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Jurisdictional Statement

This is an appeal from a judgment entered in the probate division of the Circuit Court of Bates County, Missouri, approving a personal representative's compromise settlement in a discovery of assets case under § 473.277, R.S.Mo.

This case does not fall within the exclusive jurisdiction of the Supreme Court of Missouri, pursuant to Article V, § 3, of the Constitution of Missouri. Therefore, this case is within the jurisdiction of the Missouri Court of Appeals. This case arose in Bates County. Pursuant to § 477.070, R.S.Mo., venue lies within the Western District.

Statement of Facts

I. Introduction

This is about a family dispute over Florence Bell's estate. Florence, the widow of Donald Bell, died on Christmas Eve, 2004 (Legal File 86, 134). She left many living family members, several of whom are integral to this litigation. Florence's only direct descendants are her daughter, Mona L. Watson Beardlsee, and her grandson, Justin Bell (L.F. 86, 134).

Roland Bell (the brother of Florence's late husband, Donald) has two grown sons, Dennis and Randy (L.F. 86-87, 134). Randy's son, Marc, has a wife named Allison (L.F. 87, 134).

This suit pitted Florence's grandson, Justin, as plaintiff against her in-laws, Roland, Dennis, Randy, Marc, and Allison, and against Kevin Anderson, her estate's personal representative, as defendants (L.F. 85, 124-51). Justin is the primary beneficiary of Florence's testamentary trust (L.F. 31-33). According to Florence's will, the balance of her estate and all of her real estate were to go to Justin when he reached age 30 (at which time the trust was to terminate) (L.F. 32).

II. Events leading to this litigation

Most of the family lived close to each other on farmland in Bates County (L.F. 111-14). Donald and Florence lived on a 381-acre farm (L.F. 111-14). Next

door was Roland (L.F. 163). Roland also was a farmer (he ran a cow-calf operation), so he and Donald would share the use of farm equipment (L.F. 163).

As Florence entered old age in the early 1990s, a lot of responsibility over her affairs and assets were given to Donald's family. For instance, Donald's son, Randy, became her attorney-in-fact under a durable power of attorney document (L.F. 111). Thus, he owed her fiduciary responsibilities.

Because her health had deteriorated, the 83-year-old Florence was adjudicated an incapacitated and disabled person at a proceeding on September 21, 1995 (L.F. 34). She was deemed "unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions" (L.F. 34). Her husband, Donald, was appointed to be her conservator and guardian (L.F. 34).

On November 10, 1999, Randy (as attorney-in-fact for Florence) purported to convey title to all of Donald and Florence's farmland to Donald only, by executing and filing a warranty deed (L.F. 111-12). Thereafter, Donald purported to convey all of this land to his brother, Roland, by beneficiary deed (L.F. 111-12).

Roland and his sons used Florence's money to buy things for themselves. For instance, Randy bought calves with Florence's money, paying his son, Marc, $1,100.00 for them (L.F. 117). Randy also wrote a check in the amount of $7,510.00 for a "Pickup, Bale handler, etc." (L.F. 118).

III. Proceedings after Donald's death

When Florence's husband, Donald, died a few weeks into 2000, Randy opened a small estate proceeding (L.F. 45-47).

Donald's death left Florence without a conservator or guardian. Even though Randy had an apparent conflict of interest because of his prior attempt to strip Florence of her marital interest in the farmland, Randy and Dennis's attorney petitioned that they be appointed as Florence's co-conservators and co-guardians (L.F. 35-36). No hearing was held and no notice of the petition was given to Florence's other relatives. The court issued the Letters of Guardian of the Person and Conservator of the Estate of Florence to Dennis and Randy (L.F. 37).

Over the next few years, Roland and his sons continued to keep Florence's blood relatives in the dark concerning the goings-on of her estate, even though Justin was the primary beneficiary of Florence's testamentary trust (L.F. 56-59). On February 28, 2000, Dennis and Randy filed a Petition for an Order to Sell Personal Property by Co-Guardians and Co-Conservators to sell Florence's 1998 Chevy Lumina and her 1991 Ford pickup (L.F. 38-39). They asserted that they needed the money "for payment of claims allowed against the estate" and "for support and maintenance of ward" (L.F. 38-39). The petition was granted without a hearing, but the order did not authorize the sale of any property other than the two vehicles (L.F. 40).

That same day, Randy petitioned the probate court also for an Order to Approve and Ratify Conveyance of Real Estate, seeking the ratification of two earlier deed transactions giving Florence's farmland to Roland without consideration (L.F. 43-44). The probate court also granted this petition without a hearing (L.F. 43-44). The petition was submitted for the benefit of only Roland and Randy, since the loss of Florence's marital farmland and residence could not be counted as a benefit to Florence as an incapacitated and disabled person.

These gifts were made by Randy, as attorney-in-fact for Florence, to her brother-in-law, Roland, even though Randy knew the provisions of Florence's will, in which she did not benefit Roland (L.F. 31-33, 59).

In March, 2000, Randy, as attorney-in-fact, included the 1991 Ford pickup, the 1998 Chevy Lumina, a truck trailer, two horses, fifty cows, twenty-five yearlings, and twenty-five calves in the 2000 Personal Assessment List which he submitted to the county assessor's office in the name of Donald and Florence (L.F. 122-123). However, Randy did not submit to the court an inventory of Florence's personal property as he should have, under § 475.291.1, R.S.Mo.

Randy and Dennis went further on July 22, 2000, selling all of Florence and Donald's property at a public auction without court authority (L.F. 119-120).

In late 2000, Randy paid $481.25 in personal property taxes on the property listed in the March, 2000, Personal Property Assessment List out of Florence's

funds (L.F. 53). However, the cattle and horses were never inventoried to Florence's estate (L.F. 48-49).

After Donald died, Roland kept using the farm equipment that he had been sharing with Donald (L.F. 97-99). In August, 2001, Roland conveyed Donald and Florence's family residence by gift to Marc (L.F. 92, 137). Roland sold some of the farmland for $4,000.00 in September, 2002 (L.F. 116).

IV. Proceedings after Florence's death

Then, more than two years later, on December 24, 2004, Florence died. Three days later, her estate was opened before the Probate Division of the Circuit Court of Bates County (L.F. 59). On December 29, 2004, Randy filed his Affidavit as to Death and Application for Probate of Will, which had Florence's Last Will and Testament attached (L.F. 59).

A hearing on the Application of Letters of Administration and the Application for Letters Testamentary was held on January 26, 2005 (L.F. 5). The probate court appointed Dennis and Randy as co-personal representatives of Florence's estate, over the objection that Randy and Dennis had a conflict of interests with Florence (L.F. 5).

From that time through October 7, 2005, Dennis and Randy refused to file an inventory for Florence's estate, and they did not seek additional time to file the required inventory (L.F. 5-7). So, on October 7, Justin filed his second request for

an Accounting and Renewed Request for the Discharge of the Co-Personal Representatives and Assertion of a Claim Against the Co-Representatives (L.F. 61-65). In response, and without court authorization, Randy withdrew $3,000.00 from Florence's estate to give his attorney a fee deposit to represent himself and Dennis (L.F. 72).

In January, 2006, Randy and Dennis quit as co-personal representatives of Florence's estate (L.F. 10, 79). Kevin Anderson succeeded them in April, 2006 (L.F.79). On February 10, 2006, Randy filed a Turnover Report (L.F. 77-79).

Justin filed his Third Amended Petition to Discover Assets on March 2, 2007 (L.F. 82-123).

In November, 2007, Roland moved for Leave to Amend Answer to Plaintiff's Third Amended Petition to Discover Assets and Counter Claim (L.F. 152). In December, 2007, Randy and Dennis did the same (L.F. 187). On December 21, Randy and Dennis moved to continue the trial then set for the following February (L.F. 222-24). On January 2, 2008, the probate court granted Roland, Randy, and Dennis leave and rescheduled the trial for April 23-25, 2008 (L.F. 26). A pretrial conference also was scheduled for March 31, 2008 (L.F. 26).

Justin filed a Motion for Bifurcated Trial on March 12, 2008 (L.F. 225-28). The pretrial conference took place as scheduled on March 31, 2008, but the probate court issued no formal order as a result (L.F. 229).

Kevin Anderson, the new personal representative, filed his Motion for Hearing on Settlement Offer on April 16, 2008 (L.F. 230-34). The other respondents in this action had offered Mr. Anderson, as Florence's estate's personal representative, $325,000.00 to settle (L.F. 232). The court scheduled the hearing for the next day (Transcript 1). After the hearing, the court indicated that it would approve the compromise settlement of the action to discovery assets as proposed by Mr. Anderson for $325,000.00 (Tr. 5).

At the beginning of the April 17 hearing, the trial court invited Mr. Anderson to present an opening argument, as the hearing was on his motion (Tr. 2). In his opening argument, he explained his rationale for proposing the compromise settlement of $325,000.00, stating that he personally believed that amount to be "reasonable" (Tr. 5). He described this discovery of assets proceeding as "revolv[ing] around a farm of approximately 380 acres, a house contained on that farm, a number of cattle, and some items of personal property" (Tr. 3). During the course of his argument, Mr. Anderson described Justin Bell's case as this:

> [If Justin Bell were] successful on behalf of the estate, he's looking for the return of the farm, plus the value of the cattle and various other items of reimbursement.

> Depending on the value of the farm and the value -- the value of cattle, which can -- obviously, can vary somewhat, in my opinion a best case scenario is somewhere in the neighborhood of $657,000, give or take. Maybe more than that. I know there are claims for putative [*sic*] damages and other claims that may affect that value, but for purposes of discussion here today, that's -- that's kind of where I -- I have it in my mind.

(Tr. 3).

The transcript does not show that Mr. Anderson introduced any evidence at any point during the hearing. The transcript shows that he called no witnesses. No other party introduced evidence or called witnesses.

After Mr. Anderson finished, Justin Bell's counsel objected:

> [M]y understanding of -- of a proceeding such as this that it would be an evidentiary hearing and it would be based on factual issues presented at an evidentiary hearing.
>
> …
>
> What the attorneys say at this hearing, and -- and it would be the same at the beginning of a trial. What the attorneys say is not evidence. And so I'm not sure that this hearing is appropriate in terms of making

> a final decision with regard to a compromise in settlement under 473.277.

(Tr. 9). Justin's counsel pointed out that Mr. Anderson did not know the value of the farmland at issue, such that the land should be appraised pending trial; then, during or after trial, the court could have a better understanding of the land's value and, therefore, whether the proposed settlement was appropriate (Tr. 11-12).

Mr. Lowe, counsel for Randy and Dennis Bell, also stated to the court that Mr. Anderson's opening argument was not "evidence:"

> I don't know if this is necessarily appropriate if this is supposed to be an evidentiary hearing. I might suggest that Mr. Anderson be sworn and then maybe testify. He doesn't have to say the same thing he said earlier, but testify to what he said earlier would be the same thing that he would say under oath.

(Tr. 12). The court, however, reasoned that this was unnecessary because Mr. Anderson is "an attorney at law and an officer of the Court" (Tr. 12). The court asked him, "Are you verifying that what you've indicated to the Court is true as far as you're aware?" (Tr. 12). When Mr. Anderson answered affirmatively and offered to be sworn, the court stated "As an officer of the court, I don't believe that's necessary," and let the matter stand (Tr. 12-13).

At the end of the hearing, the court cancelled the pending jury trial and stated that it would enter an order approving the settlement (Tr. 19-21). On April 21, 2008, Justin dismissed without prejudice Counts I and II of his Third Petition to Discover Assets (L.F. 237-38).

Justin Bell again raised the issue of Mr. Anderson's unsworn testimony in his Motion to Reconsider, which was filed on April 23, 2008 (L.F. 240). He requested the court to reconsider its decision, citing several cases, because,

> In general the hearing of April 17, 2008 and the court's consideration of the Personal Representative's proposed compromise should have been decided on facts brought to the Court's attention as opposed to only the Personal Representative's opinion … Whether a particular compromise is in the best interest of the estate and is fair and reasonable are questions of fact …
>
> The Personal Representative at the hearing of April 17, 2008 did not offer any facts to support his opinion, – none. His proposed compromise was simply his opinion.
>
> The Court on April 17, 2008 did not seek to have any factual basis for the proposed compromise presented to it.
>
> …

> The Plaintiff believes that the Court cannot and should not accept and approve the Personal Representative's proposed compromise without the Court having been presented with a factual basis and without the Court and the Personal Representative providing the Plaintiff adequate time to prepare to meet the supposed factual basis of support for the Personal Representative's proposed compromise.

(L.F. 240-1) (citations omitted).

Thereafter, on April 25 and April 30, 2008, Justin filed five affidavits with the court which contested the opinions which Mr. Anderson and Mr. Lowe announced at the April 17 hearing (L.F. 244-59).

On May 5, 2008, the probate court entered its Order and Judgment Approving Compromise Settlement of Discovery of Assets (L.F. 260-64). The defendants were to pay the personal representative $325,000.00 (L.F. 260). All claims were settled by the order, which did not recite any factual evidence that the settlement offer was a fair one (L.F. 260-63). In its judgment, the trial court also held that Justin Bell's argument that Mr. Anderson's unsworn statements were not factual evidence lacked merit because his counsel failed to object to the admission of the unsworn statements as evidence (L.F. 261).

Justin filed a timely Notice of Appeal to this Court (L.F. 265-68).

Point Relied On

The trial court erred in approving the personal representative's proposed compromise settlement pursuant to § 473.227, R.S.Mo., one week before the trial setting of the discovery of assets case *because* there was no substantial evidence to support the compromise settlement, the approval was against the weight of the evidence, and therefore the compromise was not in the best interests of the estate, *in that* no evidence was properly introduced before the trial court in support of the compromise settlement of $325,000.00 to show that it had a reasonable economic basis, particularly in light of the fact that the personal representative admitted that Justin Bell could receive twice that after trial.

Smith v. Snodgrass, 747 S.W.2d 743 (Mo. App. 1988)

Campbell v. Campbell, 898 S.W.2d 630 (Mo. App. 1985), *cert. denied,* 516 U.S. 1042 (1996)

Wilson v. Seebold, 938 S.W.2d 607 (Mo. App. 2004)

Dickerson v. Dickerson, 55 S.W.3d 867, 874 (Mo. App. 2001)

§ 473.227, R.S.Mo.

Argument

The trial court erred in approving the personal representative's proposed compromise settlement pursuant to § 473.227, R.S.Mo., one week before the trial setting of the discovery of assets case *because* there was no substantial evidence to support the compromise settlement, the approval was against the weight of the evidence, and therefore the compromise was not in the best interests of the estate, *in that* no evidence was properly introduced before the trial court in support of the compromise settlement of $325,000.00 to show that it had a reasonable economic basis, particularly in light of the fact that the personal representative admitted that Justin Bell could receive twice that after trial.

Standard of Review

Whether a particular compromise of a discovery of assets case is in the best interest of the estate and is fair and reasonable are questions of fact. *Smith v. Snodgrass*, 747 S.W.2d 743, 745 (Mo. App. 1988) (citing *Estate of Basler v. Delassus*, 690 S.W.2d 791, 797 (Mo. banc 1985)). In analyzing whether a probate court's decision on fact questions was error, this Court affirms the decision below, "as in any court-tried case, unless there is no substantial evidence to support the result, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law." *Id.* (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). In determining whether the trial court's decision was supported

by substantial evidence or was against the weight of the evidence, the evidence is considered in a light most favorable to the judgment. *Id.*

* * *

The law of Missouri is that a compromise settlement in a discovery of assets case must be in the best interests of the estate and must be fair and reasonable. After years of pre-trial litigation, a trial was set in Justin Bell's discovery of assets case for April 23, 2008. Seven days before trial, the personal representative moved the probate court to schedule a hearing to determine whether a compromise settlement should be approved in the amount of $325,000.00. The court held the hearing the following day. At the hearing, no party introduced any evidence or called any witnesses in support of the compromise settlement. Instead, the court treated the personal representative's unsworn oral argument as sworn evidence. Because the personal representative was not put on the witness stand under oath, Justin was given no opportunity to cross-examine the personal representative, and no opportunity to object to any of his assertions. In the course of his argument, the personal representative admitted that if Justin were successful, he could receive upwards of $700,000.00. Still, the trial court approved the personal representative's proposed compromise settlement for $325,000.00. Was this error?

Section 473.277, R.S.Mo., provides in pertinent part:

> When it appears *for the best interest of the estate*, the executor or administrator, on order of the court, may effect a fair and reasonable compromise with any debtor or other obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate.

(Emphasis added).

Since Missouri adopted the Model Probate Code in 1980, the law of Missouri has equated the "best interest of the estate" to "the existence of a reasonable economic basis" justifying a personal representative's proposed compromise settlement under either §§ 473.427 or 473.277, R.S.Mo.; *Estate of Asay v. Asay*, 902 S.W.2d 876, 882 (Mo. App. 1995); John A. Borron, Jr., *Independent Administration and Other Probate Matters Under the New Code*, 37 J. MO. B. 13, 30 (1981).

The purpose of § 473.277 "is to provide a mechanism for expeditious compromise of claims held by an estate. If the personal representative were required to wait until the final settlement of the estate is approved and order of distribution made to effect the compromise, the purpose of the statute would be thwarted." *Smith v. Snodgrass*, 747 S.W.2d 743, 745 (Mo. App. 1988). The standards set forth in this statute "for determining whether or not the probate division of the circuit court could approve the compromise are [1] whether the compromise is in the best interest of the estate and [2] whether it is a fair and

reasonable compromise. Worded differently, the representative must act with fidelity and prudence in reaching the compromise." *Id.* (citing *Jacobs v. Jacobs*, 99 Mo. 427, 12 S.W. 457, 459 (1889)).

Still because these questions of reasonableness are questions of fact, a proposed compromise settlement under § 473.277 still requires "substantial evidence" in its support through which the trial court could assess its reasonableness and fairness. *Smith*, 747 S.W.3d at 747.

The same standards for determining whether a compromise settlement is in the best interest of the estate under § 473.277 are those used in the analogous statute § 473.427, R.S.Mo., which authorizes a personal representative to compromise *claims against* an estate, rather than the *debts of* the estate, "if it appears for the best interest of the estate." *Smith*, 747 S.W.3d at 747. As in a case under § 473.427, in a case concerning the appropriate application of § 473.277, the "personal representative in compromising claims against the estate, and the trial court in approving such compromise, may consider the variable factors involving risk to the assets of the estate if the claim is not compromised." *Smith*, *supra* (citing *Estate of Basler v. Delassus*, 690 S.W.2d 791, 797 (Mo. banc 1985).

The "variable factors" to be taken under consideration on the evidence "include the certainty or uncertainty of the amount of the claim against [the

debtor], the estate's ability to collect the claim from the debtor, and the time and expense involved in collecting the note if there is no compromise." *Id.*

Again, however, consideration of these "variable factors" must be based on sufficient evidence introduced in support of the proposed compromise settlement. *Campbell v. Campbell*, 898 S.W.2d 630, 632 (Mo. App. 1995), *cert. denied*, 516 U.S. 1042 (1996). "In reaching a determination that a settlement is in the 'best interests of the estate,' the trial court should require an evidentiary hearing with notice to all persons who may be affected by the proposed settlement." 5A MO. PRAC. § 876 (3d ed. 1999).

In this case, however, not only was there no substantial evidence to support the personal administrator's proposed compromise settlement of $325,000.00, but no evidence was introduced at all. Instead, at the hearing over the personal representative's proposed compromise settlement on April 17, 2008 – merely one day after the personal representative requested the hearing – what the trial court took as evidence, over Justin Bell's objection, was actually the unsworn oral argument of the personal representative, with no reference to any actual evidence.

After the trial court called the case, it invited the personal representative, Kevin Anderson, to present an opening argument, as the hearing was on his motion (Tr. 2). In that opening argument, Mr. Anderson explained his rationale for proposing the compromise settlement of $325,000.00, averring that he believed

that amount to be "reasonable" (Tr. 5). He described the discovery of assets proceeding as "revolv[ing] around a farm of approximately 380 acres, a house contained on that farm, a number of cattle, and some items of personal property" (Tr. 3). During the course of his argument, Mr. Anderson described Justin Bell's case as this:

> [If Justin Bell were] successful on behalf of the estate, he's looking for the return of the farm, plus the value of the cattle and various other items of reimbursement.
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> Depending on the value of the farm and the value -- the value of cattle, which can -- obviously, can vary somewhat, in my opinion a best case scenario is somewhere in the neighborhood of $657,000, give or take. Maybe more than that. I know there are claims for putative [*sic*] damages and other claims that may affect that value, but for purposes of discussion here today, that's -- that's kind of where I -- I have it in my mind.

(Tr. 3).

Mr. Anderson introduced no evidence at any point during what was, by all accounts, his opening argument. No witnesses were called. No cross-examination occurred. No questions were posed to a witness. Thus, no party had an opportunity to object to any testimony. Rather, Mr. Anderson simply discussed in

freeform his opinion of the case, somehow arriving at the notion that a settlement of $325,000.00 on a case where Justin Bell stood to receive "maybe more than" $657,000.00 was "reasonable."

After Mr. Anderson finished this argument, Justin Bell's counsel objected:

> [M]y understanding of -- of a proceeding such as this that it would be an evidentiary hearing and it would be based on factual issues presented at an evidentiary hearing.
>
> …
>
> What the attorneys say at this hearing, and -- and it would be the same at the beginning of a trial. What the attorneys say is not evidence. And so I'm not sure that this hearing is appropriate in terms of making a final decision with regard to a compromise in settlement under 473.277.

(Tr. 9). Justin's counsel pointed out that Mr. Anderson did not know the value of the farmland at issue (Tr. 11). He suggested to the court that the land should be appraised pending trial, and then the court could have a better understanding of the land's value and, therefore, whether the proposed settlement was appropriate (Tr. 11-12).

Mr. Lowe, counsel for Randy and Dennis Bell, also that Mr. Anderson's opening argument was not "evidence:"

> I don't know if this is necessarily appropriate if this is supposed to be an evidentiary hearing. I might suggest that Mr. Anderson be sworn and then maybe testify. He doesn't have to say the same thing he said earlier, but testify to what he said earlier would be the same thing that he would say under oath.

(Tr. 12). Reasoning that because Mr. Anderson is "an attorney at law and an officer of the Court," however, the court asked him, "Are you verifying that what you've indicated to the Court is true as far as you're aware" (Tr. 12). When he answered affirmatively and offered to be sworn, the court stated "As an officer of the court, I don't believe that's necessary," and let the matter stand, accepting Mr. Anderson's arguments as factual evidence (Tr. 12-13).

At the end of the hearing, the court cancelled the pending jury trial and stated that it would enter an order approving the settlement (Tr. 19-21).

Justin Bell preserved his objection to Mr. Anderson's unsworn testimony in his motion to reconsider (L.F. 240). He requested the court to reconsider its decision, citing several cases, because,

> In general the hearing of April 17, 2008 and the court's consideration of the Personal Representative's proposed compromise should have been decided on facts brought to the Court's attention as opposed to only the Personal Representative's opinion … Whether a particular

> compromise is in the best interest of the estate and is fair and reasonable are questions of fact …
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> The Personal Representative at the hearing of April 17, 2008 did not offer any facts to support his opinion, – none. His proposed compromise was simply his opinion.
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> The Court on April 17, 2008 did not seek to have any factual basis for the proposed compromise presented to it.
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> The Plaintiff believes that the Court cannot and should not accept and approve the Personal Representative's proposed compromise without the Court having been presented with a factual basis and without the Court and the Personal Representative providing the Plaintiff adequate time to prepare to meet the supposed factual basis of support for the Personal Representative's proposed compromise.

(L.F. 240-1) (citations omitted).

Thereafter, before the trial court entered its judgment approving the compromise settlement, Justin Bell filed five affidavits – which *did* constitute evidence – contesting the opinions which Mr. Anderson recited before the trial court (L.F. 244-59). Thus, clear issues of fact were raised. In its judgment, however, the trial court held that Justin Bell's counsel failed to object to Mr.

Anderson's supposed "evidence" (L.F. 261). Plainly, though, that was not the case.

The law of Missouri is that "unsworn statements by counsel are not evidence of the facts asserted." *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997). "Bare assertions by counsel do not prove themselves." *Andersen v. Osmon*, 217 S.W.3d 375, 381 (Mo.App. 2007). This Court's "review is limited to evidence *properly* before the trial court, without considering counsel's statements as a substitute for record proof." *Goodman v. Goodman*, 267 S.W.3d 783, 2008 Mo. App. LEXIS 1375 at *7 (Oct. 7, 2008) (emphasis added). This is true regarding a particular motion although counsel for all parties may have argued their respective clients' positions as to that motion. *Id.*

Even if the trial court somehow was correct that Justin Bell's counsel failed to object to Mr. Anderson's remarks adequately, the trial court did consider those remarks as the "evidence" it used to support its judgment as to the facts.

> Generally, one's belief, feeling, understanding, or thought about a matter does not constitute substantial evidence justifying or permitting a finding to that effect. When a witness testifies that he "believes" a certain fact, his testimony is "objectionable and should be rejected." *Even if received without objection, such testimony "is of no probative*

> *force or evidential value and definitely so if the witness is not testifying as an expert.*"

Powell v. State Farm Mut. Auto. Ins., 173 S.W.3d 685, 690 (Mo. App. 2005) (citations omitted) (emphasis added).

Thus, the law of Missouri is that Mr. Anderon's remarks were *not* evidence on which the court could rest its factual judgment, an objection or lack of objection notwithstanding. Rather, they were simply Mr. Anderon's *beliefs* about the merits of Justin Bell's Third Amended Petition to Discover Assets. His expression of those beliefs had neither probative force nor evidentiary value. *Powell*, *supra*.

In *Dickerson v. Dickerson*, this Court held that although a guardian ad litem was "a licensed attorney and, therefore, an 'officer of the court,' this designation affords no special privileges when the guardian actively participates in a custody proceeding." 55 S.W.3d 867, 874 (Mo. App. 2001). This is because,

> Even when attorneys testify as witnesses, their testimony must be given under oath, as any other witness. In closing statements, attorneys and guardians are permitted to make legal arguments and factual summations based on the evidence. They are not permitted to give unsworn statements regarding facts not in evidence or disregard the evidentiary rules of admissibility.

Id. (citations omitted).

The principle applies to the opening and subsequent arguments of a personal representative of an estate at a hearing. Although he may be a licensed attorney, and therefore an officer of the court, this designation affords him no special privileges when he actively participates in a hearing on a motion. The outcome of a hearing hinges on what the substantial evidence indicates. Even when a personal representative testifies as a witness, his testimony must be given under oath, as any other witness. In opening and subsequent arguments, personal representatives are permitted to make legal arguments and factual summations based on the evidence. Under the rules of evidence, they cannot prove anything by making arguments or giving their opinion.

Under these standards, the arguments of Mr. Anderson and Mr. Lowe which did not point to any exhibit, any deposition, any testimony, or any other piece of evidence, *simply were not evidence*, and the trial court could not rely on them as evidence to support its ruling on the facts. This Court similarly must disregard them in weighing whether the trial court's judgment was supported by substantial evidence. Effectively, no required evidentiary hearing took place on which the trial court could base its conclusion that Mr. Anderson's proposed compromise settlement under § 473.277 was or was not in the best interest of the estate.

Nonetheless, the trial court's concluded that it had

> proceeded under 473.277 RSMo to take sworn testimony of the Personal Representative concerning the merits of Plaintiff's claims and the other Defendants' defenses thereto, and the fairness, reasonableness, and benefit to the Estate of the compromise involved in the settlement made, and to hear arguments of counsel. At the close of evidence and arguments, this Court announced that it intended to approve the proposed compromise.

(L.F. 261). Plainly, however, all of this is untrue on the face of the record. There was no sworn testimony concerning the merits of any party's claims or defenses, or concerning the fairness, reasonableness, and benefit to Florence Bell's estate of the proposed compromise settlements. There were arguments, but no evidence, documentary or testimonial, was introduced or referred to whatsoever. Still, the court approved the proposed compromise.

Trial courts are, of course, "permitted wide latitude in the admission of evidence in non-jury cases," and this Court generally presumes that "the court did not consider incompetent evidence in rendering judgment." *Dickerson*, 55 S.W.3d at 876. Where, however, as here and as in *Dickerson*, there is no competent evidence to support the trial court's factual finding because the only supposed "evidence" introduced at the relevant evidentiary hearing was actually the unsworn and un-cross-examined opinion of counsel which pointed to no properly introduced

evidence, "[t]hat presumption falters," and there is "no other competent evidence to support the trial court's" factual decision. *Id.* When this is the case, the trial court's error is "prejudicial error," because the record does not support the trial court's factual finding, and thus this Court must reverse the decision below and remand the case for an immediate hearing on the issue. *Id.*

This Court has issued three decisions interpreting and applying the evidentiary standards involved in compromise settlement proceedings under § 473.277: *Smith*, 747 S.W.3d at 743; *Campbell*, 898 S.W.2d at 630; and *Wilson v. Seebold*, 938 S.W.2d 607 (Mo. App. 1997). The Court upheld the trial court's approval of the settlements in all three cases. *Smith*, 747 S.W.2d at 748, *Campbell*, 898 S.W.2d at 631, and *Wilson*, 938 S.W.2d at 614.

In each of those cases, however, the Court's opinion reflects that a bona fide evidentiary hearing was held over the personal representative's motion, at which evidence was properly introduced, witnesses were sworn, directly examined, and cross-examined, and counsel discussed that evidence before the court. *Smith*, 747 S.W.2d at 746 ("the evidence at the hearing indicated…"); *Campbell*, ("the administrator ad litem testified at the hearing…"); *Wilson*, 938 S.W.2d at 608 (order approving compromise settlement "was entered after an evidentiary hearing at which Respondent William H. Seebold was the lone witness"). In those cases, the trial court made its decision that the proposed compromise settlement was in

the best interests of the state based on the evidence before it, rather than bald statements of interested counsel treated as evidence.

Although the law of Missouri broadly interprets both a personal representative's ability to propose a compromise settlement under § 473.277 and a trial court's authority to approve that compromise settlement, there still must be some properly introduced evidence to support that compromise so as to show the existence of a reasonable economic basis such that it is in the best interests of the estate. The unsworn statements of interested counsel acting as witnesses plainly do not meet this standard. Here, the trial court's error in deciding otherwise is magnified by the personal representative's straightforward admission that Justin Bell stood to gain more than twice the amount of the settlement if successful at trial.

No evidence was introduced before the trial court at the April 17, 2008, hearing over the personal representative's proposed compromise settlement to show that it was in the best interests of the estate. The trial court's Judgment approving the compromise was unsupported by substantial evidence and was against the weight of the evidence. As such, it was error.

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.

Conclusion

The trial court erred in approving of the personal representative's proposed compromise settlement under § 473.277, R.S.Mo. 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.