2018 IL App (1st) 163087-U

FIRST DIVISION
Order filed June 29, 2018
Modified upon denial of rehearing August 6, 2018

No. 1-16-3087

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LOURDES GUERRERO, IRIS RODRIGUEZ, and MANUEL GUERRERO,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees and Cross-Appellants,	)	
v.	)	No. 11 CH 43745
YVONNE LESKO,	)	Honorable James M. McGing, Judge Presiding.
Defendant-Appellant and Cross-Appellee.	)	

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's finding that defendant was liable for tortious interference with the expectancy interests of her three siblings in their mother's assets and its award to plaintiffs of both monetary damages as compensation for misappropriated funds and its recognition of their right to a one-quarter share each of their deceased mother's home is affirmed. The circuit court's decision to reopen the proofs and award plaintiffs monetary damages in lieu of their proportional shares in the home was based on the erroneous belief that the court had no authority to impose a constructive trust on the property and is reversed. Issues relating solely to the appraised value of the home are mooted, the trial court did not misapply the law in finding defendant liable, and none of defendant's evidentiary objections constitute reversible error.

¶ 2 Plaintiffs Lourdes (Sue) Guerrero, Iris Rodriguez, and Manuel (Manny) Guerrero are siblings who sued their older sister, defendant Yvonne Lesko, alleging that she tortiously interfered with their expectancy interests in the assets of their late mother, Mary O'Sucha. Plaintiffs presented evidence at a three-day bench trial to support their theory that, while caring for Mary—who suffered from Alzheimer's disease—and acting as her financial power of attorney, Yvonne misappropriated funds from Mary's accounts and exerted undue influence over Mary, causing her to make Yvonne the sole beneficiary of Mary's will and a land trust holding title to Mary's home. The trial court ruled in plaintiffs' favor, finding they were each entitled to a proportional share of the misappropriated funds and a one-quarter interest in the home.

¶ 3 Believing it could not grant equitable relief in an action at law, the trial court then ordered the parties to submit appraisals establishing the fair market value of Mary's home. Without holding an evidentiary hearing or permitting testimony from or cross-examination of the appraisers, the trial court decided the fair market value of the home based on the appraisals and awarded plaintiffs additional monetary damages based on that value.

¶ 4 Yvonne argues on appeal that, by accepting the appraisals after the close of evidence, the trial court improperly and without her agreement bifurcated the liability and damages portions of the trial, in an effort to cure plaintiffs' failure to introduce evidence of damages relating to the value of Mary's home. Yvonne argues that she had no opportunity to cross-examine plaintiffs' appraisers, takes issue with the date the court used to value the property, and asserts that one of the appraisals plaintiffs submitted to the court differed from what was disclosed to her.

¶ 5 Yvonne further contends that the trial court misapplied the law governing tortious interference with expectancy by focusing on Mary's competency rather than Yvonne's actions and by shifting the burden of proof to Yvonne to demonstrate that she did not misappropriate

funds withdrawn from Mary's accounts. Yvonne argues that, viewed within the proper legal framework, the judgment against her was against the manifest weight of the evidence.

¶ 6 Yvonne also asserts a number of evidentiary errors, arguing that the trial court abused its discretion by striking Yvonne's objections to an evidence deposition admitted at trial, taking judicial notice of property records mentioned for the first time in closing arguments, and admitting without an adequate foundation or prior disclosure a summary of bank records prepared by plaintiffs' counsel.

¶ 7 In their cross-appeal, plaintiffs argue that the trial court erred when it concluded that, in an action at law, it could not grant them the equitable relief they requested and believed was available to them when they developed their trial strategy. Plaintiffs also argue that the court's final order regarding the value of the home should be read in conjunction with and not as supplanting its previous order awarding them each damages based on misappropriated funds.

¶ 8 For the reasons that follow, we agree with plaintiffs that equitable relief in the form of a constructive trust was a proper remedy in this case. We reverse the trial court's determination, reflected in two of its post-trial orders, that it could not use its equitable powers to give the plaintiffs each the one-quarter share of their mother's home that it found they were entitled to and vacate a subsequent order awarding monetary damages in lieu of those proportional shares. Finding the other issues raised by the parties are mooted or without merit, we affirm the judgment of the trial court in all other respects.

¶ 9 I. BACKGROUND

¶ 10 The parties in this case are the only four children of Mary O'Sucha, who died on May 30, 2010, and who was divorced and single at the time of her death. In September 2006, Mary executed a will providing that, upon her death, all of her assets would be divided equally among

her four children. She made identical arrangements for her non-estate assets, including bank accounts, an IRA, a profit-sharing account, and—through a land trust—her single-family home located at 3137 North Kenmore Avenue, in the Wrigleyville neighborhood of Chicago (the Kenmore property).

¶ 11 Mary periodically began to suffer from confusion and memory loss beginning in 2005, and was eventually diagnosed with Alzheimer's disease in 2007 or 2008. Her physical and mental condition worsened until she could no longer live on her own and moved in with Yvonne, who served as her primary caretaker and financial power of attorney. Sometime in 2008, Mary changed her will and amended the land trust to make Yvonne the sole beneficiary.

¶ 12 A. Pretrial Proceedings

¶ 13 The record in this case reflects considerable confusion, by both the parties and the court, regarding the nature of the legal and equitable claims asserted by plaintiffs and remedies sought by them. A brief history of the case from its inception is necessary to understand certain issues on appeal arising from that confusion.

¶ 14 Plaintiffs originally filed this action on December 21, 2011, in the chancery division of the circuit court of Cook County, as a complaint for undue influence, tortious interference with expectancy, an accounting, a petition for quiet title, and for the partition and sale of the Kenmore property. On March 18, 2013, Yvonne moved to assess the costs of her defense to Mary's estate, arguing that, as the executor of Mary's estate and the holder of the power of direction for the land trust, she had a duty to defend plaintiffs' claims attacking the validity of Mary's will and seeking an amendment to the land trust. Plaintiffs disagreed, arguing that all of their claims were brought against Yvonne in her individual capacity. On May 9, 2013, the chancery judge entered an order denying Yvonne's motion "without prejudice as the Estate is not a party."

¶ 15 Yvonne then moved, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)), to dismiss or strike all but plaintiffs' count for tortious interference with expectancy, arguing that because plaintiffs had sued Yvonne individually, and had not named Mary's estate or the trustee of the land trust, their equitable claims seeking to set aside the will in favor of an earlier will and to amend the trust were improper. Yvonne argued that if the court granted her motion, the case should be transferred to the law division, because a tortious interference claim seeks only monetary damages and "no equitable count would remain." The trial court did not rule on the motion but in a March 6, 2014, order stated: "[u]pon review of Defendant's Motion and oral argument the Plaintiffs acknowledge the need for an Amended Complaint separating Undue Influence and Lack of Testamentary Capacity."

¶ 16 On April 7, 2014, plaintiffs filed a first amended complaint again asserting claims for undue influence, interference with expectancy, and an accounting—and still not naming Mary's estate or the land trust as parties. Yvonne again moved to dismiss all but the tortious interference claim. Following a hearing, on September 25, 2014, the chancery judge denied the motion to dismiss, stating in its order that the counts for undue influence and an accounting were "subsumed into" the count for tortious interference, and granting plaintiffs leave to file a second amended complaint "as to Interference with Expectation." The judge also entered an order transferring the case to the law division, which stated, in its entirety: "3 Count Complaint, asserting Undue Influence, Interference with Expectancy, and Accounting, reduced to one count only of Tortious Interference with Expectancy."

¶ 17 Plaintiffs filed a second amended complaint in the law division on November 5, 2014, which, although it included only one claim for tortious interference with expectancy, still sought the same equitable relief as in plaintiffs' previous complaints, including that "[a]ll instruments

executed after March 2008 purporting to be executed on behalf of Mary O'Sucha to the benefit of [Yvonne] be revoked," that "[p]laintiffs have and receive the proportionate assets they had a reasonable expectation to receive," and "[a]n order that [Yvonne] be directed to execute an amendment to the land trust" restoring plaintiffs as beneficiaries each entitled to a one-quarter share of the Kenmore property.

¶ 18 In her answer and affirmative defenses, Yvonne insisted that requests for such relief were barred by the chancery judge's transfer order "which st[r]uck such claims seeking equitable relief and or theory of liability for failing to join the proper parties and directed that the sole cause of action pending is interference with expectation." Yvonne also reiterated her position that the equitable relief plaintiffs sought was barred because neither Mary's estate nor the land trust had been made a party. She asserted that "on May 9, 2013 [when it denied Yvonne's motion to assess costs] the Court made such a finding of record and Plaintiffs elected not to name such entities despite extensive motion practice on this issue." The parties' complaint and answer reflect the two very different ideas they had about what remedies would be available if and when the plaintiffs prevailed.

¶ 19 The issue of the appropriate remedy was not raised again until December 2015, when the trial court heard argument on the parties' pretrial motions. Yvonne's counsel acknowledged that the orders entered by the chancery judge were "a bit unclear," but insisted that only monetary damages were recoverable in an action for tortious interference with expectancy. Plaintiffs' counsel disagreed, arguing that equitable relief, including an order requiring Yvonne to convey a portion of her interest in the land trust to plaintiffs was still available and could properly be obtained without naming the estate or trust as parties.

¶ 20 The court reserved ruling on the issue, noting that the parties could reiterate their

positions in their proposed findings of fact and law at the close of trial. The court noted that "[t]he equitable relief that defendant objects to, that's a remedy. So you can argue that in your proposed findings of fact and law."

¶ 21 B. Trial Testimony

¶ 22 A three-day bench trial was held beginning in December 2015. The court received testimony from the parties, as well as from Mary's investment advisor, lawyer, and her doctor.

¶ 23 1. Mary's Alzheimer's Disease

¶ 24 The court first heard from the plaintiffs, Mary's youngest daughter Sue, who lives in Chicago, her middle daughter Iris, who lives in Florida, and her son Manny, who lives in Texas. Plaintiffs agreed that, beginning in late 2007 and early 2008, they began to notice serious changes in Mary's behavior. Sue recounted how, when walking her dog one day, Mary forgot her keys and, unable to remember Sue's telephone number, had to have the fire department break down her door. When Sue visited her mother she noticed that the dog's water bowl was empty and saw no signs that Mary had been preparing meals for herself. In the summer of 2008, Mary became lost while walking to church, had to ask a stranger for help, and was eventually escorted home by police officers.

¶ 25 Sue also recalled that, when Mary was hospitalized in 2008 and 2009, she did not recognize visitors, including Sue, Sue's husband, and Sue's adult son; spoke Spanish, a language she had not spoken since she was a child; and rubbed the fur collar of Sue's coat, calling it "Bernie," the name of Mary's dog. By this time, Sue said Mary, once an "impeccable dresser," had grown thin, lost her front teeth, and stopped dyeing her hair. Iris agreed that Mary's personality "severely changed" during this time period. By August 2008, Mary had forgotten who Iris was, often mistaking her for a niece who lived in Texas, and would ask to see her own

sister and mother, who had both passed away many years before.

¶ 26 In his deposition, which was admitted into evidence by Yvonne, Mary's oncologist, Dr. Thomas Cao, who saw Mary every three months following a bout with cancer in 2001, also described for the court Mary's mental and physical decline. Dr. Cao testified that Mary was hospitalized a number of times in 2008, 2009, and 2010 for an "altered mental state." She often arrived at the hospital dehydrated and with a urinary tract infection, was given intravenous fluids and medication, and was discharged after about five to seven days. Dr. Cao noted that a person with Alzheimer's disease could become dehydrated after forgetting to drink liquids. The last time Dr. Cao saw Mary she was "very confused," did not recognize him or her own family members, and did not provide correct responses to questions, all indicative of end-stage advanced Alzheimer's disease. In mid-2010, he recommended that she receive hospice care.

¶ 27 Yvonne, called by plaintiffs as an adverse witness, confirmed that Mary was diagnosed with Alzheimer's disease in 2007 or 2008 and was prescribed Aricept to try to slow the progression of the disease. She explained that at first Mary just became more forgetful. On good days she could walk around and do normal things for herself, but on bad days she became unsteady and needed assistance doing things like bathing. Yvonne agreed that, on her bad days, Mary did have an "altered mental state," but stated that, when given an IV at the hospital "she'd pop right back." Yvonne did not recall a time when Mary failed to remember Iris or Sue, but explained that Mary "never really saw them."

¶ 28 2. Yvonne's Relationship With Mary

¶ 29 The parties agree that Yvonne acted as Mary's primary caregiver, both during her treatment for throat cancer in the late 1990s, and through all of the stages of her Alzheimer's disease. In the last years of Mary's life, Yvonne cooked and cleaned for her, bathed her, did her

hair and nails, and made sure she was fed. Yvonne and her husband took turns taking Mary to adult daycare each day. But plaintiffs also described for the court how Yvonne used her position of influence with Mary to exclude her other siblings.

¶ 30 Sue testified that Yvonne rejected her suggestion, in October 2008, that the siblings look into getting someone to help care for Mary. Instead, Yvonne began taking Mary to Yvonne's house in Carpentersville for the week and bringing her back to the Kenmore property on weekends. As time went on, Mary spent more and more time at Yvonne's house. According to plaintiffs, Yvonne became less and less communicative with them, making it difficult to visit their mother or know what was going on with her. Manny testified that, although he moved to Texas in 1980, he was able to visit his mother regularly, four or five times a year, and brought his children to visit her, until around 2007, when she stopped answering her telephone at the Kenmore property. Manny assumed that Mary was at Yvonne's house, but Manny's wife often could not get through to anyone when she called to check on Mary at Yvonne's house.

¶ 31 Sue, Mary's only other child who lived in the Chicago area, had an especially strained relationship with Yvonne. Sue believed this was because she questioned Yvonne's decisions regarding Mary's care and had suggested care facilities located near Sue's home or in-home help, which would have reduced Yvonne's ability to control Mary. Yvonne eventually refused to return Sue's calls or provide her with any information about Mary's condition. On the occasions when Mary was hospitalized, when she later began attending adult daycare, and even when Mary was in hospice care at Yvonne's house, Sue only learned what was happening from Iris. In late 2008 or 2009, when Sue asked Iris to arrange for them both to have lunch with Mary, Iris would not do that because, as she said, "I can't tell [Yvonne] that I'm talking to you because she would not—she would stop talking to me, and then I would never find out what happened to mom."

¶ 32 Iris confirmed that by the beginning of 2009, Yvonne "wanted nothing to do with [Sue]" and, although Yvonne never physically prevented her siblings from seeing their mother, "she made it difficult." When asked how Yvonne influenced their mother, Sue stated: "I believe that what she did was try to keep my mother away from me particularly but also from the rest of the children *** so that she could influence my mother and let my mother's dementia, the Alzheimer's, take control."

¶ 33 3. Plaintiffs' Expectations Concerning Mary's Assets

¶ 34 Plaintiffs each testified it was their understanding that upon Mary's death the four siblings would share her assets equally. Manny said that Mary spoke with him on multiple occasions about this, always assuring him that the four siblings would share everything. Mary had on occasion sent him letters showing him what she had in her IRA and in savings bonds, and he understood that the Kenmore property "would be split four ways."

¶ 35 Sue acknowledged that Mary and Yvonne had a special relationship and that it was even fair to say that Yvonne was Mary's favorite child. But Sue said that Mary always included all of her children and, in the past whenever Mary changed her will, she had had copies made for each of them. Iris agreed, stating that at the time of Mary's death, it was "absolutely" her understanding that she would be receiving one-quarter of the Kenmore property and one-quarter of her mother's other assets, including an IRA held by her mother.

¶ 36 Plaintiffs learned that Yvonne had been made the sole beneficiary of Mary's assets only after hiring a lawyer. Iris said that two days after Mary passed away, she learned that Yvonne had locked the upstairs of the Kenmore property so that the other siblings could not get in. And Manny first suspected that something was wrong when Yvonne told him he could not stay at the Kenmore property when he visited Chicago. Until that time, he said, he and his other siblings

"let [Yvonne] be in charge of everything" and "assumed that she was doing what was right."

¶ 37 4. The 2008 and 2009 Changes to Mary's Estate-Planning Documents

¶ 38 Yvonne agreed that title to the Kenmore property was held in a land trust and that she and her three siblings were once co-beneficiaries of that trust. According to Yvonne, Mary asked to see her attorney, Michael Kelly, in June 2008. Yvonne testified that she drove Mary to see Mr. Kelly and he had an amendment to the land trust already prepared that gave Mary and Yvonne joint power of direction. Yvonne testified that she went back with her mother to see Mr. Kelly again in August 2009, and he had another amendment prepared, this time making Yvonne the sole beneficiary of the trust. When asked who told Mr. Kelly to prepare the amendments, Yvonne stated that Mary did. When asked about her mother's mental condition at this time, Yvonne responded: "Well, like I said, she had good days and bad days."

¶ 39 Yvonne agreed that she and Mary met with Mr. Kelly again on September 11, 2009, and that Mary then executed a new will, leaving everything to Yvonne. When asked about her mother's mental state on that occasion, Yvonne stated: "I just listened to what my mom requested. You know, I didn't ask her why she was doing anything."

¶ 40 Yvonne acknowledged that she held a power of attorney to manage her mother's finances. Although Mary briefly transferred that responsibility to Sue, according to Yvonne Mary didn't like how Sue was handling things and had Mr. Kelly transfer it back to Yvonne in February 2007. Yvonne maintained that she never talked to Mr. Kelly about this because she "let [her] mother do her own decision making."

¶ 41 Mr. Kelly also testified, explaining that Yvonne, whom he knew because she worked at the village hall where he often filed papers, first brought Mary to meet him in 2004. Mr. Kelly initially prepared a will, powers of attorney, and trust documents for Mary that named all four of

her children as beneficiaries. He stated that when Mary later changed those documents to benefit only Yvonne, he did not get the impression that she wanted to punish her other children, but only that "Yvonne was taking care of her. Yvonne was her angel. She depended on Yvonne."

¶ 42 Mr. Kelly also explained that, although Yvonne may have driven Mary to his office to make these changes, it is his practice to ask others to step out of the room when he speaks to a client to make sure the client has not been coerced into making any changes. Mr. Kelly could not specifically recall speaking alone with Mary, but said that it was his standard practice to do so. Iris rebutted this testimony, however, describing how, a few years before the 2009 meetings in which Yvonne took Mary to see Mr. Kelly, she went with Yvonne and Mary to Mr. Kelly's office and he never asked them to leave the room so that he could speak with Mary alone. According to Iris, at that meeting Yvonne tried unsuccessfully to convince Mary to cut Manny out of her will but Mary refused, saying the will was for all of her children. Iris remembered Mr. Kelly saying at that time that he was Mary's lawyer and would do what she wanted.

¶ 43 On cross-examination, Mr. Kelly testified that he would not have changed the land trust to make Yvonne the sole beneficiary if he knew that Mary did not remember who her children were at the time of that change. He said, however, that nothing indicated to him that this was the case. According to Mr. Kelly, Mary always recognized him and was friendly toward him.

¶ 44 5. Mary's IRA

¶ 45 In addition to the Kenmore property, Mary's other primary asset was an IRA. At all relevant times, the four siblings were named as co-beneficiaries of that account. Donald Roseen, Mary's investment advisor, explained that, because of her age, Mary was required to withdraw a certain amount from her IRA each year. Identifying a report showing withdrawals from the account over the years, Mr. Roseen noted that, with the exception of one "special" withdrawal in

2006, Mary had never withdrawn more than the minimum required amount. But in 2009 and 2010, withdrawals went "well beyond the required distributions that Mary ha[d] generally taken in the past": totaling $38,000 in 2009 and over $90,000 in 2010.

¶ 46 Mr. Roseen testified that he met with Mary annually from 2001 until around 2007 or 2008, when he understood she had fallen ill and could no longer come to his office. He was told at that time that Mary had moved in with Yvonne and he "was not allowed" to visit Mary there. Mr. Roseen said that he was not made aware of Mary's death on May 30, 2010, and so was not aware that she had already died when Yvonne, purporting to act pursuant to the power of attorney, withdrew $53,000 ($47,500 after taxes) on June 21, 2010. Yvonne told Mr. Roseen in an e-mail that her siblings were aware of this distribution. Mr. Roseen received formal notice of Mary's death in approximately 2014 when, in connection with her attempt to close out the account and withdraw all of the remaining funds, Yvonne sent him Mary's death certificate. He informed Yvonne at that time that, as one of four beneficiaries, she did not have authority to unilaterally close the account and was only entitled to one quarter of the funds, or $5,920.76.

¶ 47 Yvonne was questioned at length about the IRA. She recalled the value of the account going down quite a bit, by $40,000 or $50,000, in 2008 because of the financial crisis. Plaintiffs' counsel showed Yvonne statements indicating that the account's balance was over $190,000 in November 2007 and had fallen to just over $70,000 by the time of Mary's death in May 2010. Yvonne agreed that a month after her mother's death, the account balance was even less, only $15,000, explaining that she "had to take that out for her [mother's] bills," including funeral expenses, property tax payments, and $37,000 to pay off the mortgage on the house. Yvonne insisted that "that money was all accounted for." She testified that in October 2012, when the account balance was $19,000, she took out another $5,000—what she referred to as "her portion

of the fourth"—to pay her legal fees.

¶ 48 Yvonne testified that in March 2007, Mary took out a mortgage on the Kenmore property in the amount of $37,900, and that after Mary died, Yvonne "paid that off with the monies from her IRA." When asked why Mary would need to have a mortgage and what she did with the $37,900 when the mortgage was initiated, Yvonne responded: "I never asked [*sic*] her finances. My mother was a very independent woman. *** I just know that when she passed I paid that off so it wouldn't be on the house." Yvonne acknowledged that, by that point, the Kenmore property belonged solely to her and so she had in effect used the money in the IRA to pay off a mortgage on her own property. She explained that at the time she "didn't know that was incorrect" and thought it was her responsibility to pay off her mother's bills when she died.

¶ 49 Yvonne testified that when Mary died, Yvonne transferred the money in the IRA to a joint checking account she shared with her mother and used it to pay her mother's 2010 real estate taxes and for all of the funeral arrangements. According to Yvonne, none of her siblings offered to pay for any of these expenses. She acknowledged, however, that she also used money from the IRA to pay property taxes on her home in Carpentersville and on a property she owned in Colorado, although she couldn't remember the exact amounts. She understood that, in doing so, she had used money belonging to her siblings to pay her own personal debts. When asked if she had ever given her siblings an accounting for the money she took from the IRA, Yvonne stated she had not, but added: "They never talked to me. They never called me. They never communicated with me, anything." When asked if she thought she could make whatever withdrawals she wanted as long as no one asked her about them, Yvonne stated: "I was my mother's caregiver, sir. If they had interest in taking care of her, they would have—I would have gladly passed the hat to them. They never took an interest in her all those years."

¶ 50 6. Mary's Chase Account

¶ 51 Plaintiffs' counsel also showed Yvonne highlighted statements for her mother's Chase checking account showing various deposits totaling over $47,000, for which Yvonne could not identify the source. She agreed that the entries did not indicate that they had come from her mother's savings account, as such transfers usually did, but noted "you know, banks change policies." When it was pointed out to her that other transfers from the same time period from savings were so noted, she suggested that "[i]t could have been some rent money." Yvonne did not disagree with the accuracy of the bank statements, however. At this point, Yvonne's counsel entered a continuing objection to a spreadsheet summary of the deposits used by plaintiffs' counsel to question Yvonne, noting that he had never seen it before and was "going to reserve the right to look at [it] again."

¶ 52 Yvonne then discussed, based in part on a summary that she and her daughter had created, Mary's sources of income—a Medicare supplement of $550 every two months and rent collected from Yvonne's daughter, who lived at the Kenmore property, which Yvonne guessed was between $700 and $1000 per month—and expenses, including estimates for the cost of Mary's attendance at an adult daycare facility, real estate taxes, cash payments to various caregivers, the cost of Mary's prescription drugs, veterinary care and grooming for Mary's dog, the utilities for the Kenmore property, and hospice care in the last 10 days of Mary's life.

¶ 53 7. Closing Arguments

¶ 54 In response to Yvonne's testimony at trial that she "paid off" a 2007 mortgage on the Kenmore property with funds from Mary's IRA, plaintiffs' counsel requested, in his closing argument, that the trial court take judicial notice of records of the Cook County Recorder of Deeds showing that there was still a mortgage on the Kenmore property in the amount of

$47,000, which was taken out on November 17, 2011. Plaintiff's counsel argued that this showed that Yvonne did not pay off the 2007 mortgage with funds from Mary's IRA but instead entered into another, larger mortgage on the property. Yvonne's counsel objected, stating that these records constituted impermissible new evidence. Plaintiffs' counsel insisted that, under the rules of evidence, the trial court could take judicial notice of such records at any time. The trial court overruled the objection.

¶ 55 C. Posttrial Proceedings and Orders

¶ 56 In its January 29, 2016, decision and order, the trial court found that plaintiffs had "demonstrated that but for the tortious interference of Yvonne, beyond any doubt, [they] would have received their equal shares in all of Mary's assets." The court made clear that, in reaching this ruling, it believed plaintiffs' version of events over Yvonne's and that the testimony of the third-party witnesses had only strengthened plaintiffs' case. The court awarded plaintiffs a combined $166,711.38 in damages for the funds misappropriated by Yvonne from Mary's IRA, a figure it arrived at based on the corresponding deposits made to Mary's Chase account. The court concluded that plaintiffs were "entitled to each share in a 1/4 interest in the [Kenmore] property." The court also enjoined Yvonne "from utilizing the [Kenmore] property *** for any mortgage, loan or security or in any way encumbering the title or value of the property until further order of Court."

¶ 57 The court noted, however: "[t]his is an action at law and [plaintiffs] are entitled to damages relative to their interest. The Court shall determine that at a future date." The court then ordered each side to "obtain a minimum of two appraisals" of the Kenmore property and return to court a month later "to present those to the Court to allow the Court to determine the damages amount relative to that asset."

¶ 58 Yvonne moved for reconsideration and to bar this new evidence, arguing that plaintiffs had failed to disclose an appraisal or damages witness before the close of discovery and it was improper for the trial court to "fashion a remedy" for that failure by reopening evidence after trial. Yvonne argued that the court's "decision to bifurcate damages, absent an agreement prior to trial, denie[d] [her] a fair trial, as she knew and relied upon such deficiencies in the Plaintiffs[']case." She argued in the alternative that the appraisers should be deposed and subject to cross-examination at trial, like other witnesses. Finally, Yvonne asked the court to lift its injunction on the Kenmore property so that she could obtain a mortgage to pay her attorneys' fees.

¶ 59 Plaintiffs also moved for reconsideration, urging the court to grant them the equitable relief they requested in relation to the Kenmore property; specifically, "an order that [Yvonne] be directed to execute an amendment to the land trust, adding the three plaintiffs as beneficiary of such trust, as was the case prior to the exercise of her undue influence causing herself to be named the sole beneficiary."

¶ 60 The court denied both motions, concluding in an order dated April 26, 2016, that it could not "amend the Trust Agreement and order a sale of the property" because "[t]hat is not the role of this Court in an action at law." The court agreed with Yvonne that an injunction was also "not an appropriate remedy in an action at law" and removed its injunction preventing her from transferring or obtaining a mortgage on the Kenmore property. The court noted that "[t]he injunction removal [might] affect the ability of the Plaintiffs to recover their damages but that [was] not an issue for th[e] Court to consider at law."

¶ 61 The parties submitted their appraisals and, on October 28, 2016, the trial court issued an opinion and order accepting plaintiffs' proposed fair market value for the Kenmore property of $725,000. The court described its extensive review of the appraisals and set forth reasons why it

found the sales of comparable properties used by plaintiffs' appraisers to be more persuasive than those relied on by Yvonne's appraisers. The court stated that "[p]er the January 29, 2016 Order, each Plaintiff [wa]s entitled to 1/4 of the value of the Property equaling $181,250 per person," or $543,750 for the three plaintiffs together. It noted that "[a]ll other matters ha[d] been disposed of" and its order was "a final and appealable order."

¶ 62 II. JURISDICTION

¶ 63 The trial court's final order in this case was entered on October 28, 2016. Yvonne filed a posttrial motion to reconsider that order on November 15, 2016, but later asked the court to withdraw the motion. On November 21, 2015, the trial court granted the withdrawal and Yvonne filed a timely notice of appeal that same day. Plaintiffs filed a timely notice of cross-appeal on December 5, 2016, within 30 days of the court's November 21, 2016, order disposing of Yvonne's posttrial motion. We have jurisdiction over the parties' appeals pursuant to Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 64 III. ANALYSIS

¶ 65 A. Availability of Equitable Relief

¶ 66 Because we find it to be dispositive of several other issues raised on appeal, we first consider plaintiffs' argument that the trial court erred, as a matter of law, when it concluded—either because the case was transferred from the chancery division to the law division or because tortious interference with expectancy is a legal and not an equitable claim—that equitable remedies were no longer available to plaintiffs. Both propositions are incorrect.

¶ 67 Following the abolition of separate courts of law and equity in favor of a unified court system with original jurisdiction over all justiciable matters, the court is today subdivided into

chancery and law divisions strictly as a matter of administrative convenience. *In re Marriage of Isaacs*, 260 Ill. App. 3d 423, 427-28 (1994) (citing Ill. Const. 1970, art. VI, § 9). Which division hears a case has no bearing on the availability of equitable relief. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 257–58 (2006).

¶ 68 Nor is there anything in the nature of a claim for tortious interference with expectancy that precludes the granting of equitable relief. Quite to the contrary, in *In re Estate of Ellis*, our supreme court explained that, although "[t]he remedy for a tortious interference action is not the setting aside of the will, but a judgment against the individual defendant," where, as here, the defendant has received the benefit of the lost expectancy, that remedy can take the form of either "a constructive trust, an equitable lien, or a simple monetary judgment." (Internal quotation marks omitted.) *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009). See also Restatement (Second) of Torts § 774B(e) cmt. e (Am. Law Inst. 1979) (noting that if the defendant "has himself acquired the benefits of the legacy or gift, he is unjustly enriched at the expense of the plaintiff and a remedy is also afforded in restitution," which "may consist of holding the wrongdoer to a constructive trust").

¶ 69 Although considerable confusion seems to have flowed from the order of the chancery division judge in this case refusing to dismiss plaintiffs' equitable claims and instead stating that they were "subsumed into" plaintiffs' claim for tortious interference with expectancy, we think this is likely what the judge meant. Plaintiffs were free to seek equitable or monetary relief against Yvonne, as appropriate, in connection with their tortious interference claim. The record reflects that this was essentially plaintiffs' understanding as well, and the reason they presented no evidence of the value of the Kenmore property at trial.

¶ 70 The trial court concluded that Yvonne became the sole beneficiary of the Kenmore

property land trust as a result of her tortious conduct. A land trust "is a device by which title to real property is conveyed to a trustee, reserving to the beneficiary the full management and control of the property." *Klebe v. Patel*, 247 Ill. App. 3d 474, 477 (1993). Notably, a beneficiary's interest in a land trust is considered personal property. *Id.* The relief plaintiffs sought in this case—though they perhaps could have articulated it more clearly—was an order directing Yvonne to give them back their one-quarter shares of the Kenmore property. That is a constructive trust. *Sadacca v. Monhart*, 128 Ill. App. 3d 250, 255 (1984) ("[a] constructive trust is a device *** to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs" (internal quotation marks omitted)). And that is precisely the remedy the law division judge contemplated when he ruled that plaintiffs were "entitled to each share in a 1/4 interest in the [Kenmore] property." We agree with plaintiffs that the judge only ordered the parties to submit competing appraisals, established a fair-market value for the property, and awarded plaintiffs' monetary damages in lieu of those proportional shares because he became convinced, erroneously, that he had no authority to grant equitable relief.

¶ 71 Plaintiffs discuss at some length how the same misapprehension of law caused the judge to revoke his earlier injunction prohibiting Yvonne from mortgaging or otherwise transferring the Kenmore property, which, based on facts outside the record, plaintiffs assure us she promptly did. Plaintiffs may be able to enforce a constructive trust on their shares of the Kenmore property even against a transferee. See *Id.* at 256 (noting that a constructive trust may operate "not only while [the property is] in the hands of the original wrongdoer, but as long as it can be followed and identified in the hands of a transferee, except for *bone fide* purchasers" (internal quotation marks omitted)). But the propriety of the court's order revoking the injunction is not properly before us. An order dissolving an injunction is an interlocutory order immediately appealable as

of right (Ill. S. Ct. R. 307(a)(1) (eff. Jan. 1, 2016)), and, although the court's April 26, 2016, order is listed as an order or judgment appealed from in plaintiffs' notice of cross-appeal, an appeal from that order could only be taken within 30 days of its entry (Ill. S. Ct. R. 307(a) (eff. Jan. 1, 2016)).

¶ 72 In sum, a constructive trust was a proper remedy in this case and we believe that the trial court erred in concluding that the only remedy it could impose was one for monetary damages. We reverse the trial court's determination, reflected in its January 29, 2016, and April 26, 2016, orders, that it could not use its equitable powers to declare Yvonne the constructive trustee of plaintiffs' proportional shares in the Kenmore property. And we vacate the trial court's October 28, 2016, order, which would not have been entered but for the court's mistake of law.

¶ 73 In light of this result, we need not consider plaintiffs' additional argument that the latter order should be read to incorporate by reference the former. Nor do we reach any of Yvonne's arguments concerning the nature of the appraisals or the rather unprecedented manner in which the trial court chose to receive and consider substantive evidence after the trial in this case had concluded and without the benefit of an evidentiary hearing. Those issues are now moot. We now consider Yvonne's other arguments for reversal: (1) that the trial court misapplied the law governing a claim for tortious interference with expectancy, (2) that its finding of liability was against the manifest weight of the evidence, and (3) that various evidentiary errors independently warrant reversal.

¶ 74 Before moving on, we briefly address arguments raised by Yvonne in her petition for rehearing in this matter. Yvonne contends that, in deciding this appeal, we used our equitable powers pursuant to Supreme Court Rule 366 (Ill. S. Ct. R. 366 (eff. Feb. 1, 1994) (providing that a reviewing court may "exercise all or any of the powers of amendment of the trial court,"

including the "grant[ing] of any relief *** that the case may require")) to "award[ ] damages by imposing a constructive trust." Yvonne argues that this amounts to a taking of property without due process of law for those currently in possession of the Kenmore property—Yvonne's daughter and the bank that most recently issued a mortgage on the property—who are not parties to this appeal. Yvonne misapprehends both our holding and the nature of a constructive trust. We have not, by virtue of this order, *created* a constructive trust in the first instance. Rather, a constructive trust "arises immediately" based on fraudulent conduct or the breach of a fiduciary duty. *Black v. Gray*, 411 Ill. 503, 505-7 (1952); see also Restatement (Third) of Restitution and Unjust Enrichment § 55 cmt. e (Am. Law Inst. 2011) (explaining that it is "the parties' transaction" that creates a constructive trust and a court's subsequent determination that one party holds legal title as a constructive trustee for the benefit of another party with a superior equitable claim to the property is in the nature of a declaratory judgment recognizing that preexisting relationship).

¶ 75 Whether—as between plaintiffs and any third parties who have subsequently come to possess or share an interest in the Kenmore property—plaintiffs' interests should prevail is an issue not properly before us on appeal. The presence of third parties now in possession of the property, who may or may not be *bona fide* purchasers, may be necessary should plaintiffs seek to enforce the constructive trust. We take no position on plaintiffs' ability to either trace trust property into the hands of third parties now in possession of that property or to secure other relief from Yvonne if property she held in trust was wrongfully transferred. Those issues are simply not before us. Our holding is simply that a constructive trust arose by operation of law when Yvonne, in breach of her fiduciary duty, convinced Mary to amend the land trust to make Yvonne the sole beneficiary of the Kenmore Property; plaintiffs were entitled to an order

recognizing their superior equitable title to three-fourths of the property; and the trial court erred in refusing to grant them that relief, on the basis that it had no authority to do so. In sum, this court is not operating under a mistake of fact—*i.e.*, that Yvonne still has an ownership interest in the Kenmore property—rather, it is Yvonne who has misapprehended the legal import of our holding in this case.

¶ 76 Yvonne also argues that it is improper for us to fault the trial court for awarding damages instead of recognizing a constructive trust where plaintiffs did not clearly seek a constructive trust in their second amended complaint. We have acknowledged here that plaintiffs could have more clearly articulated the equitable relief they sought. And we agree that it is generally a plaintiff's burden to reasonably inform the opposing party of the nature of his or her claims and the remedies sought to redress them. See *Forest Preserve District of DuPage County v. Miller*, 339 Ill. App. 3d 244, 252 (2003) (citing 735 ILCS 5/2-612 (West 2002)). But having reviewed the record as a whole, we are convinced that Yvonne was on notice that plaintiffs would seek a constructive trust at trial. Yvonne did not seek clarification of the chancery judge's transfer order stating that plaintiffs' equitable claims were "subsumed" into their claim for tortious interference, she did not move to strike language in plaintiffs' second amended complaint asking for equitable relief, including an order providing "that [plaintiffs] have and receive the proportionate assets they had a reasonable expectation to receive," and she knew going into trial that plaintiffs intended to present no damages expert to establish a cash value for the Kenmore property. We find Yvonne's contention now on appeal that she never believed plaintiffs were seeking a constructive trust over the property to be disingenuous.

¶ 77 B. Law Governing Claims of Tortious Interference With Expectancy

¶ 78 Yvonne argues that the trial court misapplied the law governing tortious interference with

expectancy by focusing on Mary's competency rather than Yvonne's actions and by shifting the burden of proof to Yvonne to demonstrate that she did not misappropriate funds withdrawn from Mary's accounts. We disagree and find the court's focus was entirely proper, in light of the presumption of undue influence that can arise within a fiduciary relationship.

¶ 79 To recover for tortious interference with an economic expectancy, a plaintiff must establish the following: (1) the existence of an expectancy; (2) the defendant's intentional interference with the expectancy; (3) "tortious conduct such as undue influence, fraud, or duress"; (4) "a reasonable certainty that the expectancy would have been realized but for the interference"; and (5) damages. *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1021 (1997). Although it is normally the plaintiff's burden to prove specific instances of undue influence, fraud, or duress, a rebuttable presumption of tortious conduct arises when a fiduciary benefits from a transaction with his or her principal. In will contests, for example, a presumption of undue influence arises when "(1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will, (2) the testator is the dependent and the beneficiary the dominant party, (3) the testator reposes trust and confidence in the beneficiary, and (4) the will is prepared by or its preparation procured by such beneficiary." *DeHart v. DeHart*, 2013 IL 114137, ¶ 30.

¶ 80 This presumption is not limited to will contests. In *In re Estate of Feinberg*, 2014 IL App (1st) 112219, ¶¶ 1, 8, 12, for example, a case involving claims of the misappropriation of funds and intentional interference with a testamentary expectancy, this court affirmed the trial court's finding that fiduciaries failed to rebut the presumption that transactions they benefitted from were the product of fraud or undue influence. We noted that, "once a fiduciary relationship is established, any transaction between the parties which benefits the dominant party is presumed to

be fraudulent." *Id.* ¶ 69.

¶ 81 Here, the trial court found that Yvonne "enjoyed a confidential relationship with her mother via the Power of Attorney and as her oldest child," and that Mary's Alzheimer's disease made her "completely dependent upon Yvonne." Yvonne had a fiduciary duty to use the trust reposed in her to handle her mother's finances in a way that was in Mary's best interests, not Yvonne's, and to ensure that Mary's estate-planning documents were not changed in a way that was contrary to her intentions and desires when she was competent. Instead of doing that, the court found that Yvonne "aggressively initiated financial transactions to her own benefit and insulated the relationship from outside supervision." It noted that the record was "bursting" with "example after example of unnatural and suspicious financial transactions leading up to the unnatural and suspicious Will and Trust changes." The court found that Yvonne had utterly failed to rebut the presumption that funds withdrawn from her mother's IRA were misappropriated by her or that the changes to Mary's will and land trust benefiting Yvonne were not the result of undue influence.

¶ 82 The trial court correctly applied the law governing claims of tortious interference with expectancy, including the law governing the rebuttable presumption of tortious conduct that arises in cases of fiduciary relationships.

¶ 83 C. Sufficiency of the Evidence

¶ 84 We must also reject Yvonne's argument that the judgment against her was against the manifest weight of the evidence. This case turned largely on the credibility of the witnesses. Plaintiffs painted their older sister as bitter, self-motivated, and scheming, isolating them from their mother in her final days to exert influence over her for Yvonne's sole benefit. Yvonne presented herself as the only sibling willing to take responsibility for Mary, who deserved to be

and was rewarded for the years of care-giving and companionship she gave to her mother.

¶ 85 The trial court clearly believed plaintiffs' version of events over Yvonne's:

> "This Court finds that the testimony of the three Plaintiffs in this matter is accurate and credible. The testimony of the Defendant is implausible, deceptive and lacks even a scintilla of reliability or credibility. Mr. Roseen is a credible and independent witness. Attorney Kelly's testimony did not as represented; establish that he has a custom and practice of meeting with elderly clients alone. His testimony did not establish that Mary O'Sucha was not suffering from Alzheimer's when he drafted a new will and amended her trust to benefit Yvonne Lesko whom he knew for many, many years. Attorney Kelly admitted that had he known that Mary did not recognize her own children, he would not have made the changes to her Will and Trust. In fact, Mary did not recognize her own children at the time he made the changes to her Will and Trust."

¶ 86 And the court made sure to detail why it had not found Yvonne to be a credible witness:

> "Yvonne Lesko lacks any credibility whatsoever. She was evasive at every point of her testimony. Her testimony was at times outright false and intended to mislead this Court. Only when confronted with opposing evidence did she even admit her mother's Alzheimer's, her use of Mary's funds to pay back-taxes on property she owned and the accurate amounts. There is not much that can be believed from her but that Mary was her mother, Mary lived with her for wahile [*sic*] and that Yvonne took Mary to change her Will and Trust."

¶ 87 Our supreme court reminds us that "a reviewing court may not reweigh the evidence or substitute its judgment for that of the trier of fact. Findings of fact are entitled to deference, and

this is particularly true of credibility determinations." *Eychaner v. Gross*, 202 Ill. 2d 228, 270 (2002). "Underlying this rule is the recognition that, especially where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence." *Greene v. City of Chicago*, 73 Ill. 2d 100, 110 (1978). Accordingly, we will disturb a trial court's findings only when they are against the manifest weight of the evidence, *i.e.*, "when an opposite conclusion is apparent or when [the] findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995).

¶ 88 Here, the trial court concluded that plaintiffs established "reasonable and proven expectations of Mary's intentions to have all four of her children share equally under her Will and Trust," that "Yvonne used her position of trust to induce Mary to exclude the other three children to her benefit," and that "Yvonne interfered with their beneficial interest under the Will and Trust and she abused her position as power of Attorney to benefit herself financially by depleting Mary's IRA and by inducing her mother to amend her Will and Trust to exclude her siblings," a "tortious abuse of her fiduciary duty."

¶ 89 Yvonne's arguments in support of her position that these findings are against the manifest weight of the evidence either improperly invite us to ignore the court's credibility determinations and reweigh the evidence or are based on her mistaken belief, discussed above, that no rebuttable presumption of tortious conduct arose in this case. The trial court's judgment against Yvonne is not against the manifest weight of the evidence.

¶ 90 D. Evidentiary Objections

¶ 91 Finally, Yvonne argues that certain evidentiary errors require reversal, asserting that the trial court abused its discretion by (1) striking her objections to an evidence deposition admitted

at trial, (2) taking judicial notice of property records mentioned for the first time in closing arguments, and (3) admitting without an adequate foundation or prior disclosure a summary of bank records prepared by plaintiffs' counsel.

¶ 92 A decision to admit evidence is within the discretion of the trial court and "will not be reversed absent an abuse of discretion." *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion exists when "no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848 (2010). "[T]he burden is on the party seeking reversal to establish prejudice" resulting from an erroneous evidentiary ruling. *Smith v. Baker's Feed and Grain, Inc.*, 213 Ill. App. 3d 950, 952 (1991).

¶ 93 1. Objections Made During Dr. Cao's Deposition

¶ 94 At trial, Yvonne introduced by way of stipulation the evidence deposition of Mary's oncologist, Dr. Cao. Although the parties made various evidentiary objections during the deposition, neither side sought rulings on those objections when the transcript was admitted into evidence. The trial court noted this in its order. Yvonne now contends that "[t]he trial court abused its discretion [by] *sua sponte* striking [her] objections." This is not at all what happened. Rather, it is Yvonne who forfeited her objections by failing to secure rulings on them. See *Fremont Compensation Insurance Co. v. Ace–Chicago Great Dane Corp.*, 304 Ill. App. 3d 734, 741–42 (1999) ("it is [a] party's obligation to secure a ruling on [his] objection, and the failure to obtain such a ruling operates as a waiver [forfeiture] of the objection"). Dr. Cao's deposition testimony was properly admitted.

¶ 95 2. Judicial Notice of Property Records

¶ 96 Yvonne also argues that the trial court abused its discretion by considering evidence not introduced at trial and conducting its own research after the trial concluded. As noted above, to

rebut Yvonne's testimony that she withdrew funds from Mary's IRA to pay off a mortgage on the Kenmore property, in his closing argument plaintiffs' counsel asked the trial court to take judicial notice of records of the Cook County recorder of deeds showing that there was still a mortgage on the Kenmore Avenue property in late 2011. Yvonne's counsel unsuccessfully objected, on the basis that it was too late to introduce new evidence.

¶ 97 The trial court reviewed the records and found that they showed what plaintiffs' counsel had represented they would: a second mortgage on the property. This is evidenced by a timeline of the various mortgages and payoffs on the Kenmore property that the court included in its trial order. When Yvonne argued in her motion to reconsider that the court had improperly considered new evidence and conducted its own research after the trial was over, however, the court stated that it "did not consider the contested entries in its findings in this case relative to the cause of action for Interference with Expectation." Rather, the trial court found that the claim was "proven by the Plaintiffs based upon evidence proving mental and physical condition of their mother at the time that the Defendant took all of these nefarious actions with her property, valuables and cash."

¶ 98 Yvonne does not contend that the property records are not the sort of documents the court could have taken judicial notice of if the issue was raised earlier in the trial. And indeed we find that they are. Illinois Rule of Evidence 201 provides that a court may take judicial notice of any adjudicative fact that is "not subject to reasonable dispute in that it is *** capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questions." Ill. R. Evid. 201(a), (b)(2) (eff. Jan. 1, 2011). Online records of the Cook County recorder of deeds meet this requirement. *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 4 n.1

¶ 99 The crux of Yvonne's argument is, instead, that it was improper for the trial court to

consider any new facts raised for the first time during closing argument when she had no opportunity to rebut them. As plaintiffs point out, Rule 201(f) provides that "[j]udicial notice may be taken at any stage of the proceeding" (Ill. R. Evid. 201(f) (eff. Jan. 1, 2011)). A court may even do so *sua sponte*. Ill. R. Evid. 201(c) (eff. Jan. 1, 2011). But the court must make clear "during the course of the trial *and not after the evidence is closed* what facts and sources" are being noticed. (Emphasis added.) *People v. Barham*, 337 Ill. App. 3d 1121, 1129 (2003). When parties have requested judicial notice in closing argument, we have held that the request came too late. See, *e.g.*, *People v. Moton*, 277 Ill. App. 3d 1010, 1013 (1996) (rejecting prosecutor's suggestion in closing argument that the trial court could take judicial notice of birth dates appearing on certain documents, on the basis that "[b]oth parties had rested, and the proofs were closed"). Here, although Yvonne's counsel was able to raise the issue of the property records in his motion to reconsider, it was too late for him to call Yvonne or any other witness to explain or rebut the records. We conclude that the trial court abused its discretion by taking judicial notice of facts raised for the first time in closing argument.

¶ 100 However, not every evidentiary error requires reversal. Here, although we find the trial court's statement that it did not rely on the records in finding liability to be somewhat self-serving, it is clear to us that, if the court relied on the records at all, it was to refute Yvonne's testimony that she used the funds from Mary's IRA for a legitimate purpose. The existence of the records clearly affected Yvonne's credibility as a witness. But if there is one thing that the trial judge in this case made manifestly clear, it is that, before plaintiffs' counsel even sought judicial notice of those records, he already did not find Yvonne to be a credible witness. This was due to her demeanor on the stand, her refusal to admit facts unless confronted by evidence, and significant other evidence supporting her siblings' version of events over hers. It is clear to us

that, even though the property records led the court to conclude that Yvonne was not telling the truth regarding this one detail in the case, there is no indication that the absence of those records would have changed the court's general opinion that Yvonne was an untruthful witness.

¶ 101 3. Plaintiffs' Counsel's Summary of Bank Records

¶ 102 The trial court found that when Yvonne withdrew money from Mary's IRA she would deposit it in Mary's Chase checking and savings account. Plaintiffs used two exhibits to cross-examine Yvonne regarding the activity in that account. The first consisted of bank statements showing all deposits made into the account from January 2007 to the time of Mary's death in 2010. And the second was a seven-page document created by plaintiffs' counsel, in which certain types of deposits from the statements were isolated and grouped together, including direct deposits from Social Security, interest payments, and roughly two pages of deposits without an identifying source, which the document indicated totaled $47,600.72. By having Yvonne identify the bank's naming conventions for various transaction types, counsel sought to narrow down the possible sources for the unidentified deposits. When plaintiffs' counsel first showed the summary to Yvonne, her counsel noted that he had never seen it before and reserved the right to object to it at a later time, which he did, arguing at the close of evidence that the exhibit should not be admitted because no proper foundation had been laid for it. The trial court overruled that objection.

¶ 103 Illinois Rule of Evidence 1006 governing summary evidence provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation" if the documents summarized are made available for examination. Ill. R. Evid. 1006 (eff. Jan. 1, 2011). Courts distinguish between "summaries which condense voluminous materials not admitted at trial" and

"pedagogical summaries of testimony or documents already admitted into evidence." *People v. Wiesneske*, 234 Ill. App. 3d 29, 42 (1992). Although the latter are generally *not* admitted into evidence, but are instead used merely as testimonial aids, we have held that "it is within the trial court's discretion to admit summary evidence even of documents admitted at trial where the review of those documents would be inconvenient." *Id.*

¶ 104 Here, the full bank statements from which the summary was drawn were admitted into evidence and include only around 270 pages of material. We cannot say that it would have been too inconvenient for the for the trial court to review the statements directly. And Yvonne is correct that a proper foundation was not laid for the summary, in that its author or some other knowledgeable person was never called to testify regarding how the summary was created.

¶ 105 Yvonne has nevertheless failed to convince us that admission of the summary into evidence was reversible error. In a bench trial, there is a "well-established presumption" that the court considered only competent evidence in reaching its decision (*Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 979 (1991)). Yvonne has failed to rebut that presumption. Indeed, in the discussion of Yvonne's testimony included in the trial court's order, the court cites only to the full bank statements, and not to the disputed summary. The fact that the court used some of the same descriptions of various deposits that plaintiffs' counsel pused in the summary does not mean that the court improperly relied on the summary instead of the bank statements themselves.

¶ 106 IV. CONCLUSION

¶ 107 For the foregoing reasons, we reverse the trial court's determination, reflected in its January 29, 2016, and April 26, 2016, orders, that it could not use its equitable powers to recognize the existence of a constructive trust in plaintiffs' favor. We also vacate the court's October 28, 2016, order, which awarded plaintiffs damages in lieu of their proportional shares of

the Kenmore property. We affirm the court's judgment in all other respects, including the court's award of monetary damages to plaintiffs for funds from Mary's IRA account that the court found were misappropriated by Yvonne.

¶ 108 Affirmed in part; reversed in part.