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Reply Argument

In his opening brief, Appellant Justin Bell explained how the trial court's judgment approving the personal representative's proposed compromise settlement in Justin Bell's discovery of assets case lacked any evidence supporting it. Justin Bell established that no evidence whatsoever was introduced at the hearing on the proposed settlement, be it testimonial or documentary, to support the personal representative's compromise settlement of $325,000.00. Instead, the personal representative merely presented an unsworn oral argument stating his beliefs – including that Justin Bell could receive $700,000.00 after trial – and the trial court erred in treating that as evidence at all, let alone substantial evidence.

The personal representative, Kevin Anderson, Attorney, who is a respondent on appeal, did not file a brief in response. The respondents who did file the Brief of the Respondents largely sidestep the issue of whether Mr. Anderson's unsworn oral report of his beliefs (with no introduction of any documents) was evidence. Instead, they seek to divert the Court's attention from the facts of this case by referring to facts not before the trial court and challenging Justin Bell's discussion of the facts that led to the personal representative's compromise settlement in a belated allusion to claim preclusion or issue preclusion. The respondents also make thinly veiled suggestions that Justin Bell lacked standing to litigate for Florence Bell's land in his discovery of assets case, despite the facts both that they

believe Mr. Anderson correctly included the value of the land in the compromise settlement, and that they concur that this Court has jurisdiction of this case, which it would not if Justin Bell lacked standing.

When the respondents do actually discuss the issue before the Court, they untenably suggest that the trial court briefly asking Mr. Anderson whether he would "verify[] that what [he] indicated to the Court is true, as far as [he was] aware" and Mr. Anderson *offering* to be sworn transmuted his statements from an oral argument introducing no evidence with no opportunity for cross-examination or objection into actual evidence under the law of Missouri. The only cases they cite in support of this notion are entirely inapposite.

Plainly, no actual evidence was introduced in any form at the hearing over Mr. Anderson's proposed compromise settlement. For the Court to accept the respondents' position, it would have to disregard the facts of this case, as well as the law of Missouri concerning what constitutes evidence and what constitutes sworn testimony. No evidence supports the trial court's judgment, and thus it was error.

I. No evidence, either testimonial or documentary, was introduced before the trial court at the hearing over the proposed compromise settlement.

a. The trial court's brief exchange with Mr. Anderson concerning the veracity of his statements did not transform his oral argument into evidence.

The respondents argue that the following exchange between Mr. Anderson and the trial court satisfied the requirements of the law of Missouri to make Mr. Anderson's oral argument into evidence:

> THE COURT: Well, Mr. Anderson, you're an -- you're an attorney at law and an officer of the court. *Are you verifying that what you indicated to the Court is true, as far as you're aware?*
>
> MR. ANDERSON: *Yes, Judge. And I -- and I would be happy to be sworn and affirm that.*
>
> THE COURT: As -- as an officer of the court, I don't believe that's necessary.

(Brief of Respondents 14) (quoting Transcript 17) (emphasis added by the respondents).

The respondents suggest that because the word "verified" was used, and because Mr. Anderson was "already bound by his sworn oath" as an attorney, the trial court had discretion to find him credible and accept his argument as evidence

(Br. of Respondents 14-15). For this proposition, the respondents quote *State v. Hultz*, 16 S.W. 940, 941 (Mo. 1891), as giving a trial court the power to "be satisfied … by the unsworn statement of a reputable lawyer or officer of his court." The respondents do not offer any discussion of *Hultz*. This is probably because *Hultz* had nothing to do with whether unsworn statements by an attorney constituted evidence on which a trial court could rely in reaching a final judgment.

In *Hultz*, a prosecuting attorney filed a sworn affidavit attesting that the county sheriff and coroner had a conflict of interest in a forthcoming murder trial to support his request that the court appoint two elisors to summon the venire. 16 S.W. at 941. On appeal from his murder conviction and sentence, the defendant argued that the trial court "committed error in not requiring more evidence of the partiality and prejudice of the sheriff and coroner than the affidavit of the prosecuting attorney." *Id.*

In affirming the trial court's decision, the Supreme Court held that the trial court had full discretion in that pretrial matter – analyzed for abuse of discretion rather than whether it was supported by substantial evidence, as in this case – to be satisfied with the sworn affidavit of the prosecutor:

> It must be borne in mind that the *nisi prius* judge lives in the circuit in which he presides. He knows his prosecuting attorneys and his sheriffs. He might be satisfied, as courts often are, by the unsworn

> statement of a reputable lawyer or officer of his court, whereas he might not be willing to accept the sworn statement of many others. These matters must be delegated to some one, and the law has confided it to the circuit judge. … *But it cannot be maintained, where the law, as in this case, vests the discretion in the court, that, because it does not require a certain kind and quality of evidence to establish a fact, his act is necessarily arbitrary and wrong.* … The taking of testimony in the form of affidavits is not unusual or extraordinary.

Id. at 941-42 (emphasis added).

Hultz is entirely inapposite to this case. On appeal, Justin Bell does not attack a discretionary pretrial order. While the law of Missouri gives a trial court discretion to determine whether evidence is credible and may indeed allow a trial court to determine whether statements by counsel in bureaucratic pretrial proceedings are satisfactory, the respondents cite absolutely no authority giving a trial court discretion to determine whether an unsworn statement by an attorney at a hearing is actual evidence. Indeed, in his opening brief, Justin Bell discussed several cases conclusively holding that it is *not* evidence sufficient to support a final judgment and cannot be treated as such (Brief of Appellant 26-27, 29-30): *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66 (Mo. App. 1997); *Andersen v.*

Osmon, 217 S.W.3d 375 (Mo. App. 2007); *Powell v. State Farm Mut. Auto. Ins.*, 173 S.W.3d 685 (Mo. App. 2005); *Dickerson v. Dickerson*, 55 S.W.3d 867 (Mo. App. 2001); *Goodman v. Goodman*, 267 S.W.3d 783 (Mo. App. 2008).

The prosecutor's statement at issue in *Hultz* was a sworn affidavit. Justin Bell agrees that a sworn affidavit properly introduced into evidence before a court would constitute evidence. But in this case, Mr. Anderson's unsworn statements with no documentary support were not even up to the standard of a properly introduced, sworn affidavit.

The other case which the respondents cite, *State v. Ward*, 242 S.W.3d 698 (Mo. banc 2008), correctly states the law of Missouri relating to oaths. The respondents cite *Ward* to support their proposition that the trial court's brief exchange with Mr. Anderson transformed his comments into sworn evidence, because the Supreme Court noted in *Ward* that the "important feature" of an oath, regardless of its form, "is the quickening of the conscience of the witness and the liability it creates for the penalty of perjury." 242 S.W.3d at 703. As with *Hultz*, the respondents include no discussion of *Ward*. In fact, the Supreme Court held in *Ward* that a mere verification that what was being said was true – in that case a promise to tell the truth – is insufficient to transform statements into evidence.

In *Ward*, a defendant on trial for possession of drugs with intent to deliver them came to the witness stand to testify on his own behalf. 242 S.W.3d at 701.

When the trial court asked him to raise his right hand so as to be sworn, he said he would not take a formal oath but instead promised to "tell the truth." *Id.* The trial court tried several ways to restate the oath as an affirmation, but the defendant still declined, ostensibly on religious grounds. *Id.* Thereafter, the trial court refused to let the defendant testify. *Id.*

The Supreme Court noted that the law of Missouri specifically provided the two acceptable forms of oaths and affirmances prior to giving testimony. *Id.* at 703. "Every person offered as a witness, before any testimony shall be given by him, shall be duly sworn, or affirmed, that the evidence he shall give relating to the matter in issue between ....., plaintiff, and ....., defendant, shall be the truth, the whole truth, and nothing but the truth." § 491.380.2, R.S.Mo. Alternatively, if a person has "has conscientious scruples against taking an oath or swearing in any form," he is "permitted to make his solemn declaration or affirmation in the following form: 'You do solemnly declare and affirm,' etc., concluding with the words "under the pains and penalties of perjury.'" § 492.030, R.S.Mo.

As such, though the form of oath or affirmation may vary, the defendant's "statement that he would tell the truth was insufficient to show a quickening of [his] conscience." *Ward*, 242 S.W.3d at 704. The trial court therefore correctly prevented the defendant from testifying.

In this case, Mr. Anderson *said* that he was verifying he was telling the truth "as far as [he was] aware" and *offered* to be sworn, but he took no actual oath or affirmation. While the trial court may have not "believe[d] that's necessary" (Tr. 17), the trial court was incorrect. Unlike the correct decision by the trial court in *Ward*, the trial court in this case decided that Mr. Anderson's "verification" that he was telling the truth *did* rise to the level of the oath or affirmation prescribed by the law of Missouri. But the law of Missouri relating to oaths before testimony, as discussed in *Ward*, *does* make an actual oath or affirmation necessary. There was nothing to show that Mr. Anderson was testifying under pains and penalty of perjury. *Ward* supports Justin Bell's argument, rather than that of the respondents.

While the respondents are correct that the penalty of perjury "applies 'whatever form the oath shall take,'" § 492.060, R.S.Mo., Mr. Anderson, like the defendant in *Ward*, satisfied neither the form of oath in § 491.380.2 nor in § 492.030. As such, under the law of Missouri there was no obvious quickening of Mr. Anderson's conscience on the record or any resulting liability for the penalty of perjury. Is an *offer* to be sworn now to be satisfactory in place of an actual oath? Are parties who happen to be attorneys now to be held to a lower standard of oath-taking than other parties? That is not the law of Missouri. In Missouri, "*Every person* offered as a witness, *before* any testimony shall be given by him, shall be duly sworn…" § 491.380.2 (emphasis added). It does not say "Every

person except attorneys." If the respondents desire attorneys to be held to some other standard of oath-taking, they should seek the General Assembly to exempt attorneys from § 491.380.2.

For now, though, the law of Missouri is that Mr. Anderson's statement that he was telling the truth and his offer to be sworn did not make him a sworn witness and did not constitute evidence. The respondents cite no applicable authority otherwise. The brief exchange between Mr. Anderson and the trial court reflected on page 17 of the transcript did not magically transmogrify his oral argument stating his "beliefs" into evidence on which the trial court could rely in deciding whether to approve his proposed compromise settlement.

b. No other evidence was introduced at the hearing.

The respondents argue that, beyond Mr. Anderson's statements, there was a reasonable economic basis for the settlement, such that other evidence established its propriety (Br. of Respondents 17-19). Although they do not state precisely what this evidence was, they seem to argue that the fruits of pretrial discovery attached to pretrial motions constituted this evidence (Br. of Respondents 18-19). In fact, no exhibits or other documentary evidence whatsoever were introduced as evidence at the hearing in this case, nor do the respondents assert otherwise. While discovery indeed had taken place, and various discovery-related documents were attached to pretrial motions, the law of Missouri is that "Exhibits attached to

motions filed with the trial court *are not evidence* and are not self-proving." *Kulaga v. Kulaga*, 149 S.W.3d 570, 573 n. 6 (Mo. App. 2004) (emphasis added). This Court recently reaffirmed this principle. *See Ryan v. Raytown Dodge Co.*, Case No. WD70012 (slip op. June 2, 2009) (citing *Powell*, 173 S.W.3d at 689; *Kulaga*, 149 S.W.3d at 573 n.6).

Exhibits attached to pretrial motions cannot be used as evidence to determine whether a judgment was consistent with the weight of the evidence. *AJM Packaging Corp. v. Crossland Const. Co., Inc.*, 962 S.W.2d 906, 910 (Mo. App. 1998). An "appellate court cannot accept counsels' statements as a substitute for record proof, even though the court has no reason to doubt counsels' accuracy." *Id.*

Even taken together, legal arguments by counsel at a hearing and exhibits attached to pretrial motions do not satisfy the requirement of substantial evidence on which a trial court can rely in formulating a judgment. *Powell*, 173 S.W.3d at 690-91. Instead, testimony must be sworn and evidence must be properly introduced with an opportunity for the opposing party to "contest or introduce evidence" contrary to it. *Id.* In this case, there was no sworn testimony or documentary evidence properly introduced at the hearing at all, and no opportunity for Justin Bell to contest that evidence or introduce other evidence contrary to it. Exhibits attached to pretrial motions did not satisfy the law of Missouri so as to

constitute evidence. They should have been formally introduced at the hearing of April 17.

Moreover, the two cases that the respondents cite in furtherance of their argument that the "evidence" in this case did meet these standards, *Estate of Asay v. Asay*, 902 S.W.2d 876 (Mo. App. 1995), and *Mamoulian v. St. Louis Univ.*, 780 S.W.2d 648 (Mo. App. 1989), only go to show that documentary evidence must be formally admitted at an evidentiary hearing in order to constitute evidence on which the trial court can rely in coming to its judgment. Once again, these cases support Justin Bell, not the respondents.

In *Asay*, the evidence the personal representative introduced before the trial court included "Stipulated Facts, exhibits and suggestions…" 902 S.W.2d at 876. The personal representative gave sworn testimony at an evidentiary hearing relating to this evidence and was cross-examined. *Id.* at 878, 881-82. As well, the parties formally introduced documentary evidence, including a factual stipulation at that hearing. *Id.* at 882-83. Based on this evidence, this Court affirmed the trial court's approval of the proposed compromise settlement. *Id.* at 883.

Conversely, in this case, there was no such evidence at all: Mr. Anderson made unsworn statements of his beliefs regarding the case which were not subject to cross examination, and no documents or stipulations were introduced at all before the trial court at the hearing. Had Mr. Anderson given sworn testimony

subject to cross examination or introduced documentary evidence before the court, it possibly could have been sufficient. But there was no such evidence at all in this case, and *Asay* is inapposite to the respondents' argument otherwise.

Similarly, in *Mamoulian*, the trial court approved a proposed compromise settlement *after a full evidentiary hearing*. 780 S.W.2d at 650. Whether evidence was properly introduced and whether counsel's oral arguments were improperly treated as evidence were not at issue on appeal. *Id.* at 652. The Court's opinion in *Mamoulian* came after earlier proceedings in which the Supreme Court reversed and remanded an earlier settlement in the case which was *not* based on substantial evidence and did not include all the interested parties. *See Mamoulian v. St. Louis Univ.*, 732 S.W.2d 512 (Mo. banc 1987). In the second *Mamoulian* case, this Court reviewed the sworn testimony and documentary evidence introduced in the hearing that the Supreme Court had ordered, and concluded that the compromise settlement was based on substantial evidence. 780 S.W.2d at 652. This case bears no resemblance to *Mamoulian*. Neither testimonial nor documentary evidence was introduced before the trial court.

Plainly, the trial court's judgment approving Mr. Anderson's proposed compromise settlement was not based on any evidence at all, as none was introduced before it at the hearing of April 17.

II. The respondents' references to Justin Bell's standing are inadequate and contrary to their positions both before the trial court and in their brief.

The respondents seem to make two thinly-veiled attacks on Justin Bell's standing to include Florence Bell's land in his discovery of assets case. "Appellant wanted the land, not its value nor any part thereof. But he had no personal right to litigate for the land itself, because Florence's will made no specific devise of this or any land to appellant" (Br. of Respondents 19). In their Conclusion, the respondents again suggest that Justin Bell "had no personal right to litigate for the land, for Florence's will made him no specific devise" (Br. of Respondents 22).

While the respondents do not flatly argue that Justin Bell lacked standing to include the land, because standing cannot be waived and may be considered *sua sponte*, *Querry v. State Highway and Transp. Comm'n*, 60 S.W.3d 630, 634 (Mo. App. 2001), the appellant will address this issue briefly should the Court desire to entertain his standing as an issue on appeal.

The respondents state that the appellant "had no *personal* right to litigate for the land, for Florence's will made him no specific devise" (Br. of Respondents 22) (emphasis added). This is correct. Justin Bell's interest in the land did not arise because he was the named devisee of the land. Instead, Florence Bell's will specified that, as with all the rest of her property, the land was devised to a

testamentary trust, with Randy and Dennis Bell as trustees and Justin Bell as the named beneficiary (Legal File 31-32). Florence Bell directed that when Justin Bell reached 25 years of age, he would receive half of the trust estate, minus the land, and when he reached thirty years of age, he would receive the balance of the trust estate, including the land (L.F. 32). Justin Bell's interest in the land did not arise out of a direct devise, but rather out of his status as the named beneficiary of his grandmother's intended testamentary trust.

A beneficiary of a testamentary trust always "can follow the trust property into its product, and can enforce a constructive trust or equitable lien upon the product." *Estate of Russell*, 932 S.W.2d 822, 825 (Mo. App. 1996). Indeed, this is precisely proper in a discovery of assets proceeding. *Id.* (citing *Cross v. Cross*, 246 S.W.2d 801, 825 (Mo. 1952)). Justin Bell alleged exactly this: the trust property of which he was a beneficiary was handled illegally by the trustees, and he sought constructive trusts as his remedy (L.F. 91-94). The respondents cite no authority for their untenable proposition that Justin Bell, as the named beneficiary of Florence Bell's testamentary trust, lacked standing to include Florence Bell's land, which was part of the corpus of the trust, in his discovery of assets proceeding.

The main point of the respondents' brief is that the trial court's judgment approving Mr. Anderson's proposed compromise settlement was proper. In his

unsworn oral argument to the trial court, Mr. Anderson referred to the land numerous times. Mr. Anderson plainly believed that the compromise settlement he was proposing included settling Justin Bell's claims for the land. But if Justin Bell did not have standing to recover the land in his discovery of assets proceeding, then Mr. Anderson would not have had standing to bring about a settlement for the land, because the land would not be needed to pay claims against the estate, nor would it be needed to pay for the administration costs of the estate. Indeed, it would not be in the proceeding at all. *See Smith v. Black*, 132 S.W. 1129, 1131-32 (Mo. 1910); *Estate of Shaw v. McKown*, 222 S.W.3d 289, 294 (Mo. App. 2007). Essentially, the respondents approve of Mr. Anderson's compromise settlement out of one side of their mouth and then simultaneously chastise it out of the other.

The respondents, however, obviously do not seriously believe that Justin Bell lacked standing to include the land in his proposed compromise settlement. The respondents expressly and fully concur in Justin Bell's statement that this Court has jurisdiction over this appeal (Br. of Respondents 2), and they do not ask that the appeal be dismissed for lack of jurisdiction. But, "When a party lacks standing, a court has no jurisdiction to grant the relief requested and the case must be dismissed." *In re Estate of Whittaker*, 261 S.W.3d 615, 617 (Mo. App. 2008). This rule applies to appellate courts just as it does trial courts. *Id.* If the respondents truly believed that Justin Bell lacked standing, they would not have

agreed that this Court has jurisdiction. Instead, they either would have cross-appealed and argued that the trial court erred in approving the settlement because Justin Bell lacked standing or, at the very least, would have suggested that the appeal should be dismissed because Justin Bell lacked standing.

Plainly, Justin Bell, as beneficiary of Florence Bell's testamentary trust, had standing to seek a constructive trust in a discovery of assets proceeding over trust property that he alleged was disposed of by the trustees improperly. The trial court had jurisdiction, as does this Court.

III. The respondents' differing version of the facts leading up to the April 17 hearing is irrelevant and should be disregarded.

The respondents riddle their brief with factual allegations that are irrelevant as to whether the trial court's judgment was based on substantial evidence and which were not before the trial court. Indeed, their brief is replete with "facts" not in the record, including numerous citations to the Supplemental Legal File which the Court granted the respondents leave to file out of time, prompting this Amended Reply Brief.

A. The documents included in the Supplemental Legal File are irrelevant because they are from separate, unappealed cases and were not before the trial court in this case.

The Court should disregard any "facts" the respondents put forth for which they cite to the Supplemental Legal File, as the documents included therein are all from two separate, prior, unappealed cases, *In re Bell*, Case No. 27P029500085, a guardianship and conservatorship case, and *State v. Bell*, Case No. CR200-014FX, a criminal prosecution (Supplemental Legal File 12).

This is an appeal of *Bell v. Bell*, a discovery of assets case seeking restitution and constructive trusts. The issue on appeal is whether the trial court's judgment approving the personal representative's proposed compromise settlement was based on substantial evidence. There is no indication that the documents in the Supplemental Legal File from the other two cases ever were before the trial court in *this* case. Whatever was held in those separate cases has absolutely nothing to do with whether there was evidence before the trial court at the hearing on April 17, 2008. The Court should not be led astray by these facts outside the Record that have no bearing on the issue on appeal.

"Documents never presented to, or considered by the trial court cannot be used for supplementation of the record on appeal." *Castle v. Castle*, 642 S.W.2d 709, 711 n.1 (Mo. App. 1982). Where a party moves to supplement the record

with documents that "were never presented to the trial court," its motion must be denied. *Horobec v. Mueller*, 628 S.W.2d 942, 944 (Mo. App. 1982). Even if documents are referred to in the trial court, if they were not "identified, offered, or attached" as an exhibit before the trial court, they "cannot … be received by this court as supplements to the record of the proceedings below." *Carondelet Sav. & Loan Ass'n v. Boyer*, 595 S.W.2d 744, 746 (Mo. App. 1980).

If the documents are from a related case that was not appealed, they still cannot be used as part of the record unless they were properly introduced before the trial court in the case on appeal. "*A fortiori* a record of a prior discrete proceeding not introduced in evidence in the subject case which is the matter now before [the Court] should not be included in the record on appeal." *Phillips v. Mo. Dept. of Soc. Servs.*, 723 S.W.2d 2, 2 n.2 (Mo. banc 1987).

All the documents in the Supplemental Legal File are from *In re Bell* and *State v. Bell*. The clerk of the circuit court has certified that they are copies of the documents in the files of *those* cases, not the case on appeal, *Bell v. Bell* (Supp. L.F. 12). The respondents give no indication that the documents were before the trial court at any time in the case on appeal. In fact, they were not. Indeed, if they had been identified, offered, or attached as an exhibit to a motion or affidavit before the trial court, the respondents would have included that motion or affidavit

as their supplement to the record, not the documents themselves from the separate cases.

B. The respondents' allusive suggestion that Justin Bell's claims were barred by a prior, unappealed judgment in *In re Bell*, as allegedly disclosed by the documents in the Supplemental Legal File, is not properly before the Court and should be disregarded.

The purpose of the respondents' supplements to the record seems to be to contend that "Appellant stands instead on the losing end of a final and unappealed circuit court judgment rejecting the bedrock allegations of his pleadings" (Br. of Respondents 20). While the respondents do not directly say so, it seems that they are suggesting that Justin Bell's claims are barred by some form of issue or claim preclusion, such as collateral estoppel or *res judicata*.

That is, they imply that some or all of the issues Justin Bell put forth in his Third Amended Petition to Discover Assets (the respondents do not say which) already had been rejected by the decision in *In re Bell*, and Justin Bell could not relitigate them in his discovery of assets case. Collateral estoppel is an affirmative defense which, if successful, bars "issues previously litigated," whereas *res judicata* is a separate affirmative defense that has the same effect for "every point related to the subject matter, including those which might have been brought

forward at the time." *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652, 656 (Mo. App. 1994).

When a defendant desires to plead an affirmative defense in his answer, he must do so with the same degree of specificity and detail as required in the plaintiff's petition. Supreme Court Rule 55.08; *Bergel v. Kassebaum*, 577 S.W.2d 863, 866-67 (Mo. App. 1978). This applies to both collateral estoppel, *Green v. City of St. Louis*, 870 S.W.2d 794, 797 (Mo. banc 1994), as well as *res judicata*. *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 684-85 (Mo. banc 1993).

The respondents differed in their reliance on these affirmative defenses before the trial court. Mr. Anderson raised neither of them in his answer (L.F. 124-31). Mark and Allison Bell mentioned collateral estoppel (but not *res judicata*) in their answer to each count of Justin Bell's petition (L.F. 137, 139, 140, 141, 143, 144, 145), but did not specifically include "a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Rule 55.08. As such, their reliance on collateral estoppel was void. *Bergel*, 577 S.W.2d at 866-67. Roland Bell did specifically plead both collateral estoppel and *res judicata* in his response to counts 1, 2, and 7 of Justin Bell's Third Amended Petition (L.F. 160-62, 165-66, 178-80), mentioned both doctrines in response to counts 4 and 8 but did not specifically include any facts showing how the respective doctrines applied

to those counts, (L.F. 170, 181), and did not raise either doctrine in response to Justin Bell's counts 3, 5, or 6 (L.F. 167-68, 172-73, 174-76). Randy and Dennis Bell's amended answer followed Roland Bell's answer exactly (L.F. 192-216).

To the extent that some of the respondents may have tried to raise collateral estoppel and *res judicata* below, however, the trial court did not agree with the respondents and dismiss the applicable counts of Justin Bell's petition. Instead, it approved Mr. Anderson's proposed compromise settlement which is at issue in this appeal, settling *all* of Justin Bell's claims. Thus, because the respondents did not cross appeal the trial court's denial of their affirmative defenses, their intimations that Justin Bell's claims were barred are not properly before this Court on appeal.

Where a respondent does fully raise collateral estoppel or *res judicata* before the trial court, its argument still must be properly preserved for appeal. *Gamble v. Browning*, 277 S.W.3d 723, 727 (Mo. App. 2008). In *Gamble*, a defendant raised *res judicata* in a motion for summary judgment that the trial court subsequently denied. *Id.* at 726-27. On the plaintiff's appeal, the defendant argued "that the judgment should be affirmed on the basis of *res judicata* …" *Id.* The defendant filed no cross-appeal and presented no record that the *res judicata* argument "was raised and preserved in a motion for a directed verdict." *Id.* at 727. As such, "Even if [the defendant] could raise the applicability of [*res judicata*] without a

cross appeal …," the Court did "not properly have that issue" before it and "proceed[ed] to the merits of the direct appeal." *Id.*

In this case, some of the respondents raised collateral estoppel and *res judicata* as affirmative defenses to some of Justin Bell's claims. The trial court, however, did not agree and dismiss those claims, but rather purported to settle *all* of Justin Bell's claims in its approval of Mr. Anderson's proposed compromise settlement. The respondents did not then move the Court to reconsider and ask it to dismiss the claims they believed to be precluded and lower the amount of the settlement. Instead, on appeal, they spend a majority of their brief defending the settlement in its entirety.

Generally, "in the absence of a cross-appeal, the reviewing court is concerned only with the complaint of the party appealing and that the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him." *Goldberg v. State Tax Comm'n*, 618 S.W.2d 635, 642 n.6 (Mo. banc 1981). Thus, even if some of the respondents' references to collateral estoppel and *res judicata* in response to some of Justin Bell's claims were adequate to raise the questions of issue preclusion and claim preclusion before the trial court, the respondents now essentially are arguing that the trial court was wrong to reject their asserted affirmative defenses and instead settle all of Justin Bell's claims. Because the respondents did not cross appeal, however,

they cannot use their response to Justin Bell's appeal to attack the trial court's ruling against them.

C. The Supplemental Legal File does not support the supposed "facts" for which the respondents cite to it.

Beyond the bald truth that the documents placed in the Supplemental Legal File were not before the trial court, a comparison of the page numbers in the Supplemental Legal File with the citations to it in the respondents' brief also shows that none of the citations match the facts the respondents claim to be adduced on those pages. "All statements of fact and argument shall have specific page references to the legal file or the transcript." Rule 84.04(i). The respondents have disregarded this requirement entirely.

The respondents state, "On September 21, 1995, Florence was found incapacitated with her husband Donald Bell appointed guardian and conservator," citing to page 1 of the Supplemental Legal File (Br. of Respondents 3). But page 1 is simply the first page of the docket sheet in *In re Bell*. It does not display any information that Florence Bell was found incapacitated on September 21, 1995, or that her husband was appointed guardian and conservator.

Thereafter, the respondents assert that "On February 4, 2000, Dennis and Randy suggested Donald's death and were appointed successor co-guardians and co-conservators for Florence on February 8," citing to page 2 of the Supplemental

Legal File (Br. of Respondents 3). But page 2 is merely the second page of the *In re Bell* docket, concerns events from December 29, 2003, through November 24, 2004, and does not display any information regarding anything that transpired on February 4, 2000.

The respondents aver that, "On November 10, 2003, Mona filed a "Request to Remove Co-Conservators and Co-Guardians" Randy and Dennis, citing to page six of the Supplemental Legal File (Br. of Respondents 3). That page is the first page of a docket sheet from proceedings in 1995, concerns events from September 6, 1995, through October 20, 1995, and does not disclose any information about anything that took place on November 10, 2003. The respondents further state that the Request to Remove "alleged, *inter alia*, that on November 10, 1999, Randy as Florence's attorney-in-fact … had conveyed to Roland Bell Florence's interest in real estate 'in fraud of the heirship interests' of Mona and Justin," citing to page 7 of the Supplemental Legal File (Br. of Respondents 3). While that page is the final page of the pleading described, the respondents' quote does not appear on that page.

Then, the respondents state that "Mona's Request to Remove was tried to the court on December 12, 2003 and taken under advisement," citing to page 3 of the Supplemental Legal File (Br. of Respondents 4). Again, though, that page is simply the first page of the 1995 docket sheet, and mentions nothing about any

events that took place after October 20, 1995. The respondents further suggest that "After filing of post-trial Suggestions by all parties, the court on January 29, 2004, denied the request and found 'no cause to remove the Co-Conservators and Co-Guardians,'" citing to pages 4 and 10 of the supplemental legal file (Br. of Respondents 4). Neither page displays that information.

The most outrageous example of the respondents' deficiency in mis-citing to the supplemental legal file is in their two references to *State v. Bell*, a criminal case involving Justin Bell. In their Statement of Facts, the respondents state that, at the April 17 hearing, "Respondent's counsel addressed the merits [of *Bell v. Bell*] in only one respect, pointing out that there would be evidence that '[p]laintiff was cooking methamphetamine in the basement of the very house that's at issue … that's why it happened,'" citing to page 11 of the supplemental legal file (Br. of Respondents 7-8). They allude to this notion again in their conclusion, albeit without any citation to the Record, suggesting what the trial court "was aware" of:

> The judge was aware that Appellant's claims had been previously rejected in an unappealed judgment … He knew the jury would hear that many years after the will was executed, and many years after Florence became incapacitated by Alzheimer's, Appellant pled guilty to manufacturing methamphetamine in the very house he now wants, and was sent to prison.

(Br. of Respondents 23).

Although page 11 of the supplemental legal file is the second page of a judgment against Justin Bell in *State v. Bell*, there is no indication that he "was cooking methamphetamine" in Florence Bell's basement, or that he either pleaded guilty to or was convicted of doing so. Indeed, that document shows that the charge against Mr. Bell in that case was not "manufacturing methamphetamine;" it was tampering in the first degree (Supp. L.F. 10). Moreover, the judgment does not show that Mr. Bell "pled guilty to manufacturing methamphetamine," but rather that his probation on the tampering charge was revoked because he *used* methamphetamine in violation of his probation on the tampering charge (Supp. L.F. 10).

The Court should strike all of the respondents' references to the "new facts" contained in their Supplemental Legal File and should give their attempt to inject them into this case no credence whatsoever.

Conclusion

The trial court erred in approving the personal representative's proposed compromise settlement. Its decision that the compromise was in the best interest of the estate lacked any evidentiary support whatsoever.

This Court should reverse the trial court's Judgment and should remand this case for a determination of the true value of the estate of Florence Bell and further proceedings consistent with the law of Missouri.