2014 IL App (2d) 130701-U
No. 2-13-0701
Order filed March 7, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF DENNIS F. RADWANSKI, OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
	)	No. 08-P-309
(Sherry Radwanski, Petitioner-Appellant, v. Dennis A. Radwanski and Daniel A. Radwanski, Respondents-Appellees).	)	Honorable Paul M. Fullerton, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing petitioner's citation to discover assets where any ultimate citation to recover assets would be barred by *res judicata*. Affirmed.

¶ 2 Petitioner, Sherry Radwanski, petitioned for citations to discover assets to issue against her sons, respondents Dennis A. Radwanski and Daniel A. Radwanski, as well as to several other relatives. Dennis and Daniel moved to dismiss Sherry's petition, alleging that it was barred by *res judicata*, where issues relating to certain missing funds had been litigated during an earlier trial, or that the theft issue was forfeited because Sherry failed to raise it in a prior appeal. The trial court granted the motion and dismissed Sherry's petition. Sherry appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. 2011 Trial

¶ 5 Decedent, Dennis F. Radwanski, died intestate on January 6, 1999. He was survived by his wife, Sherry Radwanski, his sons, Dennis and Daniel, and his daughter, Michelle Radwanski. Nine years after decedent's death, a probate estate was opened and the Public Administrator was ultimately appointed as independent administrator of his estate.[1]

¶ 6 Decedent worked in the towing business and started several companies under the "District" banner. Sherry worked for the companies, as did Dennis and Daniel. (Sherry fired Dennis in February 2008 and, the same day, Daniel quit.) In 1986 and 1994, decedent had some of his businesses incorporated. The corporate records for these entities were not well-maintained and, in 1998, decedent and Sherry met with an attorney, Richard Janci, to discuss business planning. At the end of 1998, Janci had updated the corporate books to reflect that decedent and Sherry owned the businesses (he understood that Dennis and Daniel had no ownership interest in them) and arranged for the documents to be dropped off to decedent to sign. After decedent's death in January 1999, Sherry assured Janci that decedent had signed the documents before his death.

¶ 7 On July 30, 1999, in an agreed order, the trial court appointed the Public Administrator as administrator of decedent's estate. It also declared that decedent died intestate and left as his sole and only surviving heirs Sherry and the couple's three children. In his report to the court, the Public Administrator noted that the heirs disputed ownership of the District businesses, certain real

[1] In a subsequent order, the trial court noted that it removed Sherry as executor and appointed the Public Guardian as administrator in order to "neutralize the family dispute and to obtain an objective resolution of the issues in controversy" in the "bitter dispute between a mother and her sons over the assets" of decedent's estate.

and personal property, and $700,000 cash kept in the basement of the family residence. (Issues concerning the $700,000 are the subject of this appeal.)

¶ 8 On October 22, 2009, the Public Administrator petitioned for the issuance of a citation to discover assets and obtain information against Sherry concerning the businesses as well as other estate assets. The trial court ordered that the citation be issued. Subsequently, the Public Administrator petitioned for the issuance of a citation to *recover* assets against Sherry, arguing that decedent was the sole owner of the District entities and taking the position that certain personal property, two real estate parcels, and the $700,000 in cash belonged to the estate.

¶ 9 Meanwhile, 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 certain District stock and equipment and that she pay the estate $700,000 in cash that allegedly belonged to decedent. They alleged that Sherry dissipated or negligently safeguarded the cash by failing to take any precautions to protect it or to take any actions to retrieve it after she claimed it was missing. They requested that Sherry be ordered to repay to the estate the cash.

¶ 10 In her response to Dennis and Daniel's petition, Sherry claimed that the money belonged to the District companies, not to her or decedent individually, and raised several affirmative defenses, including, *inter alia*, unclean hands. Sherry argued that Dennis and Daniel's petitions were barred (and she was relieved from responsibility) by their own misconduct in conjunction with the $700,000, where her sons knew that money from the corporations was kept in a hidden location in the house and where Dennis had quarreled in the last half of 2007 with Sherry about money she lent him, allegedly stating that he knew she had more money in the house. Sherry further alleged that between late December 2007 and mid-March 2008, Dennis and Daniel removed virtually all

of District's corporate funds from its hidden location and used those funds to purchase their own company, Independence Towing & Recovery, Inc.

¶ 11 In their answer to Sherry's affirmative defenses, Dennis and Daniel denied Sherry's allegations that they knew cash was kept in the home, that they took the cash, and that they used it to fund their new business.

¶ 12 On July 18, 2011, Sherry sent a notice of deposition to Dennis and Daniel (and a subsequent amended notice to Daniel), in which she requested that her sons produce all documents relating to the ownership and disappearance of the $700,000, including their personal bank statements and Independence's bank statements. An August 8, 2011, letter from Sherry's attorney, Bruce Rose, to Dennis and Daniel's attorney stated that Sherry was claiming that her sons stole the money and used it to start Independence; thus, the requested documents were relevant to the litigation and should be produced. At Dennis's August 10, 2011, deposition, Dennis's attorney refused to turn over the documents and voiced an objection to their production. Attorney Rose proceeded with the deposition, asking questions concerning the alleged theft. Dennis denied taking the money and explained how Independence was funded and its equipment purchased. Dennis testified that some of Independence's assets were purchased with loans by Daniel through the sale of an aircraft that Dennis owned. Sherry did not move to compel production of the discovery documents or deposition questions.

¶ 13 On August 23, 2011, a nine-day bench trial commenced on the two citations to recover assets against Sherry. Sherry testified that she last saw the $700,000 between December 2007 and February 2008. She never reported the money missing to police, filed any insurance claim, or told anyone else that it was missing. She did not contact police because there was no evidence of forced entry; thus, she reasoned, it had to be "someone on the inside that took it." Sherry also did

not check the security keypad to ascertain whether anyone had entered the house. She started dating her boyfriend, Rick Rubin, in 2006, and he had access to the residence in 2007 and 2008, but Sherry maintained that she was always present when he was there. Her sons did not get along with Rubin. Sherry believed her sons took the money; they had keys to the house and knew the alarm code. She also claimed that, after decedent's death, they knew cash was kept in the house. Sherry further testified that work was done on the house at the time the money went missing, including roof work, plumbing, and satellite television. Sherry conceded that she started gambling after decedent's death, but denied that she lost the $700,000 gambling. She claimed that she attempted to discuss the theft with Dennis, but that he told her that they would talk about it at a later time. According to Sherry, after February 2008, Dennis and Daniel still had the garage opener to the residence; if someone could enter the garage, they could access the area where the cash was kept.

¶ 14 Dennis testified that he was unaware his parents kept cash in the house. He denied taking the money and had no knowledge that anyone did so. Near Thanksgiving 2007, he attempted to gain entry to the house, but could not enter the interior. Daniel also denied taking the money and was unaware who took it. After Thanksgiving 2007, Daniel was locked out of Sherry's house.

¶ 15 During Rose's cross-examination of Dennis, Rose asked Dennis about a District truck, upon which Dennis's attorney raised a relevance and materiality objection. The following colloquy then ensued:

> "THE COURT: How does this have any relevance to the issues that are involved in this case, Mr. Rose?
>
> MR. ROSE: I'm just trying to bring him back, Judge, to where we were. And the real point of this was he – his mother discovered that this was going on when she

walked in and found he and his brother in the garage of her house, and this was after Thanksgiving.

THE COURT: So the purpose of it is to show he had access to the house; correct?

MR. ROSE: Correct.

THE COURT: Is the purpose of this case to determine who took the $700,000?

MR. ROSE: That evidently is one of the purposes, Judge.

THE COURT: It is not an issue in this case. $700,000 is missing.

There are two issues. Is the $700,000 an asset of the Estate? If it is, did Ms. Radwanski violate her obligation as a fiduciary to take reasonable steps to protect it? Those are the only two issues I have.

I don't care who took it. Not my job. Let's move on.

MR. ROSE: All right."

Rose did not make an offer of proof on the issue.

¶ 16 On September 30, 2011, the trial court found that the $700,000 was an estate asset and that Sherry was not negligent for its loss. The court identified two issues to resolve concerning the money: (1) whether or not it was an asset of decedent's estate at the time of his death; and (2) whether or not Sherry was negligent in safeguarding it after decedent's death and, thus, responsible for its loss. The court noted that the money was kept in a box on a shelf among other boxes in a narrow corridor between the outer pool wall and the foundation wall of the couple's basement. The money had been kept there for more than 25 years before decedent's death "without incident and another nine years before they went missing. *Neither of the Radwanski sons who lived in the house during most of those years was aware the funds were stored in this*

location or that their parents kept large sums of money in the home. It is, therefore, logical to conclude that the funds were well hidden." (Emphasis added.) The court also noted that the house was fairly secure and Sherry's decision to keep the money where it had always been stored without incident was not negligent.

¶ 17 Sherry moved to reconsider the court's ruling that the money belonged to the estate , and the trial court, on February 1, 2012, denied the motion, finding that the $700,000 was an estate asset, was now lost, and that Sherry was not negligent as to its loss. In announcing its findings, the court stated:

> "I want to turn to this issue of the $700,000 because a lot of the argument that's been raised here has been spent talking about the $700,000. And to be quite honest, I'm a bit perplexed about why it's continually being discussed. It was lost under Sherry's watch. She is the one, as I understand the history of all of this, [who] reported it missing. And I made findings that the funds were part of the estate. But the whole issue seems to be moot. The funds aren't there. They don't exist. They are lost. And the only question that then was for the Court to consider was if she – if the funds were lost under her watch and she owed a fiduciary obligation here, was she negligent in storing the money where she stored the money? That's the only way she would be culpable to the estate or to the other heirs for the loss of those funds. And I concluded in your client[']s favor that, no, she wasn't negligent based upon the evidence that was in the record.
>
> So regardless of whether it turns out to be an asset of the estate or partial partnership assets so it's partly an asset of the estate and partly belongs to your client, it's all mooted by the fact that it's lost, and the ultimate outcome of it is in your client's favor

because there was no negligence in its loss. So I don't quite understand why we're spending time on this issue. Maybe I've missed something Mr. Rose.

MR. ROSE: Because it was always Sherry's position and I believe we did state this multiple times during the trial that the money really represent[ed] corporate funds. The corporation or corporations wished to pursue the recovery of that money. They believe they know where the money is or know where it went.

THE COURT: Well regardless of whose money it was, the money is lost. And I found that Sherry isn't negligent for its loss. As far as I'm concerned, it's a moot issue. It's a dead issue in case. I don't mean to make any bad puns here. But it's a dead issue in the case. And so I don't see this, even given the arguments that were made, if I see, okay, you are correct on your legal interpretation, the bottom line on it still is that the money doesn't exist anymore.

MR. ROSE: But – I'm sorry.

THE COURT: And only your client could be culpable for it. And I found she is not.

MR. ROSE: But – I understand, judge.

But the issue really goes to who has the right to attempt to recover the money. And it's our position that all or at least virtually all of the money belonged to the corporations and that [the] corporation should be free to pursue that claim and that's really what it's about, judge.

THE COURT: But I did not find that to be the case and I don't think the facts support that conclusion for the reasons that I stated in my decision of September 30[, 2011]. So that motion is denied as well."

¶ 18 Sherry appealed (and Dennis and Daniel cross-appealed) the court's findings, *inter alia*, that the missing $700,000 was an asset of decedent's estate at the time of his death (Sherry's appeal) and that Sherry was not negligent in the disappearance of the money (Dennis and Daniel's cross-appeal). This court, on February 7, 2013, upheld both findings. *In re Estate of Radwanski*, 2013 IL App (2d) 120139-U, ¶¶ 90-93, 133. (Sherry did not raise the theft argument on appeal.)

¶ 19 B. Sherry's 2013 Petition

¶ 20 On February 13, 2013, Sherry petitioned for citations to discover assets against Dennis, Daniel, Michelle Priolo Radwanski (Dennis's wife), Michael Priolo (Michelle's father), Deborah Priolo (Michelle's mother), and Independence. (This petition is the subject of the present appeal.) Sherry alleged that she last saw the $700,000 in her basement in early 2008 and discovered that the money was missing in August or September 2008. Shortly after she last saw the money, Sherry discovered that her sons had been embezzling money from the corporations she owns and that had employed them. Sherry alleged that, without her knowledge or approval, her sons used corporate funds and employees to set up a storage lot in Westmont to store cars they had towed while using trucks belonging to one of Sherry's corporations. Sherry further alleged that, from mid-2007 to February 18, 2008, her sons set up the competing towing business (*i.e.*, Independence) while still employed by one of Sherry's companies and that these actions are the subject of a pending lawsuit in the circuit court of Cook County (*District Recovery, Inc. v. Radwanski*, 08 CH 10532), which was filed after Sherry fired Dennis and on the same day that Daniel quit.

¶ 21 Sherry's petition further alleged that Dennis and Daniel formed Independence within the next 8 to 10 months and purchased between $500,000 and $750,000 in trucks, tools, and equipment while still paying themselves salaries. These actions, according to Sherry, occurred

within 60 days of the last time she saw the $700,000 in her basement and at a time when she was discovering that Dennis had "secretly" written himself at least $140,000 in checks from Sherry's corporations to pay for improvements to his and Michelle's house because he lacked personal funds to do so. Sherry acknowledged that Dennis and Daniel testified in their depositions that the funding for Independence came from a certificate of deposit owned by Daniel and from loans made by Michael (Daniel's father-in-law); however, she believed that her sons stole the $700,000 from her basement. Sherry also alleged that any monies her sons received from Michael or Deborah was placed into Michael or Deborah's accounts "in an effort by Dennis and Danny to 'launder' those funds."

¶ 22 Sherry requested that the court issue a citation to discover assets against respondents in order to determine the source of the funding for Dennis and Michelle's home improvements and the source of Independence's capitalization and acquisition of assets. She argued that it was necessary to examine respondents' individual, joint, and corporate tax returns, investment portfolios, bank account records (from 2007 to the present), all Independence corporate books and asset purchase documents (from 2007 to the present), as well as respondents' mortgage-related documents (from 2007 to the present).

¶ 23 On March 15, 2013, Dennis and Daniel moved to dismiss Sherry's petition (735 ILCS 5/2-619(a)(4) (West 2012) (action barred by a prior judgment)), arguing that it was barred by *res judicata*. They noted that Sherry previously (identically) claimed as an affirmative defense (in her answer to a previous citation to recover assets) that her sons stole the money and used it to fund their own company; respondents denied her allegations; discovery was conducted on that issue; and evidence was presented at trial. Dennis and Daniel argued that, on September 30, 2011, final

judgment was entered on the merits of responsibility for the $700,000 and, therefore, Sherry was barred from re-litigating the issue.

¶ 24 Dennis and Daniel further noted that Sherry did not appeal to this court the trial court's denial of her second affirmative defense (that she was relieved from responsibility for safekeeping the $700,000 because her sons stole it) and, thus, the issue was forfeited or barred by *res judicata*.

¶ 25 Sherry responded that the trial court explicitly limited the issues before it, noting that the determination of who took the money was not an issue in the case. In its written findings as to the $700,000, the court noted that the issues before it were whether: (1) the money was an estate asset at the time of decedent's death; and (2) whether Sherry was negligent in causing its loss. Accordingly, Sherry argued that the issue was reserved for a decision in a different context.

¶ 26 Sherry explained that Dennis's in-laws and Independence were included in her petition because Dennis had testified at his August 10, 2011, deposition that, when he and Daniel were forming Independence in May or July 2008, Dennis's father-in-law transferred the entire purchase price for the first truck to the seller and subsequently lent part of the purchase price for the company's second truck. Sherry averred that, based on her conversations with Michael, the Priolos do not have the liquid assets (new flatbed and two trucks cost between $75,000 to $200,000) to fund the purchases. Thus, she believed that either Dennis lied under oath and her sons purchased the trucks with some or all of the missing money, or that funds moving through the Priolos' accounts were "laundered" by her sons. She also noted that her sons never produced the documents she requested.

¶ 27 As to *res judicata*, Sherry argued first that there was no final judgment on the merits of the claim or cause of action of who took the $700,000. Rather, the court ruled that the matter was not before it and it (allegedly) reserved the issue for determination in another case. Second, Sherry

noted that there is no identity of parties because Independence, Michelle, and the Priolos were not the subject of earlier citations. Third, she maintained that *res judicata* should not apply to a citation to discover assets because the doctrine applies to causes of action that can be adjudicated. In contrast, a citation to recover involves an adjudication of a title or claim.

¶ 28 In reply, Dennis and Daniel argued that the trial court ruled that the question of who took the $700,000 was moot as to the entire estate, rather than simply as to the citations to recover issued against Sherry. They also noted that the trial court ruled that only Sherry could be culpable for the loss of the funds, which was a final determination on the issue. Thus, a final judgment was rendered. They further argued that Sherry forfeited the theft issue during the first trial because she did not appeal the court's ruling that the theft issue was not an issue in the case. Even if she had, they argued, she failed to make an offer of proof. Next, Dennis and Daniel argued that Sherry never brought a motion to compel or for sanctions after Dennis did not comply with her discovery request. Thus, she forfeited the issue. They also argued that there is an identity of parties. Finally, they argued that the citation to discover assets does constitute a cause of action because it is commenced by the filing of a pleading, followed by service, and must include a prayer for relief.

¶ 29 On May 6, 2013, Sherry sur-replied that the trial court actually determined that the question of who took the money was never before it. Rather, the court started from the premise that the money was missing and then decided whether it belonged to the estate and if Sherry was negligent as to its loss. The court never determined culpability for the theft, but "merely determined whether Sherry was culpable for acting negligently and allowing the money to be stolen." The thief's identity was never decided. She further argued that the issue of who took the money was not (and could not have been) decided in the case addressing the two citations to

recover assets issued against Sherry. Thus, the issue was not moot as to the entirety of the estate proceedings.

¶ 30 At the May 8, 2013, hearing on Dennis and Daniel's motion to dismiss, the following colloquy occurred:

> "THE COURT: Well, do you agree that an affirmative defense of your client[']s was that Dennis and Daniel took the money, stole the money?
>
> MR. ROSE: We certainly raise[d] the [de]fense, judge, but Judge Dudgeon ruled that he was not going to decide that issue in the pages that I cited earlier.
>
> THE COURT: Was there evidence with respect to that issue during the trial?
>
> MR. ROSE: There was the beginning of evidence, but as both sides agree, Judge Dudgeon cut off the submission of that evidence and nothing on that was ever argued to the Court. And Judge Dudgeon made no decision final or otherwise on that issue."

¶ 31 The court also asked: "But if the cause of action – if the discovery relates to the cause of action, then it could apply. Would you agree with that or not?" Attorney Rose replied: "Potentially." The court then noted: "Because otherwise you could continue doing discovery all of the time." Rose replied: "Potentially that would be an issue down the road if and when there is a petition for a citation to recover assets hypothetically. But I don't think it would apply in this case for the reasons that I was about to get into." Rose then argued that Judge Dudgeon determined that the issue of who took the money would not be decided at the 2011 trial.

¶ 32 On June 10, 2013, the trial court granted Dennis and Daniel's motion to dismiss Sherry's petition to issue citations to discover assets. In announcing its ruling, the court noted that it was granting the motion "for those reasons set forth in Dennis and Daniel's" motion and "subsequent

briefs." First, the court found that the issue was barred by *res judicata* because theft/unclean hands was pleaded as an affirmative defense, discovery was conducted on the issue, and "some evidence of theft came up at trial." Second, the court explicitly rejected Sherry's argument that the issue was not resolved at trial or deferred, noting that the issue was again raised in her motion to reconsider and that Judge Dudgeon "made clear that that was a done deal[;] that issue was over. And then during the appeal, it was not part of the appeal. So the Court also believes that the issue would be waived." Sherry appeals.

¶ 33 II. ANALYSIS

¶ 34 A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that defeats the plaintiff's claim. *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 243 (2010). A section 2-619 motion to dismiss admits as true all well-pleaded facts, together with all reasonable inferences that can be gleaned from the facts. *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 325 (1995). When ruling on a section 2-619 motion, "a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Section 2-619(a)(4) permits a defendant to file a motion for dismissal on the basis that the cause of action is barred by a prior judgment (*res judicata*). See 735 ILCS 5/2-619(a)(4) (West 2012). The standard of review from a dismissal based upon the doctrine of *res judicata* is *de novo*. *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 489 (2009).

¶ 35 The doctrine of *res judicata* provides that "a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996); see also *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998) (*res judicata*, or

claim preclusion, refers to the preclusive effect that a final judgment on the merits has on the parties, in that it forecloses litigation of any claim that was, or could have been, raised in an earlier suit between the parties or their privies). "*[R]es judicata* applies to all matters that were actually decided in the original action, as well as to matters that could have been decided." *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. The doctrine "promotes judicial economy by requiring parties to litigate all rights arising out of the same set of operative facts in one case." *Id.* ¶ 35. It "also prevents a party from being unjustly burdened from having to relitigate the same case." *Id.* The burden of showing that the doctrine applies is on the party invoking the doctrine. *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41.

¶ 36 Three requirements must be met for the doctrine to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70, 73-74 (1994). This case centers on the first two elements; specifically, as to the first requirement, whether the court ruled on the theft issue during the 2011 trial (which we address below in assessing mootness) and, as to the second, whether Sherry's citation to discover constitutes a cause of action (which we address first).[2] As to the first requirement, generally, a plaintiff who splits his or her claims by voluntarily dismissing and re-filing part of an action after a final judgment has been entered on another part of the case subjects himself or herself to a *res judicata* defense. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 473 (2008) (discussing *Rein*, 172 Ill. 2d at 342-43). As to the second requirement, the

[2] As to the third requirement, the "rule of privity extends the preclusive effect of *res judicata* to those who were not parties to the original action, if their interests were adequately represented by someone else." *Cooney*, 2012 IL 113227, ¶ 33.

supreme court has adopted the "transactional test" and rejected the "same evidence test" in evaluating whether there is an identity of cause of action between two cases. *River Park, Inc.*, 184 Ill. 2d at 311. Thus, separate claims are considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Id.* at 311, 318 (doctrine barred the plaintiffs' state claims because the claims could have been brought in their federal action).

¶ 37 Sherry begins by addressing the second requirement—identity of causes of action. Sherry argues that, as a matter of law, a citation to *discover* assets is a discovery device that does not state a claim or cause of action and, therefore, the trial court erred in dismissing her petition on the basis of *res judicata*, which requires an identity of causes of action. She notes that, in contrast, citations to *recover* assets involve an adjudication of a title or claim. Sherry also contends that the trial court's comment that the issue of who took the $700,000 was not an issue in the case did not constitute an evidentiary ruling, such as one relating to the admissibility of evidence or the propriety of a question. Rather, the court's ruling defined the issues before it in the citation to recover assets directed against her. The trial court made clear, according to Sherry, that the only culpability issue before it was whether Sherry violated her fiduciary duty by taking reasonable steps to protect the funds from theft. Thus, its ruling was a definition of the issues in that earlier proceeding. Sherry complains that she did not have a full and fair opportunity to litigate the question of who took the money.

¶ 38 Dennis and Daniel raise three arguments in response. First, they contend that a citation to discover assets is a claim barred by *res judicata*. Next, they argue that Sherry's claim is forfeited. Finally, they argue that Sherry's claim is moot because any citation to recover assets

that might ultimately issue would be barred by *res judicata*. For the following reasons, we find the final argument dispositive.

¶ 39 First, Dennis and Daniel argue that a final judgment is an absolute bar to a subsequent action involving the same claim, demand, or cause of action. See *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389 (2001) ("doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."). In their view, a citation to discover assets is clearly a *demand* for discovery. Sherry's citation to discover, they urge, should be considered a demand that is barred by *res judicata* because in both her unclean hands affirmative defense and in her citation to discover, Sherry (identically) raised or claimed the same set of operative facts: that her sons stole the $700,000 and used it to start Independence. Dennis and Daniel also argue that, in addition to being a demand, Sherry's citation to discover is both a claim and a cause of action. The statute requires that a citation be commenced by a pleading, followed by service (as provided for in all other civil cases) (755 ILCS 5/16-1(b) (West 2012)), and must include a prayer for relief (755 ILCS 5/16-1(a) (West 2012)). Finally, Dennis and Daniel point to other types of civil citations, arguing that they have been construed as actions. See, *e.g.*, *Elmhurst Auto Parts, Inc. v. Fencl-Tufo Chevrolet, Inc.*, 235 Ill. App. 3d 88, 93-94 (1992) (commencement of supplemental citation to discover assets proceeding under section 2-1402(e) of the Code of Civil Procedure, which contains a procedure to discover assets and to compel their application to satisfy a prior judgment is an action; circuit court has authority to determine the rights of the parties and proceeding is "not merely a subpoena to appear before the

court and answer questions regarding the debtor's assets"). They urge that a citation to discover assets is a claim, demand, and/or cause of action and *res judicata* applies.

¶ 40 We reject Dennis and Daniel's argument that a citation to discover assets is a cause of action, claim, or demand. Section 16-1(a) of the Probate Act of 1975 "allows a party to file a citation petition on behalf of [an] estate, not only to discover information, but also to recover property." *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 250 (2006). It provides:

> "Upon the filing of a petition therefor by the representative or by any other person interested in the estate or, in the case of an estate of a ward by any other person, the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes (1) to have concealed, converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall contain a request for the relief sought." 755 ILCS 5/16-1(a) (West 2012).

The probate court is authorized to "examine the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may determine all questions of title, claims of adverse title and the right of property and may enter such orders and judgment as the case requires." 755 ILCS 5/16-1(d) (West 2012). Subsection (1) of section 16-1(a) contemplates the recovery of personal property belonging to the estate, and subsection (2) "has as its purpose the discovery of information." *In re Estate of Garrett*, 81 Ill. App. 2d 141, 146 (1967). Procedures under section 16-1(a) are summary and informal, and

courts are liberal in the procedures they permit to be followed thereunder. *In re Estate of Garrett*, 81 Ill. App. 2d 141, 147 (1967).

¶ 41 It has been noted that "[t]he statute thus contemplates two distinct types of proceedings, one merely in the nature of discovery and the other a truly adversary proceeding in which the right and title to personal property may be contested with optional jury trial on demand, and with power in the court to determine all questions of title," etc. *Id.* at 146-47.[3] It has been further noted that "the authorities provide that where the petition is for discovery only, there can be no adjudication of title or of claim, for there are no issues on which to enter judgment." *In re Conservatorship of Baker*, 79 Ill. App. 2d 234, 240 (1967); see also *In re Estate of Weisberg*, 62 Ill. App. 3d 578, 585 (1978) ("If a citation petition requests only information, the court may not try the question of title and order property to be turned over."). In contrast, where a citation petition seeks the recovery of property, it " 'must make out cognizable legal claims against the respondent just like any other complaint.' " *Hoellen*, 367 Ill. App. 3d at 250 (quoting C. Golbert, *Using the Probate Act to Recover Assets Stolen From Persons With Disabilities*, 88 Ill. B.J. 510, 512 (2000)); see also *In re Estate of Shugart*, 81 Ill. App. 3d 538, 540 (1980) ("where

[3] *Res judicata* can apply in the case of subsequent citations to recover assets. See *In re Estate of Cochrane*, 72 Ill. App. 3d 812, 814 (1979) (whether the dismissal of a petition seeking to recover assets acts as a bar to a second petition to recover assets depends on the basis of the dismissal order and the effect of the adjudication; if the first petition was dismissed because of technical deficiency or other reason not going to the merits, the dismissal would not bar the second petition under *res judicata*; if, on the other hand, the dismissal order was based on the merits, it would bar the second petition under the *res judicata* doctrine).

the relief sought is the recovery of property, the petition must state a cause of action or be subject to dismissal.").

¶ 42 In contrast, orders entered pursuant to citations to discover assets would not bar further action involving the same matter. See *In re Estate of Curley*, 43 Ill. App. 2d 389, 393 (1967) (the institution of citation-to-discover proceedings alone, "unaccompanied by any request for an adjudication," does not give the probate court exclusive jurisdiction to try the issues subsequently raised by the parties in the circuit court; first attempt to actually adjudicate matter—validity of a transfer—was suit filed in the circuit court; second attempt was in the probate court; when circuit court assumed jurisdiction of the matter, it made the probate court's exercise of concurrent jurisdiction improper); see also *Schwaan v. Schwaan*, 320 Ill. App. 287, 289-90 (1943) (in "a proceeding merely for discovery there can be no adjudication for the reason that there is no issue to be tried on which a formal and final judgment may be determined and entered.")

¶ 43 Having concluded that a citation to discover assets does not constitute a claim, demand, or cause of action, it necessarily follows that a citation to discover assets would not be barred by *res judicata*. However, Dennis and Daniel raise two additional theories to support their claim that dismissal was proper here.

¶ 44 First, they argue that the theft issue is forfeited. Indeed, the trial court found in the alternative that the issue of who took the $700,000 was forfeited. In announcing its findings, the trial court explicitly rejected Sherry's argument that the issue was not resolved at the 2011 trial or deferred, noting that the issue was again raised in *her* motion to reconsider:

> "There was discussion on the record [at the hearing on Sherry's motion to reconsider] between counsel and Judge Dudgeon on that issue. And Judge Dudgeon, in

this Court's view, made clear that that was a done deal, that issue was over. And then during the appeal, it was not part of the appeal. So the Court also believes that the issue would be waived."

¶ 45 Dennis and Daniel argue that Sherry forfeited the theft issue because, in the first appeal, Sherry did not raise the trial court's denial of her unclean hands affirmative defense (wherein she alleged that her sons stole the $700,000) or the evidentiary rulings on that defense. According to Dennis and Daniel, when, during the first trial, the trial court disagreed with Sherry's attorney's assertion that the theft of the money was one of the issues in the case, he "simply dropped the issue" and did not mention the alleged theft in the written closing argument submitted to the court. They contend that Sherry chose to not argue the issue despite the fact that her affirmative defense was still pending and some evidence had been presented.[4]

¶ 46 Addressing Dennis and Daniel's argument that she failed to appeal the issue, Sherry responds that there was nothing to appeal and, thus, no forfeiture. She contends that the trial court made clear that the issue of who took the money (and therefore any cause of action to recover it) was not before it in the citation proceedings against her and was to be pursued separately. Sherry argues that the trial court expressly ruled that the only culpability issue in the proceedings on the citation to recover assets from Sherry was her own potential liability for

[4] Dennis and Daniel also note that Sherry did not move to compel production of the discovery documents or deposition questions after her sons failed to produce the documents and, thus, she forfeited the issue (see *Klein v. Steel City National Bank*, 212 Ill. App. 3d 629, 633-34 (1991) (failure to object to trial court's *sua sponte* order severing previously consolidated actions waives issues on appeal)) and this precluded her from raising it in the first appeal (although she did not appeal it) (*Redmond v. Central Community Hospital*, 65 Ill. App. 3d 669, 678-79 (1978)).

having allowed the money to be stolen. (She notes that there was no allegation that she had taken the money.) Sherry argues that the trial court's remarks, therefore, on the motion for reconsideration have no bearing on either the preservation of the right to bring a later claim to recover the $700,000 or even the narrower issue of whether or not her sons took the money. She urges that those remarks were merely a restatement of the court's earlier remarks that the issue of who took the funds was not before it.

¶ 47 We disagree with Dennis and Daniel that the forfeiture rule has any application here. The failure to raise an argument before a trial court results in the forfeiture of that argument on appeal. *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 93. Thus, generally, the rule applies in the (civil) context of a reviewing court's assessment of issues on direct appeal from the trial court. Here, in contrast, the parties ask us to assess the trial court's findings in the first trial (that resulted in a prior appeal). An argument that a claim has already been decided in an earlier case and cannot be re-litigated in a new case implicates *res judicata*. The forfeiture rule, although somewhat similar, has no application here.

¶ 48 The more compelling, and, indeed, dispositive, argument Dennis and Daniel raise is mootness. They argue that the theft issue is moot because Sherry would be barred by *res judicata* from ultimately pursuing a citation to *recover* assets, where that type of citation constitutes a cause of action. Stated differently, they argue that conducting discovery on a claim that cannot be pursued in a citation to recover is futile and would not benefit the estate.[5] Dennis and Daniel request that this court not allow discovery on an issue they characterize as

[5] Rather, they contend that Sherry is utilizing the present proceedings to obtain confidential information concerning Independence in order to gain a competitive advantage.

moot. Sherry responds, without citation to any authority, that *res judicata* would not bar a subsequent citation to *recover* assets issued at her request.

¶ 49 "An appeal is considered moot where it presents no actual controversy or where the issues involved in the trial court no longer exist because intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party." *In re J.T.*, 221 Ill. 2d 338, 349-50 (2006). Generally, courts of review do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided. *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998).

¶ 50 As to the issue of whether *res judicata* would bar a subsequent citation to recover assets, we agree with Dennis and Daniel that it would bar a citation to recover and that this renders moot Sherry's citation to discover. The proceedings below reflect that the theft issue was not reserved, either explicitly or implicitly. Thus, the doctrine's first requirement—a final judgment on the merits—is met. Specifically, although Sherry correctly notes that the trial court stated during the 2011 trial that the theft issue was not before it, Sherry fails to note that she did not request that the court issue a written order explicitly reserving the issue and granting her leave to re-file and the record does not reflect that the court elsewhere expressly stated that it was granting her that right. See *Rein*, 172 Ill. 2d at 340 (one exception to *res judicata* is where "the court in the first action expressly reserved the plaintiff's right to maintain the second action"). Indeed, the court commented that the theft issue was "moot" and a "dead issue," comments that belie her claim that the issue was in any way reserved. In its written findings after the trial, the court found that neither Dennis nor Daniel (who lived in the residence at the relevant time) were "aware that their parents kept large sums of money in the home" and further noted during the motion-to-reconsider hearing that *only* Sherry could have been culpable for the

loss of the funds. Attorney Rose noted that the corporations "believe they know where the money is or know where it went." He further argued that "the issue really goes to who has the right to attempt to recover the money" and that the corporations "should be free to pursue that claim and that's really what it's about, judge." In denying Sherry's motion, the court specifically rejected that claim, stating: "But I did not find that to be the case and I don't think the facts support that conclusion."[6]

¶ 51 We believe that the interests of judicial economy and the parties' expenses are not well-served by allowing discovery here. Allowing discovery could result in either of two options: (1) no evidence would be discovered to warrant the issuance of a citation to recover and, thus, the matter would terminate; or (2) evidence *would* be discovered warranting the issuance of a citation to recover, but the citation would be barred by *res judicata*, thus, again, terminating the proceeding. Because, under either possible scenario, the issuance of a citation to discover could not prove fruitful in terms of granting Sherry the relief she seeks, the theft issue is in a sense moot. More importantly, we cannot condone the issuance of a citation to discover where *res judicata* would ultimately bar a citation to recover, if discovery on the theft issue ultimately warranted the issuance of such a citation.

¶ 52 Sherry argues further that, even if she could not request a citation to recover assets, the Public Administrator could do so on the estate's behalf and, thus, allowing the citation to discover assets is not a futile effort. We decline to address this point because Sherry fails to

[6] The *res judicata* doctrine's second and third requirements would also be met. Any citation to *recover* assets would constitute a cause of action that would meet the second requirement—identity of causes of action. Further, the third requirement would be met because the parties and/or their privies would be identical.

cite any authority for her proposition and fails to explain how the Public Administrator's citation would not also be barred by *res judicata*. Both argument and citation to relevant authority are required in order to comply with Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) ("issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.").

¶ 53 In summary, the trial court did not err in dismissing Sherry's citation to discover assets.

¶ 54 III. CONCLUSION

¶ 55 The foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 56 Affirmed.