's personal tax returns nor those of the corporations reflect cash amounts even remotely approaching the $700,000 Dennis had amassed prior to his death." The court determined that any monies taken after 1994 were converted by decedent for his personal use. The court also found that the couple treated the money as their personal property, which was evidenced by the fact that they kept track of how much money the companies borrowed and when it was repaid. The court noted that, if the money belonged to the businesses, there would be no need to repay the funds.

¶ 88 Sherry argues that the evidence was clear that she controlled the basement cash reserve, tallied the daily business receipts and decided how much would be put into the reserve, and that decedent asked Sherry for money if he needed funds for a purchase. She notes that there are three periods during which she would have added funds to the reserve: (1) pre-incorporation; (2) post-incorporation until decedent's death; and (3) post-decedent's death. Any funds added after decedent's death could not belong to his estate. Sherry maintains that any funds added between the January 21, 1994, incorporations and decedent's death (the second period) could not belong to decedent because the funds were generated through the use of corporate assets from corporate opportunities and, therefore, those funds belong to the corporations. As to the pre-incorporation accumulation, Sherry argues that any funds added during this period belong, as a matter of law, to the partnership of decedent and herself. Thus, half of the pre-incorporation funds belong to Sherry because, upon dissolution of the partnership, each partner is entitled to be paid his or her share of any amounts remaining after the payment of all partnership liabilities. 805 ILCS 206/401(a)(1), 807(b) (West 2010). Sherry challenges the court's finding that the $700,000 is not reflected in any tax returns. Sherry also notes that there was no testimony breaking down the pre-incorporation and post-incorporation balance of the cash reserves prior to decedent's death or what amounts Sherry added after decedent's death. Thus, she urges, petitioners have failed to carry their burden.

¶ 89 Petitioners respond that the evidence clearly reflected that the $700,000 was accumulated before decedent died, noting that Sherry testified that she could not recall adding any money to the reserve after decedent passed away. They further contend that the monies came from draws taken by decedent, as evidenced by: (1) a February 4, 2009, letter from Sherry's attorney (exhibit No. 30), where Sherry stated that the primary purpose of the funds was to pay decedent's estate taxes; (2) a

statement by her attorney in his opening statement that the cash reserve "was not the Decedent and Sherry Radwanski's personal property," which is an admission that binds Sherry; (3) a November 14, 2001, letter from Mark Halper, District's accountant, (exhibit No. 16) in which he states that the couple would draw money out of the District businesses and those draws would be classified as income to them, but where only decedent earned any salary, as reflected in exhibit Nos. 10, 11, and 12, the corporate tax returns, and where no proof was offered of any loans (Moeller testified that there were no loans in 1999); (4) the 1999 corporate return for District Enterprises, which lists as cash held by the company only $93,433; and (5) Sherry's testimony that, if the businesses needed cash, she treated any withdrawal from the cash reserve as a loan, thus, undermining her argument that the funds were company property.

¶ 90 We conclude that the trial court's finding that the $700,000 belonged to the estate was not against the manifest weight of the evidence. Contrary to Sherry's claims that the cash was District money, that the pre- and post-incorporation funds were kept together (because the pre-incorporation assets were carried forward as assets of the corporations), and that the money was not to be primarily used to pay inheritance taxes (claiming that her attorney "might have misunderstood" her), there was ample evidence supporting the trial court's findings.

¶ 91 First, as to the pre-incorporation period, we upheld above the court's finding that decedent alone owned the pre-incorporation businesses. It necessarily flows that the monies accumulated during this period, which indisputably came from the businesses, belonged to decedent. Sherry's sole argument as to this period is based on her assertion that the couple jointly held in partnership the District companies, a position, again, we rejected above.

¶ 92 Second, as to the period from incorporation to decedent's death, we reject Sherry's claim that the evidence clearly reflected that monies were accumulated during this time and belonged to the businesses. Sherry offers no reasonable explanation for why (unspecified) loans to the companies from the reserve were paid back. As the trial court found, if the monies were District property, there would be no need to repay the loans. (Further confusing this issue is that Moeller testified that no loans were listed on the District Enterprises 1999 tax return.) Moeller also testified as to the 1999 return that Sherry never told her about the $700,000 and that, if she had, Moeller would have included those monies on the return (which lists only $93,433 in cash assets). Moeller stated that the retained earnings are listed as $164,208 and that this amount is not cash. Daniel testified that, after decedent's death, Sherry asked Daniel to make loans to District to purchase equipment, representing to him that the company did *not* have the money. Further, the admittedly conflicting testimony that the funds were accumulated to pay potential inheritance taxes also belies Sherry's argument that the funds belonged to the businesses. Finally and most significantly, other than Sherry's testimony, which the court found incredible, there was no affirmative evidence showing that any monies were added to the basement cash horde during this period.

¶ 93 As to the tax returns, Sherry testified that the $700,000 was not reflected on the returns because it accumulated over several years and that it is not shown on the 1999 corporate return for District Enterprises, which reflects $164,208 in retained earnings. However, in her motion to reconsider, Sherry argued for the first time that the 1999 corporate return specified $863,990 in accumulated depreciation on the general corporate property as of the end of 1998; thus, she reasoned, the cash reserve remained a corporate asset. We find this argument forfeited because Sherry raised it for the first time in her posttrial motion. Forfeiture aside, we note that Moeller's testimony

conflicted with Sherry's. Moeller did not state that the cash horde would have been reflected on the return as accumulated depreciation. We find no error with the trial court's resolution of this conflict.

¶ 94 Finally, given our conclusion that the monies belonged to decedent through the date of his death, they necessarily remained estate property after his death pending resolution of the issues in this case. Also, because we uphold the trial court's determination that the funds were always decedent's alone, we reject Sherry's claim that the trial court was required to apportion the funds accumulated pre-incorporation versus those accumulated post-incorporation.

¶ 95 D. Ownership of Crane and Tools

¶ 96 Sherry next argues that the trial court erred in finding that the crane and tools belonged to decedent's estate rather than to the corporations and/or that at least one-half interest belongs to Sherry as co-owner of the pre-incorporation businesses. For the following reasons, we reject her argument.

¶ 97 The trial court made extensive findings as to this property. Addressing the crane, the trial court found that the certificate of origin for the crane, which was purchased in 1985, lists "District Crane" and "Dennis Radwanski" as owners and that the reverse side of the document did not reflect any transfers or assignments. In 1985, District Crane was a sole proprietorship operated by decedent. The company was incorporated in 1994. The court found that the crane was decedent's property at the time of its purchase and at the time the certificate of origin was executed. As to the period after incorporation, the court rejected Sherry's argument that the crane automatically became company property, finding that no documentation was provided to substantiate this claim and that the uncontroverted facts reflected that decedent took no steps to transfer ownership of the crane from himself to the company before he died. The court further noted that the evidence showed that

decedent made statements years later when the company was named as a defendant in a wrongful death action that he was glad that the crane was still in his name.

¶ 98 As to the tools listed on exhibit No. 39, the trial court found that, except for the Snap-On Tools hot dog cart kept on District premises, they were all owned by decedent personally at the time of his death and are, therefore, estate assets. The court assessed as factors: (1) the source of funds used to purchase the tools; and (2) decedent's treatment of the tools and the location where he kept them, with the latter factor being more significant in the court's eyes. As to the source of funds, the trial court found that Sherry's testimony directly conflicted with Dennis and Daniel's testimony on this aspect and that none of their testimony was credible. "The Radwanski sons would have this court believe they were present every time their father made a tool purchase and Sherr[y] would have this court believe that her husband always reported to her which tools were purchased for business use so that she could keep track of the funds for the business's accountants." The court found that, in light of the incredible testimony and lack of documentation from Sherry, it could not determine whether or not corporate funds were used to purchase the tools. Thus, it relied on the second factor.

¶ 99 The court found significant that, with the exception of the hot dog cart, all of the tools were kept at the Downers Grove residence. The court noted that many of the tools were for aircraft work or woodworking, which were not the specialties of the District businesses; it also noted that the residence's basement contained workshops and that the residence abutted an aircraft landing strip. To the extent the tools were used in the businesses, the court found, they were loaned to them and returned to the residence.

¶ 100 Sherry argues that the trial court should have accepted her argument that she was a partner in the pre-incorporation businesses and that the crane and tools had been transferred to and had

become assets of the corporations upon incorporation. She further argues that, even if the equipment had not been transferred to the corporations, she was still a one-half owner. Given that we have rejected her co-owner argument, we reject this claim.

¶ 101 As to the tools, Sherry and (some of) Lesmeister's testimony conflicted with Dennis and Daniel's testimony on this issue. It was for the trial court to resolve this conflict and, based on our review, we cannot conclude that the court's findings were against the manifest weight of the evidence. It was undisputed that most of the tools on exhibit No. 39 were at the residence and that they included woodworking and aircraft tools, which the evidence overwhelmingly showed were not used by the District businesses and, thus, were decedent's personal items. As to the crane, Sherry herself testified that decedent exclusively owned it prior to District Crane's incorporation and that the crane was never transferred out of decedent's name. Accordingly, the trial court's findings were not against the manifest weight of the evidence.

¶ 102 E. Motion to Substitute Complete Copies of Tax Returns

¶ 103 Sherry next argues that the trial court erred in denying her motion to substitute complete copies of personal tax returns for the redacted copies that comprised petitioners' exhibit Nos. 10 through 12. We reject her argument.

¶ 104 We review evidentiary rulings for an abuse of discretion. *In re Estate of Michalak*, 404 Ill. App. 3d 75, 90 (2010). Similarly, the denial of a motion to reopen proofs is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *In re Marriage of Davis*, 215 Ill. App. 3d 763, 776 (1991). An abuse of discretion occurs where no reasonable person could agree with the trial court's position. *In re Estate of Wright*, 377 Ill. App. 3d 800, 803-04 (2007). If evidence offered for the first time in a posttrial motion could have been

produced at an earlier time, it is not an abuse of discretion for the court to deny its introduction into evidence. *Davis*, 215 Ill. App. 3d at 776.

¶ 105 Sherry maintains that she did not seek to add new documents, but to add complete ones. She complains that there was no indication during trial that the exhibits were incomplete and that a comparison with the "original versions" reveals Sherry's co-ownership with decedent of the pre-incorporation businesses as well as the real property on which they are located.

¶ 106 Petitioners respond that the trial court correctly recognized that Sherry's motion was one to reopen proofs and properly denied it. They note that: (1) exhibit Nos. 10 through 12 were never offered or admitted into evidence; (2) they were only included in the heirs' exhibit binder because it was prepared prior to the court's summary judgment ruling (when it was anticipated that they would be necessary to show ownership in District); and (3) no witness was asked any questions concerning the exhibits. Petitioners contend that Sherry's motion is merely an attempt to introduce new evidence that she and her counsel forgot to use at trial or decided not to use in a calculated risk.

¶ 107 We conclude that the trial court did not abuse its discretion in denying Sherry's motion. Sherry offered no explanation for her failure to use her substitute exhibits during trial. Most significantly, we fail to see any reason for a substitution of exhibits that were never used at trial or offered or admitted into evidence. Further, Sherry's claim that she merely sought to introduce into the record complete copies of the returns is unavailing. First, Sherry's substitute exhibits do not appear to be complete. As petitioners note, Sherry's substitute exhibit No. 12 (the couple's 1996 return) contains only 7 pages, whereas the version of the same return used at Dennis' deposition contained 20 pages (including his form W-2, showing that he was the only person to draw a salary from District that year). Second, she belies this claim by *also* submitting in her briefs that the

evidence establishing her joint ownership of the pre-incorporation businesses "is of the utmost importance" to her case.

¶ 108 Sherry agrees that proofs can be reopened if there is a reasonable explanation given for failing to use an exhibit at trial. However, again, she does not offer an explanation for her failure to do so. Instead, she notes that the trial court should also have considered whether granting the motion would have resulted in surprise or unfair prejudice to petitioners and if the evidence is of the utmost importance to the movant's case. See *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1077 (2007). In the absence of any explanation for failing to offer the exhibits during trial, we decline to consider this factor.

¶ 109 F. Dennis and Daniel's Motion for Fees and Expenses

¶ 110 Next, Sherry argues that the trial court erred in granting Dennis and Daniel's motion for fees and expenses incurred for the benefit of the estate. The Probate Act provides for reasonable compensation to an attorney for his or her services. 755 ILCS 5/27-2 (West 2010). The trial court granted Dennis and Daniel's petition in the amount of $40,177.32, specifically noting that Dennis and Daniel's counsel "conducted most of the heavy lifting" at trial. We review the court's decision to grant fees and expenses in citation proceedings for an abuse of discretion. *In re Estate of Elias*, 408 Ill. App. 3d 301, 322 (2011). For the following reasons, we conclude that the trial court did not abuse its discretion in granting the motion.

¶ 111 Sherry first asserts that no request for fees and expenses was first submitted to the Public Administrator for his approval. She next argues that the court erroneously allowed double billing against decedent's estate, where there was no breakout of the time Dennis and Daniel's counsel spent on behalf of the estate, as opposed to time spent pursuing the citation to recover on his own clients'

behalf. Sherry asserts that much, if not all, of the time spent and costs incurred by Dennis and Daniel's counsel was not the result of efforts that the Public Administrator would otherwise have performed so that a savings to the estate resulted. She claims that the work was duplicative to that of the Public Administrator and resulted in double billing to the estate instead of a savings to it because the Public Administrator was awarded fees and expenses for the same efforts.

¶ 112 First, we reject outright Sherry's argument that Dennis and Daniel failed to submit their fees to the Public Administrator. Sherry cites no relevant authority for the proposition that the trial court does not have the ultimate authority to determine and award attorney fees. Further, we note that the Public Administrator filed no objection to Dennis and Daniel's fee request and did not object at the hearing.

¶ 113 Second, we reject Sherry's claim that Dennis and Daniel failed to distinguish between time spent on their behalf and time spent on behalf of decedent's estate. Her complaint that this was "particularly obvious" upon reviewing the trial time, where both Dennis and Daniel's counsel and the Public Administrator's counsel "were billing for precisely the same time as they sat through the trial" is not well-taken as it suggests that one of the parties was not entitled to have their counsel represent them at trial on both citations. Further, the court found that Dennis and Daniel's counsel "conducted most of the heavy lifting" at trial, a finding that is supported by the record.

¶ 114 Further, as to the pre-trial period, we note that the Public Administrator was not appointed until July 30, 2009, whereas Dennis and Daniel incurred fees beginning in April 2008 when they petitioned for letters of administration for decedent's estate. Sherry does not contest that Dennis and Daniel assisted the Public Administrator in gathering evidence and advanced costs for him to conduct his investigation, both after he was appointed and after he filed his citation against Sherry

in October 2009. Finally, she also does not challenge that the joint efforts resulted in the recovery of over $1 million in assets for the estate.

¶ 115 In summary, we cannot conclude that the court abused its discretion in granting Dennis and Daniel's petition for fees and expenses in the amount of $40,177.32.

¶ 116 G. Cross-Appeals: Summary Judgment Ruling and Motion Taken with the Case

¶ 117 In their cross-appeals, petitioners first argue that the trial court erred in granting Sherry partial summary judgment on the basis of finding that decedent and Sherry held joint title to District Enterprises. They contend that material factual questions precluded summary judgment on this issue.

¶ 118 Initially, we address a motion taken with the case. Sherry has moved this court to dismiss petitioners' cross-appeals as to the District Enterprises stock issue. She argues that the portions of petitioners' cross-appeals challenging the summary judgment ruling should be dismissed because petitioners are barred by *res judicata* from re-litigating that issue, where the identical issue was also decided in Sherry's favor in the chancery case (in a judgment that became final and appealable on September 26, 2011, but from which no appeal was taken). On June 5, 2008, Dennis and Daniel sued Sherry and some District entities, alleging, *inter alia*, conversion of District (*i.e.*, Enterprises, Rebuilders, Recovery, Towing, and Crane) stock and other real and personal property. In count II of that complaint, they alleged that, following decedent's death, Sherry converted property (namely, District stock) that would have been in decedent's estate at the time of his death to her own use and has attempted to change title to property to her own name and use it to the exclusion of Dennis and Daniel.

¶ 119 We conclude that Sherry has forfeited her *res judicata* argument. Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any

subsequent cause of action between the parties or their privies on the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The doctrine of *res judicata* applies to all matters that were actually decided in the original action, as well as to matters that could have been decided. *Id.* However, *res judicata* may be forfeited by the failure to timely raise the defense. *Thornton v. Williams*, 89 Ill. App. 3d 544, 547-48 (1980); see also *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1038 (2001). Sherry raises the doctrine for the first time in her motion in this appeal. Sherry did not raise the defense in her summary judgment motion, and the trial court made no findings on the issue. Sherry mentioned the chancery case in the memorandum she filed in support of her summary judgment motion, but stated only that the trial judge in the chancery case had granted her summary judgment against Dennis on the same theory (*i.e.*, his ownership claim on the District Enterprises stock), finding that Sherry, on the date of decedent's death, owned all of the stock in joint tenancy with decedent and remained the sole shareholder. She did not mention the *res judicata* doctrine, or argue what, if anything, the chancery court's finding implied for the current case. Accordingly, because Sherry did not raise her *res judicata* argument below, we conclude that it is forfeited and we deny Sherry's motion to dismiss those portions of the cross-appeals.

¶ 120 Turning to the merits, petitioners argue that the trial court erred in granting Sherry partial summary judgment by finding that the District Enterprises stock belonged exclusively to Sherry. For the following reasons, we reject this argument.

¶ 121 A motion for summary judgment is properly granted when the pleadings, depositions, admissions, and affidavits on file establish that no genuine issue as to any material fact exists and, therefore, the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 530 (1996). The purpose of summary

judgment is to determine whether a fact question exists, not to try a question of fact. *Starr v. Gay*, 354 Ill. App. 3d 610, 613 (2004); *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993). We review *de novo* the trial court's granting of a summary judgment motion. *McNamee v. State of Illinois*, 173 Ill. 2d 433, 438 (1996).

¶ 122 Petitioners take issue with the trial court's finding that the primary factor in its decision was the registration of the District Enterprises stock in the corporate registry. *Frey v. Wubbena*, 26 Ill. 2d 62, 69 (1962) ("The registration of stock ownership upon the books of the corporation in appropriate statutory language is sufficient to vest legal title, subject to divestment if the circumstances surrounding the transaction warrant it."). They complain that there are material factual questions that the trial court ignored, including: (1) whether decedent actually saw the corporate registry, listing himself and Sherry as joint tenants; (2) whether he understood the concept of joint tenancy; (3) whether decedent actually intended to adopt the corporate books prepared by Janci; (4) whether the corporate books were ever adopted by the corporation before decedent's death; and (5) whether the corporate books were otherwise authentic. Petitioners urge that all the evidence shows that decedent did not approve the corporate documents Janci prepared. There was no evidence, they assert, showing that decedent actually picked up, read, or signed them. According to petitioners, decedent had the documents in his possession for, at most, seven days prior to his death (just after Christmas and including the New Year's holiday). They contend that the evidence reflects that some form of fraud or impropriety occurred in the posthumous execution of the documents (with fraudulent signatures; they argue that Sherry directed Dennis to forge his father's signature).

¶ 123 Petitioners' first specific arguments are evidentiary. See *Harris Bank Hinsdale v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992) (evidence that is inadmissible at trial may not be used in support of a summary judgment motion); but see *In re Weisberg's Estate*, 62 Ill. App. 3d 578, 585-86 (1978) ("In citation proceedings brought by the representative of an estate against someone withholding assets claimed by the estate, the rules of evidence are liberally applied."). They contend that the trial court erred in relying on Janci's testimony, which, they assert, constituted hearsay that did not fall under the business records exception to that rule and was inadmissible under the Dead-Man's Act (735 ILCS 5/8-201 (West 2010)). They argue that the corporate book was not made in the regular course of business (it was backdated five years) and that Janci did not receive back the corporate records until after decedent's death.

¶ 124 We reject petitioners' evidentiary arguments. We disagree that Janci's statements are hearsay and do not fall under the business records exception. The business records exception to the hearsay rule requires the party tendering the record to satisfy the following foundational requirements: (1) the record must be made in the regular course of business, and (2) the record must be made at or near the time of the event or occurrence. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414-15 (2005); see also Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). *Kimble* also holds that a sufficient foundation for admitting records pursuant to the business records exception to the hearsay rule should be established through testimony of the custodian of records *or another person familiar with the business and its mode of operation*. *Id.* at 414. Janci testified that, as District's corporate attorney, he prepared the corporate records pursuant to instructions from decedent that reflected decedent's wishes as to the ownership of the business. We find no error with the trial court's view that the proper focus is how District stock ownership was recorded on the corporate books *at the time*

of decedent's death. We disagree with petitioners' argument (which is unsupported by citation to relevant authority) that the business records were not made at or near the time of the transaction and that the relevant period here was five years earlier (when the businesses were incorporated, which, in their view, was the relevant transaction). Also, the Dead-Man's Act has no application because Janci, as decedent's corporate attorney and not a party to this action, was not a "person directly interested in the action." 735 ILCS 5/8-201 (West 2010).

¶ 125 Petitioners also argue that the corporate book was not properly authenticated. Specifically, they contend that Janci could not authenticate any corporate documents and that certified copies of the corporate records were required and that decedent's signature was required for authentication. This claim is forfeited because petitioners raised no best-evidence-rule objection to this testimony during Janci's deposition. Forfeiture aside, Sherry, as corporate secretary (this was evidenced by 1995 and 1999 Secretary of State Annual Reports that Sherry attached to her summary judgment filings), was authorized to certify corporate documents; decedent's signature was not required. See 735 ILCS 5/8-1204 (West 2010) ("The papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the signature of the secretary, clerk, cashier or other keeper of the same.").

¶ 126 Petitioners also argue that, assuming the corporate book is admissible and authentic, the trial court erred in relying on District's corporate registry and "ignoring" the stock certificate. They contend that, although the bylaws permit uncertificated shares, the board of directors did not approve such shares at its first meeting. We reject this argument because, pursuant to *Frey* and as the trial court determined, the registry was the proper focus.

¶ 127 Petitioners' final argument on this issue (and the one that essentially underlies their evidentiary arguments) is that there were material facts establishing fraud at the time the stock was registered. Their primary objection is that the trial court improperly focused on the time of registration of the stock. See *Frey*, 26 Ill. 2d at 69 ("The registration of stock ownership upon the books of the corporation in appropriate statutory language is sufficient to vest legal title, subject to divestment if the circumstances surrounding the transaction warrant it."). Petitioners urge that the court should have looked at the time when Janci received back the corporate documents in the mail, which was *after* decedent's death. If it had done so, the court could only have found that material factual issues concerning fraud precluded summary judgment. At this time, all of the signatures were on the corporate documents and the trial court, petitioners urge, should have also considered the opinion of Dennis and Daniel's handwriting expert, who stated that none of the signatures on the corporate documents were decedent's.

¶ 128 We reject petitioners' argument. First, they ignore that, under the Probate Act, the date of a decedent's death is the critical reference date. See, *e.g.*, 755 ILCS 5/20-19(c) (West 2012) (encumbrances on real estate); 755 ILCS 5/28-7 (West 2010) (certain spouse and child awards). Janci's unrefuted testimony was that, near the time of his death, decedent desired that the corporate documents reflect that he and Sherry owned the companies in joint tenancy. Janci testified that he spoke with Sherry on the telephone shortly after decedent's death to inquire if he signed the documents, and she stated that he had. The documents submitted with the summary judgment filings are *consistent* with Janci's testimony. Petitioners claim (unsupported by citation to any relevant authority) that the court should have assessed the motion with respect to certain events *after* decedent's death, thus, fails, as does their argument that "all available evidence" showed that

decedent did not approve the documents (including that they were not returned to Janci "right away," and that they contained a forged signature). Second, petitioners' argument presumes that decedent's signature on the corporate books, most significantly the corporate registry, was necessary. As we noted above, the registry (which reflected joint ownership of District Enterprises) was properly certified (by Sherry) *without* decedent's signature. Accordingly, any arguments concerning whether or not decedent actually signed the *remaining* documents are not relevant (see *Frey*, 26 Ill. 2d at 69) and do not raise a material factual question precluding summary judgment.

¶ 129 The trial court did not err in granting Sherry partial summary judgment as to the ownership of the District Enterprises corporate entity.

¶ 130 H. Cross-Appeals: Finding that Sherry was Not Negligent as to the $700,000

¶ 131 Petitioners next argue that the trial court erred in finding, after trial, that Sherry was not negligent in the disappearance of the $700,000 cash horde in her home. For the following reasons, we conclude that the trial court's finding was not against the manifest weight of the evidence.

¶ 132 Petitioners assert that Sherry's disregard for the security of the cash, over which she had exclusive possession and control, reflects her negligence, where she kept the monies in an unlocked box in the basement of her home, despite having knowledge of a prior theft from the basement (of her coin collection). Petitioners also argue that, even if she was not negligent, Sherry still bears some culpability for failing to exert any effort towards the funds' return, pointing to Sherry's actions after the funds disappeared and her failure to take any affirmative acts (*e.g.*, filing an insurance claim or calling the police).

¶ 133 We conclude that, assuming Sherry owed a duty to petitioners, the trial court's finding that Sherry was not negligent was not erroneous. The trial court found that the funds were "well hidden"

in the Radwanski residence, which was equipped with an alarm system and where two locked doors secured the room where the money was hidden. It also noted that Dennis had essentially characterized the home as a "fortress," despite his claim that Sherry was negligent in storing the monies in the home. The testimony concerning the alleged coin collection theft was conflicting, and we cannot quarrel with the court's resolution. As the court noted, the funds were kept in the home for over 25 years before decedent's death without incident, a fact that reflected that they were well secured. Finally, we reject Dennis and Daniel's contention that Sherry's actions after the money went missing were negligent, noting that she failed to report the missing funds, file any insurance claim, or otherwise investigate the loss. As the court found that the monies were skimmed from the District entities, the court did not further err in implicitly finding that Sherry's failure to report or otherwise call attention to their loss was not inconsistent with the circumstances under which they were accumulated. In sum, in light of the evidence, the court's findings were not unreasonable.

¶ 134 I. Cross-Appeals: Interest on the $700,000

¶ 135 Petitioners next argue that the trial court erred in finding that Sherry was not liable to the estate for interest on the $700,000 cash horde during the time it remained in her possession and control. They contend that, when decedent died, Sherry took possession of the $700,000 and retained it without any of the other heirs' knowledge. The money did not belong to Sherry; rather, it was estate property that she retained without either the estate's or the children's knowledge. Also, petitioners note, Sherry made no-interest loans to herself and the companies during this time, thus putting the monies to her own use and benefit for nine years. Petitioners argue that, irrespective of whether Sherry diligently or negligently safeguarded the money, she should be responsible for payment of 5% interest from the date of decedent's death until February 2008. They also complain

that Sherry should have placed the funds in a reasonably secure investment or interest-bearing account.

¶ 136 In Illinois, prejudgment interest may be recovered when warranted by equitable considerations. *In re Estate of Wernick*, 127 Ill. 2d 61, 87 (1989). Whether equitable considerations support an award of interest is a matter lying within the sound discretion of the trial court. *Id.* An award of prejudgment interest will not be disturbed on appeal unless it constituted an abuse of discretion. *United States Fidelity & Guaranty Co. v. Alliance Syndicate, Inc.*, 286 Ill. App. 3d 417, 420 (1997). The rationale underlying an equitable award of prejudgment interest in a case involving, for example, a breach of a fiduciary duty is to make the injured party complete by forcing the fiduciary to account for profits and interest he or she gained by the use of the injured party's money. *Wernick*, 127 Ill. 2d at 87.

¶ 137 Here, the trial court did not abuse its discretion. The undisputed evidence reflected that the fund balance remained stable at $700,000 until its disappearance. To the extent she borrowed any monies from the cash horde during the nine-year period (we note that there was no specific testimony as to these loans, such as the amounts or frequency of such loans), it was also undisputed that Sherry ultimately paid back the monies. Thus, the trial court had before it evidence that, although Sherry did not deposit the monies in an interest-bearing account, she made unspecified loans from the fund that she ultimately repaid. Without specific testimony as to the extent that Sherry utilized the funds, we cannot conclude that the court erred in not requiring Sherry to pay prejudgment interest on the monies.

¶ 138 J. Dennis and Daniel's Cross-Appeal: Justice Suzuki

¶ 139 Finally, in their cross-appeal, Dennis and Daniel additionally challenge the trial court's findings as to Justice Suzuki. For the following reasons, we reject their arguments.

¶ 140 The trial court made extensive findings concerning Justice Suzuki. It found that, at the time of decedent's death, Justice Suzuki was a sole proprietorship and that, therefore, any assets it held at this time were estate assets. However, it next addressed whether the company had any assets, a point that the parties disputed. The court found that the company acted as a clearinghouse for vehicles acquired by the District entities; they were sold through Suzuki because it alone possessed a valid dealer's license. Also, these vehicles generally had open titles until a buyer was found. After reimbursing Suzuki for costs, the proceeds were paid to the District entity that originally had acquired the vehicle.

¶ 141 The court further found that the operation was intended as a wash, but that its assessment of this issue was hampered by the absence of a check registry for the business (both before and after decedent's death). It noted that the 1999 tax return for the District entities showed that Suzuki was owed $21,559 from two entities (*i.e.*, District Towing, Inc., and District Auto Parts, Inc.). However, neither entity was named as a respondent in the citation to recover assets and, thus, the court found that it had no jurisdiction to adjudicate the issue. Next, the court determined that Suzuki owned only two vehicles at the time of decedent's death: the 1987 Monte Carlo and the 1997 Chevrolet Tahoe; thus, the vehicles were estate assets. Also, the 1997 Chevrolet Camaro, which decedent purchased from a vehicle repossessor and which had an open title, was also an estate asset. As to any additional vehicles owned by Suzuki at the time of decedent's death, the court found that the determination was "difficult" because, although they are required to be listed in the company's logbook (625 ILCS 5/5-401.2 (West 2010)), Suzuki's log does not list vehicles by acquisition date; it lists them by dates of

sale. As to the "purchase date" on the log, the court found that Michelle's testimony that these were actual purchase dates conflicted with how the entity conducted its business. Specifically, the court found that the business did not actually purchase vehicles, but took possession of them when a buyer was located by one of the District entities; it processed the open titles to sell them, returning the sale price to the District company of origin. The court determined that the "purchase dates" on the log were likely the dates that the District companies acquired the vehicles, not the dates they were purchased by Suzuki. Suzuki acquired vehicles in its own name only in limited cases; these were estate assets.

¶ 142 Dennis and Daniel argue first that there were five vehicles[9] owned by the sole proprietorship at the time of decedent's death that were later sold by Suzuki after the decedent's death. They note that the logbook states that they were purchased before the decedent's death and sold after his death (although it does not contain a sales price). They complain that Sherry should be estopped from arguing that they are not estate assets because she never produced bills of sale at trial. They also argue that the trial court should not have accepted Sherry's testimony that the vehicles were owned by the District entities with open titles until they were sold by Suzuki. They note that it would have been a violation of Illinois law for any person or corporation not licensed as a dealer to hold open titles. 625 ILCS 5/3-113(a) (West 2010).

¶ 143 We conclude that the trial court's findings were not against the manifest weight of the evidence. Dennis and Daniel essentially challenge the court's credibility findings. We disagree that the court should have disregarded Sherry's testimony and relied on the logbook's notations and

[9]A 1990 Lincoln Continental; a 1984 Buick Riviera; a 1995 Yamaha Wave Runner; a 1996 Chevy Cavalier; and a 1987 Ford F350.

found that the acquisition dates entered therein were the dates Suzuki acquired the vehicles. The trial judge is in a position superior to a court of review to determine the credibility of witnesses and the weight their testimony should receive. *In re Estate of Coleman*, 262 Ill. App. 3d 297, 301-02 (1994). Here, the court's findings were supported by the evidence and were not unreasonable. There was nothing inherently incredible in Sherry's testimony concerning Suzuki's recordkeeping and practices. We cannot conclude that the court's determination that Michelle's testimony that the purchase dates are indeed the dates Suzuki (not the other District entities) acquired the vehicles is not reasonable, as it explained that this did not correspond to the entity's practice of acquiring vehicles only when a buyer had already been identified. Further, that certain records may have been kept in alleged violation of Illinois law is not an issue before us and does not render Sherry's testimony incredible. Her failure to produce bills of sale and the testimony from various witnesses concerning the alleged flood were issues for the trial court to resolve and we cannot conclude that its findings were erroneous.

¶ 144 Second, Dennis and Daniel argue that the proceeds from 18 vehicles sold by the sole proprietorship after decedent's death (and prior to its incorporation on August 25, 1999) belong to the estate. They rely on Michelle's testimony that the sale prices for the vehicles would be shown on bills of sale that Sherry failed to produce at trial. They also note that the sales proceeds would be shown in the Suzuki checkbook, which Sherry claimed was destroyed in a flood. Third, Dennis and Daniel argue that the balance in the Suzuki sole proprietorship checking account at decedent's death is an estate asset. Again, they rely on Michelle's testimony that the proceeds from all vehicle sales would be placed into the Suzuki checking account. As with their prior argument, Dennis and

Daniel's second and third claims challenge the trial court's credibility findings. Again, we conclude that the court's findings were not unreasonable.

¶ 145 Fourth, Dennis and Daniel argue that Justice Suzuki Auto, Inc. is an estate asset. They contend that it is a "sham" entity that was set up eight months after decedent's death using vehicles and other asserts of the sole proprietorship, the same dealer's license as the sole proprietorship, the same checking account, and the same logbook. Dennis and Daniel urge that, as all of the funds and assets of the corporate entity came from the decedent, the corporation should be considered an estate asset. We reject this final claim outright, as the argument should be directed against the corporation itself, which is not a party to this appeal.

¶ 146 III. CONCLUSION

¶ 147 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 148 Affirmed.