No. 17-3534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EILEEN L. ZELL
Plaintiff-Appellant,

v.

Katherine M. KLINGELHAFER, ESQ.; FROST BROWN TODD, LLC; Patricia D. LAUB, ESQ.; Shannah J. MORRIS, ESQ.; Joseph J. DEHNER, ESQ.; Douglas A. BOZELL, ESQ.; Jeffrey G. RUPERT, ESQ.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION,
IN CASE NO. 2:13-CV-458,
District Court Judge Algenon L. Marbley

OPENING BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: **17-3534** Case Name: **Eileen L. Zell v. Katherine M. Klingelhafer, et al.**

Name of counsel: **Jonathan R. Zell**

Pursuant to 6th Cir. R. 26.1, **Eileen L. Zell** (Plaintiff-Appellant)
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 30, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Jonathan R. Zell
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal raises the question of what an appellate court should do when a district court seemingly uses the principle of "Too Big to Fail (or Lose)" to decide a case. Here, a politically-prominent law firm (Appellee Frost Brown Todd) is facing a malpractice action by its former client (Appellant Eileen Zell) who, for most of the instant case, was a pro-se litigant being assisted by her son (the undersigned Jonathan Zell), a non-practicing attorney.[1] Based on FBT's ***obvious*** perjury at trial concerning the nature of the volunteer assistance MR. ZELL had given to FBT in MRS. ZELL's underlying case, the district court then ***framed*** MR. ZELL for FBT's own malpractice.

Worse, although the district court made MR. ZELL the scapegoat for FBT's malpractice, the court didn't even hold MR. ZELL liable for the losses this malpractice caused to MRS. ZELL. Yet, at least one of MRS. ZELL's attorneys in the underlying action was clearly liable for those losses. And, of course, the court failed to apportion any liability to the FBT attorneys who were working hand-in-glove with MR. ZELL.

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[1] Both Frost Brown Todd individually and all the Appellees collectively will be referred to as "FBT"; Appellant Eileen Zell will be referred to as "MRS. ZELL"; and Jonathan Zell will be referred to as "MR. ZELL."

While one can understand the district court's natural tendencies to want to protect a prominent law firm and the court's fellow attorneys (including MR. ZELL), here the court's normally-protective attitude exceeded the bounds of due process to such a degree that it created a mockery of justice. FBT and its counsel were given *carte blanch* to engage in every variety of litigation misconduct imaginable; the court's numerous one-sided decisions in FBT's favor honored the facts and the law mainly in the breach and ignored any issues that would conflict with its seemingly-pre-determined *Judgment*; and the (largely) pro-se litigant was left with no one to hold responsible for the obvious malpractice of which she was a victim.

Nonetheless, to resolve the instant case, this Court need NOT address the allegations of litigation misconduct or, especially, the suggestions of judicial bias made in this brief. Instead, this Court can simply remand the case back for a new trial based on the clear errors of law and the key issues left undetermined.

In the way an *amicus curiae* states its interest in a case, the under-signed would like to mention he recently became one of two Executive Directors as well as a six-state Regional Director of *The Posner Center of*

Justice for Pro Se's. The *Posner Center* is a nationwide *pro bono* legal-services organization founded and led by Richard Posner, a retired Judge on the U.S. Court of Appeals for the Seventh Circuit. Its mission is not merely to assist deserving pro-se litigants, like MRS. ZELL, but also to effect a sea-change in the terrible way the courts treat pro se's. Indeed, the *Posner Center* "was founded on the belief that pro se litigants are being mistreated by the courts because judges are often indifferent or hostile to them." *See* RICHARD POSNER, JUSTICE FOR PRO SE'S 106 (2018).

First, the *Center* "refers deserving pro se litigants to outside lawyers.... [It] will then monitor the pro se's cases, publish the results, and thereby bring accountability to the courts." *Id*. This publicity is expected to encompass websites, books, theatrical productions, movies, etc. In Justice Brandeis' words, the *Center* will use the sunlight of publicity as a disinfectant for judicial decisions abusing pro se's. Thus, the *Posner Center* is a *#Me Too* movement designed ***specifically*** for district-court decisions like the instant one. Consequently, what the *Dred Scott* case was to the civil-rights movement this case will be to the pro-se movement if the district court's erroneous, indeed lawless, *Judgment* is not reversed and this case is not remanded for a new trial.

JURISDICTIONAL STATEMENT

The district court below had subject-matter jurisdiction over MRS. ZELL'S action based on diversity of citizenship and a controversy exceeding $75,000 pursuant to 28 U.S.C. § 1332(a)(2). MRS. ZELL is a citizen of Florida. On the Appellees' side, Patricia Laub ("LAUB"), Shannah Morris ("MORRIS"), Katherine Klingelhafer ("KLINGELHAFER"), and Joseph Dehner ("DEHNER") are citizens of Ohio; Douglas Bozell ("BOZELL") is a citizen of Kentucky; Jeffrey Rupert ("RUPERT") is a citizen of Washington; and Frost Brown Todd is an Ohio LLC.

On 4/26/2016, MRS. ZELL filed a *Petition for a Writ of Mandamus* before this Court (RE 159, Page ID # 3705-3706), which was denied on 8/17/2016. The district court issued a final *Judgment* disposing of all parties' claims on 4/21/2017. (RE 200, Page ID # 4463.) MRS. ZELL filed a post-trial motion for a new trial on 5/19/2017 (RE 211, Page ID # 5126-5188) and a timely *Notice of Appeal* on 5/21/2017 (Doc. 213, Page ID # 5193-5195). The court denied the motion for a new trial on 1/8/2018. (RE 227, Page ID # 6393-6403.) MRS. ZELL filed a timely *Amended Notice of Appeal* on 2/1/2018. (RE 228, Page ID # 6404-6413.) Accordingly, this Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the district court erred in limiting the number of trial exhibits (consisting of e-mails to and from the FBT attorneys) that MRS. ZELL's trial counsel was allowed to put into evidence and in limiting MRS. ZELL's main fact witness, MR. ZELL, from testifying about both these exhibits and other trial exhibits that were put into evidence.

II. Whether the district court erred in granting summary judgment on the choice-of-law error to LAUB, MORRIS, BOZELL, KLINGEL-HAFER, and RUPERT as well as in refusing to grant MRS. ZELL leave to file a second amended complaint adding Aaron Bernay ("BERNAY") as a party defendant — all based on the statute of limitations ("SOL").

III. Whether the district court erred in denying MRS. ZELL access to evidence FBT was concealing and in refusing MRS. ZELL's request to call FBT's loss-control counsel as a witness at the trial.

IV. Whether the district court erred in denying MRS. ZELL access to FBT's previously-concealed and belated privilege log.

V. Whether the district court erred in refusing MRS. ZELL's request to call FBT's CEO as a witness at the trial.

VI. Whether the district court erred in not ruling in MRS. ZELL's favor.

VII. Whether the district court erred in granting FBT's oral *Rule 52(c) Motion for a Judgment on Partial Findings*.

VIII. Whether the district court erred in refusing MRS. ZELL's request to recall RUPERT to the witness stand and in denying MRS. ZELL's post-trial *Motion for a New Trial Based on FBT's Perjury* without even the requested hearing.

STANDARDS OF REVIEW

For Issues I, III, IV, V, and VIII, this Court will not overturn the district court's decision or ruling absent an abuse of discretion. A district court abuses its discretion "by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989) (internal quotation marks omitted).

Issues II, VI, and VII involve questions of both fact and law. With regard to the district court's conclusions of law, this Court will review those conclusions *de novo*. With regard to the district court's findings of fact, MRS. ZELL is required to show by clear and convincing evidence the court's findings were clearly erroneous.

Since Issue II involved the district court's grant of summary judgment, this Court must "view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the non-moving party." *Fed. Home Loan Mtge. Corp. v. Lamar*, 503 F.3d 504, 507-508 (6th Cir. 2007). Thus, the usual abuse-of-discretion standard does not apply to the part of Issue II dealing with BERNAY.

STATEMENT OF THE CASE

In 2000, MRS. ZELL loaned $90,000 — due 12/31/2001 — to her Missouri-based nephew Michael Mindlin and others (the "debtors"). The debtors gave MRS. ZELL a repayment agreement and a Promissory Note ("Note"), both signed in Missouri. In early 2009, MRS. ZELL retained FBT to collect on the now-delinquent loan. After the debtors sued MRS. ZELL in October 2010 in *Mindlin v. Zell* (the "Ohio action"), FBT represented MRS. ZELL in that case. Twelve FBT attorneys — led by DEHNER — represented MRS. ZELL, billing her $73,857.80 on the less than $90,000 claim. *See* ¶¶ 5-6 of *9/2/2014 Jonathan Zell Affidavit* (RE 86-3, Page ID # 1586).

Since MRS. ZELL's son — the undersigned Jonathan Zell (MR. ZELL) — was a non-practicing attorney with zero trial experience and no access to online legal research, he did not have the ability to represent his mother. However, to reduce MRS. ZELL's attorney's fees — and subject to FBT's oversight and review — MR. ZELL voluntarily assisted FBT with the writing tasks of assembling the facts and putting FBT's legal research into the first draft of MRS. ZELL's pleadings and briefs. *See 3/17/2014 Eileen Zell Affidavit* (RE 50-1, Page ID # 593-596);

3/17/2014 Jonathan Zell Affidavit (RE 50-2, Page ID # 600-603); Transcript (RE 222, Page ID # 6187-6190); E-mails (RE 50-2, Page ID # 608, 628, 634-643). *See also* e-mails and testimony cited in section "VI.C," *infra*.[2]

On 7/5/2011, the debtors filed a *Motion for Summary Judgment* based on the expiration of Ohio's statute of limitations (SOL). From 7/5/2011 to 8/15/2011, RUPERT, KLINGELHAFER, and MR. ZELL were all working together in preparing MRS. ZELL's response to the debtors' summary-judgment motion on the SOL and MRS. ZELL's own motion.

As MRS. ZELL's expert witness (James Leickly) testified (RE 220, Page ID # 5929-5936), RUPERT's 7/14/2011 e-mail (Trial Exhibit P-120) — to which RUPERT's and KLINGELHAFER's 7/13/2011 e-mails were attached — clearly showed RUPERT and KLINGELHAFER researching the SOL applicable to MRS. ZELL's Note. However, the problem was

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[2] Except for the two above paragraphs, the rest of this section and the following section has been excerpted ***verbatim*** (albeit omitting ellipses and brackets for slight changes) from MRS. ZELL's *Reply Brief in Support of Motion for a New Trial* (RE 217, Page ID # 5212-5287). The undersigned apologizes for using this unorthodox format to stay within the word limitations. But it shows all the damning evidence the district court possessed and, thus, how that court abused its discretion by ignoring that evidence during or, at least, after the trial.

— not being aware of the principle of *lex loci* (the law of the forum) — RUPERT and KLINGELHAFER did their research using the ***wrong*** choice-of-law rules. Instead of using the rules for ***procedural***-law issues — such as the SOL — (which would have pointed to Ohio's expired SOL), they used the rules for ***substantive***-law issues (which pointed to Missouri's unexpired SOL). Then, in an attempt to hide their error, they falsely testified at the trial they had ***purposefully*** researched the substantive choice-of-law rules rather than the procedural ones; MR. ZELL had supposedly asked them to do this; and they had not questioned MR. ZELL's illogical request.

RUPERT's and KLINGELHAFER's explanation ***might*** have seemed a little less outlandish if Judge Marbley had not already known from his prior decision dismissing FBT's *Third-Party Complaint* against MR. ZELL (RE 121, Page ID # 2689, n.2) that MORRIS (based on her associate BERNAY's research) had earlier made this same error. The only difference was, while MORRIS and BERNAY had relied on the *Standard Agencies* case to advise MRS. ZELL the court in the Ohio action would apply Missouri's SOL to MRS. ZELL's Note, RUPERT and KLINGELHAFER had given MRS. ZELL this same advice based on the

factors in the *Restatement of the Law 2d, Conflict of Laws*. RUPERT and KLINGELHAFER were correct to the extent *Standard Agencies*' single-factor test had been replaced in the modern case law by the *Restatement's* multiple-factor test. However, as previously stated, their error was that ***both*** the single- and multiple-factor tests applied to substantive — not procedural — choice-of-law issues.

Apparently to be consistent, MORRIS and BERNAY also falsely testified at the trial they, too, had researched the substantive — rather than procedural — choice-of-law rules on ***purpose*** rather than by mistake. Of course, as previously stated, this testimony flatly contradicted the finding in Judge Marbley's prior order dismissing the Defendants' *Third-Party Complaint*. However, what made RUPERT's and KLINGELHAFER's perjuries even ***more*** obvious than those of MORRIS and BERNAY was the former were claiming to have ***purposefully*** avoided researching the procedural choice-of-law (i.e., SOL) rules in connection with MRS. ZELL's response to the debtors' summary-judgment motion ***on the SOL issue!***

Of course, using the substantive choice-of-law rules to rebut the SOL defense in the debtors' summary-judgment motion — which is what

MRS. ZELL's *Memorandum in Opposition* (*see* Trial Exhibit P-278, Appendix II) to the debtors' summary-judgment motion then attempted to do — would have been total insanity if it had been done on ***purpose***. Yet, that's what RUPERT and KLINGELHAFER testified to at the trial, and what Judge Marbley then uncritically accepted and incorporated into *his Findings of Fact and Conclusions of Law*. If there could ever be a more obvious example of perjury, the undersigned cannot imagine it.

SUMMARY OF THE ARGUMENT[3]

FBT attorneys MORRIS, RUPERT, KLINGELHAFER, and BERNAY all gave seemingly-coached, blatant, wholesale, and obviously-false testimonies at trial. For their testimonies were contradicted by and inconsistent with FBT's three-and-one-half-year history of pleadings and briefs in the instant case, the district court's prior order, the voluminous documentary evidence in the Record, and MRS. ZELL's expert's (Mr. Leickly's) testimony at the trial.

Nonetheless, Judge Marbley uncritically accepted their false testimonies and based all of his *Findings of Fact and Conclusions of Law* on those false testimonies. The FBT attorneys' false testimonies as well as

[3] *See* note 2, *supra*.

Judge Marbley's findings involved (1) the nature of the legal research RUPERT and KLINGELHAFER conducted during their representation of MRS. ZELL in the Ohio action and (2) the role MRS. ZELL's son (MR. ZELL) played in MRS. ZELL's representation vis-à-vis FBT. Together, the FBT attorneys — with Judge Marbley's assistance — then created an obviously false, ***NEW***, and indeed slanderous interpretation of MR. ZELL's role in assisting FBT in order to frame MR. ZELL for FBT's own malpractice.

A typical example showing how RUPERT and KLINGELHAFER were not only allowed to make obviously-false statements with impunity at the trial, but also how Judge Marbley then incorporated those obviously-false statements into his findings of fact:

- On 7/5/2011, the debtors filed a *Motion for Summary Judgment* (Trial Exhibit P-276) based on Ohio's expired statute of limitations (SOL) in the underlying Ohio action.
- On 7/5/2011, referring to the debtors' motion, Jonathan Zell (MR. ZELL) sent an email to RUPERT stating: "[I]f your research suggests that we might have a statute-of-limitations problem (i.e.,

that Ohio law applies), please let me know and my mother [MRS. ZELL] will then reconsider the idea of a settlement." (RE 135-4, Page ID # 3303-3304; Plaintiff's Trial Exhibit E, *a.k.a.*, P-12 (RE 199, Page ID # 4460)). *See* Transcript (RE 219, Page # 5515-5518).

- On 7/11/2011, RUPERT sent an email (Plaintiff's Trial Exhibit P-116) to KLINGELHAFER, ***attaching MR. ZELL's 7/5/11 email.***
- On 7/13/2011, KLINGELHAFER sent RUPERT a research memo containing MR. ZELL's requested SOL research on MRS. ZELL's Note, which RUPERT then forwarded to MR. ZELL. *See* Plaintiff's Trial Exhibit P-49 (Appendix XII).
- On 7/14/2011, MR. ZELL sent RUPERT an email stating: "So, my questions for you are: (1) For us merely to defeat the other sides' MSJ [Motion for Summary Judgment], is the only thing that we must do is to show that there are material questions of fact that must first be determined before the Court can find that Ohio's statute of limitations applies as the other side has argued in its MSJ? (2) If so, then does my Memo in Opposition to the other side's MSJ do that? (3)How sure are you that Missouri law applies to the Note?" *See* Plaintiff's Trial Exhibit P-121 (Appendix XIII).

- On 8/9-10/2011, having just learned about them from his 20-year-old law-school study guide, MR. ZELL sent emails to RUPERT asking RUPERT to research various alternative or tolling arguments under Ohio law applicable to MRS. ZELL's Note. *See* Plaintiff's Trial Exhibits P-90 & P-92 (Appendices VII & VIII).
- On 8/9/2011, RUPERT forwarded to MR. ZELL a research memo KLINGELHAFER had just prepared on tolling "the statute of limitations on a note." *See* Plaintiff's Trial Exhibit P-59 (RE 220, Page ID # 5781).
- On 8/11/2011, RUPERT forwarded to MR. ZELL a second research memo Defendant KLINGELHAFER had just prepared on "debts barred by the statute of limitations." *See* Plaintiff's Trial Exhibit P-93 (Appendix IX).
- MR. ZELL then used KLINGELHAFER's three research memos to prepare (for RUPERT's review) initial drafts of MRS. ZELL's memorandum in opposition to the debtors' summary-judgment motion, MRS. ZELL's own summary-judgment motion, and MRS. ZELL's reply brief — all of which focused on the SOL applicable to MRS. ZELL's note.

- RUPERT then made extensive comments on MR. ZELL's drafts. *See, e.g.*, Plaintiff's Trial Exhibits P-90 (RE 199, Page ID # 4462); P-92 (RE 199, Page ID # 4462); P-93 (RE 227, Page ID # 6403); P-121 (RE 227, Page ID # 6403) (Appendices VII, VIII, IX, XIII).
- MR. ZELL then repeatedly revised the drafts of MRS. ZELL's pleading and briefs based on RUPERT's comments. *See, e.g.,* P-47 at 7 (re "4th draft of MSJ").
- Finally, RUPERT approved and filed the final version of MRS. ZELL's *Memorandum in Opposition* to the summary-judgment motion, Mrs. Zell's own *Motion for Summary Judgment*, and Mrs. Zell's *Reply* Brief. *See* Trial Exhibits P-277, P-278, P-279 (Appendices I, II, III).

Yet, RUPERT and KLINGELHAFER both testified they had ***never*** been asked to research the SOL applicable to MRS. ZELL's Note, and they had therefore ***never*** researched the SOL issue, during the ***entire*** trial-court proceedings in the Ohio action. Incredibly, KLINGELHAFER testified she did not ***even know*** her research memos were going to be used to address a statute-of-limitations issue!

Based on RUPERT's and KLINGELHAFER's obviously-false testimony, Judge Marbley stated in his *Findings of Fact and Conclusions of Law* "there's no evidence … [KLINGELHAFER was asked by RUPERT or did] research[] statute of limitations" or RUPERT was asked by MR. ZELL "to research procedural choice of law [such as the statute of limitations]." RE 222, Page ID # 6355, lines 8-21; Page ID # 6356, line 24 to # 6357, line 14.

Judge Marbley adopted RUPERT's and KLINGELHAFER's obvious perjury despite the extensive email evidence showing:

- RUPERT and KLINGELHAFER were representing MRS. ZELL during the trial-court proceedings in the Ohio action, and ***procedural choice of law (e.g., the statute-of-limitations issue)*** was the ***sole*** determining factor in whether MRS. ZELL would prevail.
- There was ***no*** ambiguity in the plain meaning of the words in MR. ZELL's 7/5/2011 email to RUPERT, ***which RUPERT then forwarded to KLINGELHAFER***, stating "if your research suggests that we might have a statute-of-limitations problem (i.e., that Ohio law applies), please let me know."

- KLINGELHAFER prepared and sent three research memos on the SOL applicable to MRS. ZELL's Note to RUPERT, who then forwarded those research memos to MR. ZELL.
- MR. ZELL sent several emails to RUPERT discussing the SOL issue raised in the debtors' summary-judgment motion — which had to be rebutted — including asking "[h]ow sure" RUPERT was Missouri's SOL applied to MRS. ZELL's Note.
- Based on KLINGELHAFER's research memos, MR. ZELL prepared (for RUPERT's review) initial drafts of MRS. ZELL's pleading and briefs on the SOL applicable to MRS. ZELL's Note.
- RUPERT then revised, approved, and filed final drafts of those pleadings and briefs on the SOL issue in court.

At trial, MRS. ZELL's expert witness (James Leickly) confirmed the ***obvious falsity*** of KLINGELHAFER's and RUPERT's testimonies that they had not researched the SOL or erroneously advised MRS. ZELL (via MR. ZELL) on the SOL applicable to MRS. ZELL's Note and, thus, confirmed the ***truthfulness*** of MR. ZELL's testimony that KLINGELHAFER and RUPERT had indeed done both of those things — and even did them ***in writing*** via numerous emails to MR. ZELL.

Here is a short sampling of Mr. Leickly's testimony:

> The only question of research [for Mrs. Zell's response to the debtors' summary-judgment motion] — the only thing you would need to research would be that statute of limitations ****
>
> ***
>
> So, yes, it's procedural law. That was what the issue was. So Frost Brown, from everything I could tell, every clue I could see, what they said, how they argued, was researching the statute of limitations issue. That's what they were researching.
>
> If they weren't researching that, that would be malpractice because that was the issue. They identified the problem. They just didn't identify the proper solution to the problem.
>
> ***
>
> I don't see how you can read it any other way, that they are trying to determine — as they do this research, they are trying to determine statute of limitations, which state's laws apply because we all agree, if Ohio applies, Mrs. Zell is out. If Missouri applies, it's a ten-year instead of a six, she's in ****
>
> Everything I've seen — and this is directly on point — everything I've seen leads me to believe that the research, the issue in the case, the obvious issue in the case, they knew what it was. Whether they addressed it right or not, they knew what the issue was. It was a statute of limitations[.]

RE 220, Page ID # 5913, line 12 to # 5918, line 14.

ARGUMENT

As MRS. ZELL's trial counsel (MR. ZELL) repeatedly complained to Judge Marbley during the trial, FBT attorneys MORRIS and RUPERT as well as their respective associates, BERNAY and KLINGELHAFER, had "sandbagged" him. The FBT attorneys did this by using obviously-perjured testimony to ***frame*** MR. ZELL for their own malpractice.[4] *See* Section "VIII.C," *infra*.

Worse, the alleged contributory negligence of MR. ZELL was an issue Judge Marbley had previously prohibited FBT from even ***raising*** at trial. On the eve of trial, Judge Marbley held in his *Plenary Order* dated 4/3/2017:

> Regarding whether Defendants may argue the contributory negligence of Jonathan Zell, the Court notes that it has previously granted summary judgment for Mr. Zell on Defendants' third-party complaint for contribution and indemnification. (Doc. 121.) Defendants may not re-raise issues that have already been decided by the Court.

RE 192, Page ID # 4312.

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[4] The terms "MR. ZELL" and "MRS. ZELL's trial counsel" refer to the same person because MR. ZELL also served as MRS. ZELL's main fact witness at trial.

As Judge Marbley alluded, this prohibition was based on his having previously found the FBT attorneys not only advised MRS. ZELL (through MR ZELL) erroneously on the SOL issue, but also did so by overcoming MR. ZELL's expressly-stated doubts their advice was correct:

> On the statute of limitations issue, Mr. Zell presents evidence of correspondence between himself and the Defendants in which he questions Defendants' statute of limitations analysis and expresses doubt as to whether Defendants properly considered the issue. Moreover, Mr. Zell presents correspondence indicating that Plaintiff's … belief that the Missouri statute of limitations would apply was based on a review of Defendants' recommendation and reasoning, as opposed to any independent research or investigation conducted by Plaintiff or by Mr. Zell.

Opinion & Order dated 12/23/2014 (RE 121, Page ID # 2689, n.2) (citations omitted).

If this Court cannot reconcile the findings Judge Marbley made above with those he made after the trial in this case, the explanation can be found in what Judge Marbley also stated in his *Plenary Order*. Acting *sua sponte*, he telegraphed the *Judgment* he ***then expected*** to make by helpfully suggesting to FBT: "On the other hand, Defendants are free to argue the contributory negligence of *Plaintiff*, Eileen Zell." (RE 192, Page ID # 4312.)

However, Judge Marbley's advice that FBT blame MRS. ZELL for FBT's own malpractice was too far-fetched for even FBT. Therefore, at the trial FBT went back to blaming MR. ZELL — a tactic Judge Marbley then apparently felt he had to support even though this required him to adopt, as his *Findings of Fact*, FBT's blatant and obvious perjuries.

I. THE DISTRICT COURT ERRED IN LIMITING THE NUMBER OF TRIAL EXHIBITS MRS. ZELL's TRIAL COUNSEL COULD PUT INTO EVIDENCE AND MR. ZELL's TESTIMONY ABOUT THOSE EXHIBITS

As will be shown in this brief, to blame MR. ZELL for their own malpractice, in their testimonies MORRIS, RUPERT, BERNAY, and KLINGELHAFER would either misrepresent the plain meaning of the e-mails they had exchanged with MR. ZELL and/or each other. Or they would flatly contradict those e-mails.

To counteract their false testimonies, MRS. ZELL's counsel had MRS. ZELL's expert witness (James Leickly) give his interpretation of some of the FBT attorneys' e-mails. Mr. Leickly showed how the FBT attorneys' testimonies were refuted by both the plain meaning of their e-mails and commonsense.

However, MRS. ZELL's counsel also needed MR. ZELL (who was a party to almost all the e-mails in question) to testify as to not only the

true meaning of these e-mails, but also the context in which they had been written. In addition, being the only witness to FBT's malpractice, MR. ZELL needed to give the chronology of what had occurred. But, so MR. ZELL would not have spend hours on the witness stand refuting the four FBT attorneys' false testimonies, MRS. ZELL's counsel asked Judge Marbley to enforce the prohibition in his *Plenary Order* against the FBT attorneys' trying to blame MR. ZELL for their own malpractice. Transcript (RE 219, Page ID # 5652, lines 2-20). Although the court denied that motion, the court still ***shortened*** MR. ZELL's trial testimony anyway. Transcript (RE 220, Page # 5950, lines 8-16).

Using attorney James Feibel as a temporary substitute counsel, MR. ZELL began his testimony by explaining, one by one, his e-mail correspondence with the FBT attorneys concerning their past representation of MRS. ZELL. MR. ZELL then showed how these e-mails completely contradicted the FBT attorneys' previous testimony. However, to prevent MR. ZELL from continuing in this vein, FBT's counsel requested a sidebar from which MR. ZELL was excluded. Transcript (RE 221, Page ID # 6176, lines 9-11). There, Judge Marbley joined FBT's counsel in complaining MR. ZELL was giving "cumulative testimony." (*Id.*, Page ID

6172, lines 2-11.) However, it was not "cumulative" to what the FBT attorneys had previously testified. It was ***contradictory*** to what they had testified (which, of course, was the reason behind opposing counsel's objection).

A later review by MR. ZELL of the transcript of this sidebar seemed to show Judge Marbley intimidating Mr. Feibel into agreeing to "put the [subsequent email] exhibits into evidence without [allowing MR. ZELL to continue to] go[] through" his planned explanation of each email and, furthermore, to limit the rest of MR. ZELL's testimony to only 45 minutes. (*Id.*, Page ID # 6173, line 7 to # 6175, line 8.) However, at the time, Mr. Feibel inaccurately told MR. ZELL Judge Marbley had "ordered" these time and subject-matter restrictions on his testimony.

MR. ZELL then immediately confronted Judge Marbley with this interpretation of the Judge's actions; however, Judge Marbley declined to disabuse MR. ZELL of the erroneous belief he had ***ordered*** these restrictions. (*Id.*, Page ID # 6177, line 9 to # 6180, line 22.) On the contrary, Judge Marbley later referred to these restrictions as "an order," stating: "We didn't have an agreement. The Court issued an order." Transcript (RE 222, Page ID # 6185, lines 24-25).

Also, although Judge Marbley had told Mr. Feibel during the sidebar there was no rule prohibiting MR. ZELL from explaining his correspondence with the FBT attorneys, even email by email (Transcript, RE 221, Page ID # 6172, lines 2-11), Judge Marbley then turned around and stopped MR. ZELL from doing so during MR. ZELL's testimony the next day. Transcript (RE 222, Page ID # 6203, line 10 to # 6204, line 4).

Due to the time limitations Judge Marbley put on MR. ZELL's testimony, the number of trial exhibits (i.e., e-mails) about which MR. ZELL had planned to testify was minimized. And, because MR. ZELL was stopped from testifying in detail about even this small number of exhibits, MRS. ZELL's counsel sought to admit some additional ones. FBT's trial counsel (Brian Goldwasser) then agreed on the record to allow this. Transcript (RE 221, Page ID # 6180, lines 20-22). However, Mr. Goldwasser later refused.

When MRS. ZELL's counsel requested a sidebar to raise this issue, he was turned down. Transcript (RE 222, Page ID # 6185, line 7 to # 6186, line 2). However, Judge Marbley had previously acknowledged the existence of the parties' agreement to allow MRS. ZELL to enter additional exhibits into the record, and Judge Marbley even appeared

willing to enforce that agreement at a future time. (*Id.*, Page ID # 4910, lines 8-11.) Yet, despite the continual complaints of MRS. ZELL's counsel, that later time never arrived. For example, MRS. ZELL's counsel complained about this to Judge Marbley during both his closing argument (*id.*, Page ID # 6308, line 9 to # 6310, line 19) and afterwards (*id.*, Page ID # 6363, lines 8-12). But to no avail. (*Id.*, Page ID # 6363, lines 13-17.)

The unreasonable limitation Judge Marbley put on both the number of trial exhibits MRS. ZELL's trial counsel could put into evidence and MR. ZELL's testimony about those exhibits constitutes reversible error, requiring a new trial. First, this interfered with MRS. ZELL's and her trial counsel's effectively counteracting FBT's perjurious testimony — which, having taken them by ***surprise***, they were already having difficulty handling. *See* Section III ("Surprise") of MRS. ZELL's *Reply Brief Supporting Motion for a New Trial* (RE 217, Page # 5276-5287).

Second, since the surprise testimony covered an issue Judge Marbley had previously ruled could ***not*** even be raised at trial — i.e., MR. ZELL's potential responsibility for MRS. ZELL's losses — MRS. ZELL and her trial counsel reasonably assumed they did not have to

re-litigate that issue at trial. Thus, the e-mails MRS. ZELL's trial counsel had used in his own pretrial pleadings to defeat that issue (although included in MRS. ZELL's Trial Exhibit Binder) were among those MRS. ZELL was prevented from entering into evidence at the trial.[5]

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[5] Consequently, in this present brief the undersigned has had to cite to many e-mails and other documents directly from the district court's docket. Another reason for citing to the docket is, during the trial, the district court expressly stated both pleadings and documents that had been attached to pleadings in the instant case were "already a part of the record in this case" and, therefore, were "not going to be entered" into evidence at trial. Transcript (RE 221, Page ID # 6001, line 22 to # 6002, line 2). This appeared to have been based on, "at the pretrial conference, … [the court's giving of] permission [to counsel] not to put this case's pleadings" in their Trial Exhibit Binders, but still to be able to use those pleadings and their attachments for any purpose at trial. (*Id*., Page ID # 5999, line 18 to # 6000, line 15.)

II. WITH REGARD TO THE CHOICE-OF-LAW ERROR, THE DISTRICT COURT ERRED IN GRANTING FBT PARTIAL SUMMARY JUDGMENT AND IN REFUSING TO ALLOW MRS. ZELL TO ADD AARON BERNAY AS A DEFENDANT BASED ON THE STATUTE OF LIMITATIONS (SOL)

In its *Motion for Summary Judgment* on the SOL issue (RE 41, Page ID # 412-420; RE 49, Page ID # 568-569), FBT argued only DEHNER had been sued within the SOL. First, under the termination-of-representation prong of the SOL, FBT acknowledged the six Appellee attorneys — LAUB, MORRIS, BOZELL, KLINGELHAFER, RUPERT, and DEHNER — had alternated among themselves in working on MRS. ZELL's underlying case from 2009 to August 2012. However, FBT alleged all except DEHNER had stopped working on MRS. ZELL's case more than one year before the instant case was filed.

Second, FBT also argued, under the discovery prong of the SOL, the "cognizable event" was the trial court's decision in the Ohio action, which had occurred more than one year before the instant case was filed.

Beginning with its *Opinion & Order* dated 9/12/2014, the district court accepted both of FBT's arguments with regard to MRS. ZELL's choice-of-law claim, finding potential liability for that claim against only DEHNER. (RE 89, Page ID # 1746.)

However, the court held there was no SOL problem with MRS. ZELL's claims based on the alternative or tolling-type errors since the "cognizable event" for them was the Ohio appellate court decision. *Id.*, Page ID # 1744 ("With regard to … Defendants' various alleged errors related to the arguments raised (or not raised) in the trial court, and thus not preserved on appeal, including their failure to argue alternative bases for timeliness under Ohio law, and their appeal to 'promissory' rather than 'equitable' estoppel — …. any claim based on these alleged failures is timely.").

E-mails FBT previously concealed later revealed the choice-of-law error had originated with BERNAY, so MRS. ZELL moved to add BERNAY as a defendant. (Motions, RE 135, 137, 141, 145.) However, reusing FBT's sham SOL arguments, the court denied this motion. (RE 140, 147.)

A. Termination-of-Representation Prong of SOL

1.

In its *Opinion & Order* of 4/18/2016, the district court explained why, in its previous *Opinion & Orders* of 9/12/2014 and 9/22/2015, it had approved LAUB's, MORRIS', BOZELL's, and KLINGELHAFER's SOL

defense on the choice-of-law claim and was refusing to add BERNAY as a defendant. The court stated, with regard to the termination-of-representation prong of Ohio's SOL, these attorneys had "stopped working" on MRS. ZELL's case more than one year before the filing of the instant case. (RE 147, Page ID # 3590 & 3595) (citing RE 89, Page ID # 1745-1746).

Moreover, according to the court, it apparently did not matter (1) in violation of Rule 1.16(d) of the Ohio Rules of Professional Conduct, these attorneys never informed Mrs. Zell they were terminating their representation; (2) they were all still employed at FBT; (3) in their place, other FBT attorneys had continued to work on MRS. ZELL's case within the SOL; or (4) MRS. ZELL had no way of knowing whether or not these attorneys had ***permanently*** stopped working on her case.

When asked how MRS. ZELL was supposed to know these attorneys had ***completely or permanently*** stopped working on her case, FBT argued MRS. ZELL could see from the time charges on FBT's monthly bills when an attorney had or had not worked on her case. But this argument is factually flawed for three reasons:

- First, the bills did not distinguish between an attorney who had only temporarily and one who had permanently stopped working on MRS. ZELL's case.
- Second, at the time ***even the attorneys themselves*** had no way of knowing whether their cessation of work would be permanent or only temporary. Indeed, since not every attorney who worked on MRS. ZELL's case did so every month, there were always temporary cessations of work.
- Third, many of these attorneys devoted numerous unbilled hours of work to MRS. ZELL's case, which did not appear on the bills.

More importantly, the district court's holding was contrary to Ohio law. Ohio courts have consistently held the SOL begins to run ***not*** once an attorney does no further work on a matter, but only after the demonstration of an "unequivocal intent to terminate the attorney-client relationship." *McOwen v. Zena*, No. 11 MA 58, 2012-Ohio-4568, ¶ 23 (Ohio 7th Dist. App.) (quoting *Daniel v. McKinney*, 181 Ohio App.3d 1, 2009-Ohio-690, 907 N.E.2d 787, ¶ 47). Following Ohio law, a different division of the same district court hearing MRS. ZELL's case had also previously held this way. *See Brautigam v. Damon*, No. 1:11-CV-551

(S.D. Ohio, W.D. Feb. 14, 2014). And even Judge Marbley had previously held so as well. *See Scherer v. Wiles*, No. 2:12-cv-1101, 2014 U.S. Dist. LEXIS 121970, *5-7 (S.D. Ohio, E.D. Sept. 2, 2014).

The law is clear: Absent a "clear and unambiguous" act demonstrating a termination of the attorney-client relationship, *see Duvall v. Manning*, No. 2010-L-069, 2011-Ohio-2587, at ¶ 27 (Ohio 11th Dist. App), stopping work by an attorney on a client's case will not automatically terminate the relationship. ***This is only logical because (as previously stated) often even an attorney does not know at the time whether the attorney's cessation of work will be permanent or only temporary.*** Accordingly, just knowing the last dates LAUB, MORRIS, BOZELL, KLINGELHAFER, and BERNAY allegedly stopped working on MRS. ZELL's legal matter does not tell us when those attorneys terminated their attorney-client relationship with her.

Based on the court's erroneous ruling, Ohio attorneys are now able to immunize themselves completely from liability for malpractice occurring in litigation. All the attorneys would have to do is hand off a litigation case in which they had committed malpractice to other members of their own firm — as in the child's game of "hot potato." Then, if (for

example, by filing an appeal) those other members delayed the resolution of the case for one year, the entire firm would get off scot-free. That is essentially what occurred in MRS. ZELL's case.

The district court based its erroneous SOL ruling on *Fisk v. Rauser & Assoc. Legal Clinic*, No. 10AP-427, 2011-Ohio-5465, at ¶ 19 (Ohio 10th Dist. App. Oct. 25, 2011). (RE 89, Page ID # 1745-1746.) However, the court grossly misinterpreted *Fisk*. Under the termination-of-representation prong of the SOL, the SOL begins to run "when the attorney-client relationship for that particular transaction or undertaking terminates." *Smith v. Conley*, 109 Ohio St.3d 141, 846 N.E.2d 509, 511-12, 2006-Ohio-2035 (2006).

In *Fisk*, the malpracticing attorney resigned from his law firm. The client's case was transferred to another lawyer in the same firm. Under *Smith v. Conley*, the SOL on the first attorney's malpractice began when that attorney's representation ended. Thus, the first question is: When did that attorney's representation end? *Fisk* answered: When the first attorney resigned from his law firm.

The second question is: Should the SOL on the first attorney's malpractice be ***tolled*** due to the continuation of the client's representation

by the other member of the attorney's law firm? *Fisk* answered no.

In the instant case, the district court sped through the first question: When did LAUB, MORRIS, BOZELL, KLINGELHAFER, and BERNAY terminate their representation of MRS. ZELL? For the court simply assumed "each attorney that represented Plaintiff terminated his or her representation" when "each attorney … did no further work on the promissory note matter." (RE 89, Page ID # 1745.)

But *Fisk* did ***not*** hold an attorney's representation of a client terminates when that attorney stops working on the client's legal matter. On the contrary, *Fisk* held an attorney's representation of a client terminates when the attorney ***resigns*** from his or her law firm. However, in the instant case, LAUB, MORRIS, BOZELL, KLINGELHAFER, and BERNAY did not leave FBT. Thus, *Fisk* did not answer the threshold question in the instant case: Whether, although they continued to work at FBT, these five FBT attorneys had terminated their representation of MRS. ZELL prematurely by stopping work on her legal matter in the middle of the Ohio action while other FBT attorneys continued to work on it? Yet, citing *Fisk*, the district court answered "Yes" to this question.

2.

Long before the district court ruled on FBT's summary-judgment motion on the SOL issue, MRS. ZELL and the then-Third-Party Defendant explained in their respective first *Motions to Compel Discovery* (RE 77, Page ID # 823-897; RE 78, Page ID # 900-913; RE 82, Page ID # 1363-1416) FBT's motion should be denied under Fed. R. Civ. P. 56(a) because FBT had failed to properly support or address the facts in its motion.

FBT tried to prevail on the SOL issue without presenting ***any*** affirmative evidence. But, under Rule 56(a), FBT ***may not*** prevail on the SOL issue without alleging facts supporting its position. Despite being the only party who knew the dates the FBT attorneys worked on MRS. ZELL's case, FBT argued in its motion based on inferences derived from MRS. ZELL's *Complaint* to make it look like LAUB, MORRIS, BOZELL, and KLINGELHAFER had stopped working on MRS. ZELL's case more than one year before the filing of the instant action. FBT did this to suggest something FBT ***knew*** not to be true.

However, overlooking or perhaps ignoring the motions to compel, the district court allowed itself to be fooled by the allegations in FBT's

motion that had been extrapolated from MRS. ZELL's *Complaint* for the purpose of misrepresenting the dates LAUB, MORRIS, BOZELL, and KLINGELHAFER had last worked on MRS. ZELL's case. For, in granting most of FBT's summary-judgment motion, the court specifically adopted as its own findings of fact FBT's false inferences. This can be clearly seen in the court's *Opinion & Order* dated 9/12/2014 (RE 89, Page ID # 1746):

> Defendant Laub terminated her work on the case on October 22, 2010 (*Compl.*, ¶ 93); Defendant Bozell, on February 4, 2009 (*id.*, ¶ 84); Defendant Morris, on May 10, 2011 (*id.*, ¶¶ 40, 42); [and] Defendant Klingel-hafer, on January 4, 2012 (*id.*, ¶¶ 123, 125-26, 135, 137-38, 140, 146).

In her motion for reconsideration of the above decision, MRS. ZELL compared the court's above findings of fact with the paragraphs of her *Complaint* from which those findings had supposedly been derived. There is room here for discussing only one finding, but please review the rest of them at RE 90, Page ID # 1779-1781; RE 104, Page # 2327-2333).

The first paragraph -- ¶ 93 -- cited from the *Complaint* (*see* RE 2, Page ID # 27) in the court's decision referred to an e-mail dated 10/22/2010 from LAUB to MR. ZELL:

> 93. On October 22, 2010, ATTORNEY LAUB sent Mr. Zell an e-mail, stating: "I spoke with shannah morris [ATTORNEY MORRIS] earlier this week an[d] we will contact you."

The court found as a matter of law the e-mail described in paragraph 93 of the *Complaint* showed "Defendant Laub terminated her work on the case on October 22, 2010 (*Compl.*, ¶ 93)." However, in that e-mail, LAUB is ***not*** telling MR. ZELL she is terminating her work on the case. On the contrary, LAUB tells MR. ZELL: "[W]e [MORRIS and LAUB] will contact you." The use of the future tense "will contact" clearly shows LAUB was telling MR. ZELL she was continuing — not terminating — her representation of MRS. ZELL at least as of the date of that e-mail.

Although inferences are supposed to be drawn ***against the party (FBT)*** whose motion is under consideration, here the court simply rewrote LAUB's e-mail in a way ***favoring FBT*** and extinguishing MRS. ZELL's claim.

As further pointed out in MRS. ZELL's reconsideration motion, ***the court's other findings of fact on the SOL issue were just as obviously baseless*** as this first one.

3.

As the Magistrate in the instant case noted in his *Order* of 9/30/2014 (RE 94, Page ID # 2050) granting MRS. ZELL's first motion to compel, FBT even "failed to acknowledge their apparent failure to provide any response to … [MRS. ZELL's] Second Set of Interrogatories," which merely asked for the range of dates the FBT attorneys had worked on MRS. ZELL's case. Accordingly, the Magistrate ordered FBT to provide those dates. *Id.*, Page ID # 2047 & 2050.

However, as MRS. ZELL had argued in that motion, FBT's refusal to provide the dates the FBT attorneys had worked on MRS. ZELL's case should have required the district court, under Fed. R. Civ. P. 56(d), to defer considering FBT's summary-judgment motion. This is because FBT's discovery abuse prevented MRS. ZELL from presenting facts she needed to oppose FBT's motion.

But it gets even worse. As the Magistrate later acknowledged in his *Order* of 1/14/2015 (RE 123, Page ID # 2733-2741), FBT continued to refuse to provide the dates the FBT attorneys had worked on MRS. ZELL's case in violation of the Magistrate's previous *Order*. Indeed, to this day ***FBT has still never provided these dates***. *See* Mrs. Zell's

first *Motion for Rule 37 Sanctions* (RE 102-1, Page ID # 2273-2281) and *Second Motion for Sanctions* (RE 175, Page ID # 4080). But, at the same time, FBT (falsely) implied in its summary-judgment motion on the SOL issue none of the FBT attorneys (except DEHNER) had worked on MRS. ZELL's case during the SOL period.

Thus, as MRS. ZELL later pointed out in both her first and second motions for discovery sanctions, the court should have barred FBT, under Rule 37(b)(2)(A)(ii) and 37(c)(1), from using these same undisclosed and unmentioned dates to argue for summary judgment on the SOL issue.

To prevent unfairness or even fraud, issue preclusion is mandatory when, on the one hand, a party asserts a claim or defense while, on the other hand, denying the other party access to the very information needed to refute that claim or defense. For, in Rule 37(c)(1), "the phrase 'is not allowed' is mandatory language." *Jackson v. Steele*, No. 11-72-DLB-EBA (E.D. Kentucky, N.D. August 26, 2013). *See Dickenson v. Cardiac and Thoracic Surgery of Eastern Tenn.*, 388 F.3d 976, 983 (6th Cir. 2004) ("The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or

harmless"). This is because:

> [H]owever innocent a failure to provide discovery may be, it is fundamental that a party that does not provide discovery cannot profit from its own failure. Thus … parties failing to comply with discovery requests may be estopped from "support(ing) or oppos(ing) designated claims or defenses."

Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977).

4.

In response to MRS. ZELL's first *Motion to Compel*, FBT denied withholding any documents or needing a privilege log. (*See* RE 79, Page ID # 915-917; RE 94, Page ID # 2049, n.1) However, after the court granted most of FBT's summary-judgment motion on the SOL, FBT suddenly "found" hundreds of the FBT attorneys' missing e-mails concerning Mrs. Zell's case. *See Goldwasser Declaration* (RE 106-1, Page ID # 2403-2405); *Blickensderfer Declaration* (RE 106-2, Page ID #2460-2462).

Not surprisingly, the newly-discovered and previously-concealed e-mails showed at least LAUB, MORRIS, and BOZELL had continued to work on MRS. ZELL'S legal matter long after the dates on which FBT had based its summary-judgment motion and on which the district court had based its *Opinion & Order* of 9/12/2014 dismissing those Appellees

as defendants. (RE 128, Page ID # 2807-2812.) ***Since the claims on which FBT's summary-judgment motion on the SOL issue was based (which had never been supported by any direct evidence in the first place) were now thoroughly discredited by the newly-discovered e-mails, FBT's summary-judgment motion was left completely unsupported. Therefore, it should have failed under Fed. R. Civ. P. 56(a).*** Also, since the district court's decision on summary judgment had also been based on these discredited claims, the court's decision ***also*** needed to be reconsidered and reversed.

After obtaining the newly-discovered e-mail evidence, MRS. ZELL presented to the district court both the new evidence and FBT's misconduct in having purposefully waited (over 10 months) until after the court had granted FBT's summary-judgment motion before providing this evidence. Since the court's decision on summary judgment was not a final judgment, the proper vehicle to get this new evidence and FBT's misconduct before the court was a motion for reconsideration rather than a Rule 60(b) motion. But, since MRS. ZELL already had a pending *Motion for Reconsideration* of the court's decision granting summary judgment (to which this new evidence and FBT's misconduct applied),

the proper vehicle seemed to be a *Supplement* to that reconsideration motion.

In the *Supplement* (RE 128, Page ID # 2793-2844), MRS. ZELL explained the new evidence (i.e., the previously-concealed e-mails) proved FBT's SOL defense had been a sham. Therefore, MRS. ZELL argued the district court should reverse its erroneous decision granting (most of) FBT's summary-judgment motion on the SOL issue. MRS. ZELL also argued FBT, having concealed this evidence for so long and then lied to the court about its supposed nonexistence, was certainly not entitled to keep the undeserved grant of summary judgment that had been based on its fraudulent SOL defense.

However, in its *Opinion & Order* of 9/22/2015, the district court stated MRS. ZELL's *Supplement* "will not be considered." (RE 138, Page ID 3390.) As explained more fully in MRS. ZELL's *Motion for an Interlocutory Appeal* (RE 139, Page ID # 3449-3454), in refusing to consider the *Supplement* the court did not base its ruling on the standard for reviewing reconsideration decisions under Rule 59(e). That is, the court did not deny the evidence was "previously unavailable." Nor did the court deny the newly-discovered evidence demonstrated the court's

prior decision on summary judgment had contained a "clear error of law" or FBT had obtained their summary-judgment victory through fraud, thus causing a "manifest injustice."

Instead, the court suppressed the newly-discovered evidence contained in the *Supplement* based on the standard for reviewing reconsideration decisions under Rule 60(b)(2). That is, the court ***improperly imported from Rule 60(b), and added to its consideration of MRS. ZELL's request for reconsideration under Rule 59(e),*** the requirement, with reasonable diligence, the evidence could not have been discovered in time. Then, on this wholly inapplicable basis, the court refused to consider either this new evidence or FBT's misconduct.

5.

After all of FBT's aforementioned dilatory tactics had been revealed, FBT belatedly supplied *Declarations* from LAUB (RE 132-1, Page ID # 2889-2891) and MORRIS (RE 132-2, Page ID # 2943-2946) to address the previously-***un***answered question of when these two Appellees had last worked or consulted on MRS. ZELL's underlying case. These *Declarations* were designed to give cover to the district court's two previous (and flawed) decisions on the SOL issue. So naturally, in its

third and final decision on the SOL issue, the court gladly embraced them. But the court's decision is not supported by the evidence.

First, contrary to the implication in the court's third decision (*see Opinion & Order* of 4/18/2016, RE 147, Page ID # 3590), these *Declarations* still failed to state the dates MORRIS or LAUB had last ***worked*** on MRS. ZELL's case. Instead, as explained in MRS. ZELL's *Reply Brief in Support of the Supplement* (RE 134, Page ID # 3052-3068), MORRIS' and LAUB's ***lawyerly-worded*** *Declarations* referred only to LAUB's "***role***" (¶ 3 of RE 132-1, Page ID # 2889) "as counsel for Eileen Zell" (¶ 10 of Doc. 132-1, Page ID # 2891) concerning "the underlying litigation between Michael Mindlin and Eileen Zell" (¶ 4 of Doc. 132-1, Page ID # 2890); and only to MORRIS' ***acts*** of "being consulted" and "continu[ing] to consult" as "counsel for Eileen Zell" (¶ 13 of Doc. 132-2, Page ID # 2945)(emphasis added). That is, these self-serving *Declarations* did not address whether or not these two Appellees had continued to ***work*** on MRS. ZELL's ongoing case (without billing MRS. ZELL) in a non-consulting role.

Second, as will be discussed below under Issue "III," to prevent MRS. ZELL from proving MORRIS and other FBT attorneys continued

to work on Mrs. Zell's case, FBT hid its records of their unbilled work. In fact FBT did more than merely hide the records; it fabricated them. For example, pursuant to the district court's *Plenary Order*, FBT provided a spreadsheet purporting to show only DEHNER had performed any unbilled work on MRS. ZELL's case. However, this spreadsheet was demonstrably false. For, in discovery, some internal e-mails slipped through showing MORRIS and other FBT attorneys had routinely spent unbilled time on MRS. ZELL's case.

Third, LAUB's and MORRIS' *Declarations* were directly contradicted by MRS. ZELL's (RE 134-3, Page ID # 3085-3087) and her son's (RE 134-1, Page ID # 3081-3083) own *Declarations*.

Fourth, when the FBT attorneys terminated their attorney-client relationship with MRS. ZELL is a question of fact for a jury — not a judge — to decide. *See Scherer v. Wiles*, No. 2:12-cv-1101, 2014 U.S. Dist. LEXIS 121970, *5-7 (S.D. Ohio, E.D. Sept. 2, 2014). (The instant case was changed from a jury to a bench trial on 12/28/2016. *See Order*, RE 166, Page ID # 3886.)

Fifth and finally, "[s]ince the question of when an attorney-client relationship ends is a question of fact … the evidence must be weighed

most strongly in favor [of the non-movant]." *See Monastra v. D'Amore*, 111 Ohio App.3d 296, 304, 676 N.E.2d 132, 138 (Ohio 8th Dist. App. 1996). Yet, here, the district court judge not only usurped the jury's role but also impermissibly shifted the burden of proof onto MRS. ZELL.

B. Discovery Prong of SOL

1.

The district court found the "cognizable event" for FBT's choice-of-law error occurred when the state trial court in the Ohio action granted judgment against MRS. ZELL rather than when the state appellate court affirmed that decision ***on other grounds***. The district court correctly held a "cognizable event occurs, and a claim for legal malpractice accrues, when a client 'should … have known that he or she may have an injury caused by his or her attorney'" (RE 89, Page ID # 1743) (citation omitted). The court further held the phrase "should have known" means "a reasonable person [would have been put] on notice of the need for further inquiry as to the cause of such damage or injury." *Id.* (citing *Omni-Food & Fashion, Inc. v. Smith*, 528 N.E.2d 941, 944-45 (Ohio 1988)).

The "damage or injury" in question was the state trial court's judgment. Under *Omni-Food & Fashion*, the next steps would have been to look at (1) whether MRS. ZELL had made the required "further inquiry" to find out "the cause" of the trial court's judgment and (2) after that, whether MRS. ZELL had taken whatever follow-up actions "a reasonable person" would have taken.

For, "[u]nder Ohio law, the Court must concentrate on 'what the client was aware of and not an extrinsic judicial determination.'" (RE 89, Page ID # 1743) (citation omitted). But then the district court skipped the steps set forth in *Omni-Food & Fashion* and neglected to focus on what MRS. ZELL "was aware of." Instead, the court focused on the "extrinsic judicial determination" of the trial court's judgment, conclusively presuming anytime a trial court renders an adverse judgment the losing party has notice of possible malpractice. *Id.*, Page ID # 1744.

However, this presumption is contrary to law and the undisputed facts, which demonstrate MRS. ZELL satisfied the requirements of *Omni-Food & Fashion.*

The state trial court ruled MRS. ZELL's Note was governed by Ohio's SOL pursuant to O.R.C. § 1321.17, a provision of Ohio's Small

Loans Act. Specifically, the trial court held: "This Note is governed by Ohio law. See R.C. 1321.17." From the word "See" after the trial court's holding, it is clear Ohio's Small Loans Act (O.R.C. § 1321.17) was the reason the trial court applied Ohio's SOL. *See* RE 48, Page ID # 494.

While the Note was governed by Ohio's SOL, this was ***not*** for the reason given by the trial court. As the state appellate court ruled, the Note was subject to Ohio's SOL ***only*** because FBT had imprudently "cho-[sen] Ohio as the forum for pursuing" MRS. ZELL's action. *See Mindlin v. Zell*, No. 11-AP-983, 2012-Ohio-3543 ¶ 15 (Ohio App. Aug. 7, 2012).

Indeed, it was obvious, by its own terms, Ohio's Small Loans Act did not apply to MRS. ZELL. *See* Amended Reply Brief (RE 48, Page ID # 494-495). And the state trial court ***knew*** the Act did not apply, but relied on it anyway. *See* Reconsideration Motion (RE 90, Page ID # 1758).

Since the Small Loans Act obviously did not apply, what action would a reasonable person in MRS. ZELL's shoes have taken to satisfy *Omni-Food & Fashion*? Would a reasonable person have suspected she had been the victim of malpractice by her lawyers or of "judicial malpractice" by the trial court? It is clear MRS. ZELL thought the latter. But, without any inquiry into what the trial court's decision actually

stated, the district court found a reasonable person would have thought the former. Since the trial court ***knowingly*** based its decision on a statute that clearly did not apply, no reasonable person would have believed its decision was even based on the merits of the case.

In any event, this is a factual question for the jury — ***not*** the court.

2.

Based on RUPERT's opinion that the state trial court's decision was erroneous, RUPERT sent a 10/13/2011 letter to the Zells stating: "There seem to be a number of legal errors … [in] the Decision…. I assume that you will want to appeal this decision to the Tenth District Court of Appeals." (RE 64-4, Page ID # 794.)

Thus, even if the trial court's decision were the "cognizable event" for FBT's choice-of-law error, that "cognizable event" was negated by MRS. ZELL's reliance on RUPERT's false representation that this decision contained reversible error. (*See, e.g.*, RE 134, Page ID # 3074-3077; RE 135, Page ID # 3139; RE 141, Page ID # 3498-3500.) For, just like the client in *McOwen v. Zena*, 7th Dist. Mahoning No. 11 MA 58, 2012-Ohio-4568, ¶¶ 4-6, after the trial court's adverse decision MRS. ZELL exercised reasonable diligence by consulting with RUPERT (whose

representations about the decision then dispelled any suspicions MRS. ZELL might have had about its correctness) and by following his advice to appeal.

Finally, as MRS. ZELL's expert (James Leickly) testified, RUPERT's opinion that the trial court's decision contained reversible error constitutes legal malpractice by itself because, even now, RUPERT "still doesn't understand the *lex loci* issues in this case." (RE 221, Page ID # 6023, lines 3-16.) Thus, FBT's malpractice before the trial court in committing the choice-of-law error was superseded by its malpractice after the trial court rendered its decision. Obviously, the trial court's decision cannot be the "cognizable event" for this later malpractice. *Id.* However, the district court ignored these arguments.

C.

While FBT was representing MRS. ZELL in the Ohio action, DEHNER attempted to negotiate a settlement with MRS. ZELL (via MR. ZELL) over FBT's choice-of-law error. However, DEHNER then told MRS. ZELL (via MR. ZELL) to wait until after the appeals process in the Ohio action was completed before FBT would continue the settlement negotiations. (E-mail, RE 48-1, Page ID # 517.) Of course, we now know

these settlement negotiations were merely a ploy to run out the clock. For, when the appeals process was complete and MR. ZELL then attempted to resume the negotiations, Appellee DEHNER declined to do so. *See* Motion (RE 77-1, Page ID # 841-845 and 851-855); *9/2/2014 Affidavit of Jonathan Zell* (RE 86-3, Page ID # 1587-1589); E-mail (RE 48-1, Page ID # 518). And, as the above-cited e-mail shows, DEHNER was in contact with FBT's loss-counsel counsel about all of this at the time.

Consequently, FBT should have been prevented from asserting a SOL defense on the basis of waiver and equitable estoppel. *See* RE 48, Page ID # 502. After initially failing to address these issues, the district court claimed they would apply only to DEHNER. (RE 147, Page ID # 3596.) However, when FBT's loss-counsel counsel is strategizing with another FBT attorney about how to delay MRS. ZELL's malpractice action against all of FBT, estoppel and waiver apply to all of FBT.

D.

With regard to RUPERT, there is an additional reason the district court erred in granting him summary judgment on the choice-of-law error. RUPERT left FBT before FBT's representation of MRS. ZELL ended and he timely notified MRS. ZELL of his relocation to Washington

state. However, RUPERT moved out of state for non-business reasons. Therefore, RUPERT's absence from the state should have tolled the SOL under O.R.C. § 2305.15(A). *See* Motion (RE 19, Page ID 233-236). However, the court ignored this tolling argument.

Ohio's tolling statute satisfies due process when the defendant has left the state for non-business reasons. *See Johnson v. Rhodes*, 89 Ohio St.3d 540, 543, 733 N.E.2d 1132, 1134 (2000). That RUPERT left Ohio for non-business reasons is undisputed. According to DEHNER's 5/4/2013 e-mail (RE 19-1, Page ID # 265): "Jeff [RUPERT] fell in love with someone who lived in Seattle, and that is why he moved there." In addition, according to RUPERT's current employer, RUPERT did not become employed there until almost one and one-half years after he had relocated to Washington. *See* RE 19-1, Page ID # 266.

Ohio courts have recently interpreted the tolling statute to include the situation where a defendant potentially leaves the state ***permanently*** for non-business reasons. For example, two courts have held Ohio's tolling statute applies even where a defendant left and never returned to the state and, thus, his absence appeared to be permanent. *See Cramer v. Archdiocese of Cincinnati*, 814 N.E.2d 97, 158 Ohio App.3d

110, 2004-Ohio-3891 (1st. Dist. 2004) at ¶ 27. *See also Tremp v. Mash*, 2014-Ohio-3516, L-14-1018 at ¶ 10 (Ohio 6th Dist. App. 2014).

III. THE DISTRICT COURT ERRED IN DENYING MRS. ZELL ACCESS TO EVIDENCE FBT WAS CONCEALING AND IN REFUSING MRS. ZELL'S REQUEST TO CALL FBT'S LOSS-CONTROL COUNSEL AS A WITNESS

As the person responsible for providing the discovery materials requested by MRS. ZELL (*see Blickensderfer Declaration,* RE 106-2, Page ID # 2460), BLICKENSDERFER was also responsible for the following discovery abuses:

1. Throughout the entire summary-judgment period, FBT denied having withheld any documents even though MRS. ZELL had identified a number of missing documents because they had been mentioned in other produced documents.

2. As soon as FBT largely prevailed on its summary-judgment motion, FBT admitted it had concealed hundreds of e-mails exchanged by ten FBT attorneys. BLICKENSDERFER claimed these e-mails were not produced due to RUPERT's absence from the firm. *Id.* at ¶ 4 (RE 106-2, Page ID # 2461). However, this failed to explain the non-production of the other nine FBT attorneys' e-mails — including 50 from BLICKENSDERFER himself!

3. Even after it was ordered by the court to do so, FBT refused to provide the dates the FBT attorneys had worked on MRS. ZELL's underlying case or to produce the records — such as the FBT attorneys' time sheets and calendars — that would show these dates.

4. FBT produced a spreadsheet stating only DEHNER had performed any unbilled work on MRS. ZELL'S case. Transcript (RE 218, Page ID # 5422, line 6 to # 5423, line 18). However, e-mails dated 3/2/2011 between MORRIS and David Schulkers showed MORRIS and others were indeed spending a significant number of unbilled hours working on MRS. ZELL'S case. *See* Trial Exhibit P-263, (Appendix VI).

5. Although they were identified in MRS. ZELL's bills, FBT never produced MORRIS' or BERNAY's March and April 2011 legal research, emails, or meeting notes concerning the choice-of-law issue. *See* RE 82, Page ID # 1368-1369. Since they had previously (although erroneously) researched this issue when they advised MRS. ZELL in 2010 that Missouri's SOL governed her Note, there was no reason to research this a second time. But, if they did, they probably discovered their error, and were now hiding it.

6. In the course of this litigation it was revealed BLICKENS-DERFER had produced in discovery two different sets of document disks — one for FBT's outside trial counsel (Mr. Goldwasser) and the other for MRS. ZELL. *See* RE 135, Page ID # 3115-3116. What more proof of skullduggery does one need than this?

7. FBT produced only one personal note concerning MRS. ZELL'S legal matter written by any of the over one dozen FBT attorneys who had worked on her case for over three years. *See, e.g. Plenary Order* (RE 192, Page ID # 4311) ("Defendants need not search again for personal notes or 'all written communications'").

According to ¶ 3 of BLICKENSDERFER's *Declaration*: "In connection with the filing of this lawsuit, I collected paper documents and electronic information for the purpose of discovery." (RE 106-2, Page ID # 2460.) However, BLICKENSDERFER then admitted he never even asked RUPERT for his notes or other relevant documents. *Id.*

Also, according to BERNAY's *Declaration* (submitted almost eight months later in response to MRS. ZELL'S motion to make BERNAY a defendant), BERNAY didn't even know about MRS. ZELL'S lawsuit until then. *See* ¶ 8 of *Bernay Declaration* (RE 136-1, Page ID # 3323). And,

according to BERNAY's testimony, although BERNAY did take notes on MRS. ZELL's case, he never turned them over to anyone. Transcript (RE 220, Page ID # 5834, line 25 to # 5837, line 25).

To remedy FBT's discovery abuses, at various times MRS. ZELL asked the court to appoint a Special Master, to authorize a forensic examination of FBT's computers (at MRS. ZELL'S own expense), and to allow MRS. ZELL to call BLICKENSDERFER as a witness at the trial.

However, the court repeatedly ignored MRS. ZELL's requests for a Special Master and for an examination of FBT's computers. Moreover, in its *Plenary Order* of 4/3/2017 (RE 192, Page ID # 4311), the court refused to allow MRS. ZELL to call BLICKENSDERFER (who attended every day of the trial) as a witness, claiming: "[T]here is no evidence at this time that Mr. Blickensderfer has sought to thwart discovery efforts."

In light of all the incontrovertible evidence of BLICKENSDER-FER's role in FBT's discovery abuses, it was reversible error for the district court to deny MRS. ZELL the right to call BLICKENSDERFER as a witness. For a litigant's right to uncover and present to the fact-finder an opponent's concealment of evidence is best exercised through cross-examination at trial.

IV. THE DISTRICT COURT ERRED IN DENYING MRS. ZELL ACCESS TO FBT'S BELATED PRIVILEGE LOG

MRS. ZELL complained other documents produced indicated FBT was withholding e-mails DEHNER had exchanged with what turned out to be BLICKENSDERFER concerning FBT's strategy, *inter alia*, to trick MRS. ZELL into delaying her suit against FBT and thereby miss the SOL. *See* Item No. 4, *First Motion to Compel* (RE 77-1, Page ID # 836).

Nonetheless, in its memo contra, FBT denied having withheld any documents or having a privilege log. *See* RE 79, Page ID # 916. Thus, in the district court's *Order* of 9/30/2014 granting MRS. ZELL's first *Motion to Compel*, the court noted: "[T]heir [FBT's] brief asserts that no documents subject to work-product protection or attorney client privilege were withheld." (RE 94, Page ID # 2049.)

Then, almost eight months after FBT's initial document production, FBT suddenly put 51 of the very emails MRS. ZELL had described — and whose existence FBT had previously denied — into an out-of-rules privilege log. Accordingly, MRS. ZELL moved the court to order FBT to produce these e-mails. *See* RE 175, Page ID # 4072-4130. But the court refused. Transcript (RE 218, Page ID # 5289, line 13 to 5291, line 24).

V. THE DISTRICT COURT ERRED IN REFUSING MRS. ZELL'S REQUEST TO CALL FBT'S CEO AS A WITNESS

The district court erred in refusing to allow MRS. ZELL to call George Yund ("YUND") as a witness. In her *Trial Brief* (RE 186, Page ID # 4200-4229), MRS. ZELL gave two reasons she needed to call YUND.

First, MRS. ZELL needed a FBT official to explain the statements found on FBT's website at http://www.frostbrowntodd.com/firm.html (RE 86-15, Page ID # 1622) and http://www.frostbrowntodd.com/client-teams.html (RE 86-20, Page ID # 1630). Specifically, MRS. ZELL needed to ask YUND whether these statements accurately described FBT's "client service teams" and the "relationship attorney or team leader" who leads and oversees the team members. If so, then MRS. ZELL needed to ask whether the FBT attorneys on the client team working on MRS. ZELL's case would (as stated on FBT's website) "periodically meet," "maintain an ongoing dialog," "monitor developments," and have a "deep[] understanding" of MRS. ZELL's goals; and also whether "the relationship attorney or team leader" (DEHNER) would "oversee[]" the team members' work "to assure the highest standards of work product quality."

MRS. ZELL needed to ask YUND these questions because, in the trial, LAUB, MORRIS, RUPERT, KLINGELHAFER, DEHNER, and

BERNAY all testified they did not do any of the things stated on FBT's website. Had MRS. ZELL been able to confront YUND at trial with the above testimonies, YUND would have had to admit either he was running a law firm composed of idiots or the above testimonies were untrue or the conduct described in those testimonies diverged 180 degrees from the conduct described on the firm's website — any one of which would have confirmed malpractice.

VI. THE DISTRICT COURT ERRED IN NOT RULING IN MRS. ZELL'S FAVOR

A. The Choice-of-Law Error

As MRS. ZELL demonstrated in her *Motion for Leave to File a Summary-Judgment Motion* (RE 160, Page ID # 3719-3722; RE 162, Page ID # 3839-3841), even if one were to accept FBT's expert's opinion MRS. ZELL's Note became unenforceable once the debtors sued MRS. ZELL in Ohio, MRS. ZELL was still entitled to prevail in the instant case. Due to their choice-of-law error regarding whether Ohio's or Missouri's SOL applied to the Note, the FBT attorneys erroneously informed MRS. ZELL she would prevail in the Ohio action. Consequently, MRS. ZELL litigated the case, losing both the settlement value of her Note and the attorneys' fees she paid FBT.

As Judge Marbley noted in *Scherer v. Wiles*, No. 2:12-CV-1101 (S.D. Ohio, July 24, 2015), a plaintiff in a legal-malpractice action need ***not*** prove it would have prevailed in the underlying action if it can show ***instead***, "but for the attorney's negligence, the plaintiff would be in a ***more favorable position***" (emphasis added). In other words, a plaintiff need only "show it sustained some loss ***regardless of any eventual outcome***" of the underlying case. *Id*. (citing *Vahila v. Hall*, 77 Ohio St.3d 421, 428, 674 N.E.2d 1164, 1169 (1997) (emphasis added)).

MORRIS testified DEHNER was the relationship attorney in MRS. ZELL's case (Transcript, RE 218, Page ID # 5415, lines 14-15) and MR. ZELL testified the team of FBT attorneys representing MRS. ZELL went to DEHNER whenever they had a problem (Transcript, RE 222, Page ID # 6190-6191). According to FBT's website, when "a team of lawyers must be assembled .... [a]ll matters are overseen by the relationship attorney or team leader[.]" *See* http://www.frostbrowntodd.com/firm.html (RE 86-15, Page ID # 1622). DEHNER testified he was a 20-year veteran of FBT's litigation department (Transcript, RE 220, Page ID # 5842, lines 7-8); served as MRS. ZELL's billing attorney (*id*., Page ID # 5868, lines 12-13); consulted with other FBT attorneys on MRS. ZELL's case and,

through that, had an attorney-client relationship with MRS. ZELL (*id.*, Page ID # 5864, line 22 to # 5865, line 2).

Through his positions, DEHNER possessed contemporaneous knowledge of the erroneous choice-of-law advice the other FBT attorneys were giving to MRS. ZELL, but then failed to correct this advice or take steps to prevent MRS. ZELL from being harmed by it. For example:

1. Besides having to approve MRS. ZELL's bills, DEHNER corresponded by e-mail with MORRIS on 11/16/2010 (RE 128-5, Page ID # 2838-2839) about using MR. ZELL as a "possible witness" in the Ohio action. Transcript (RE 220, Page ID # 5860, line 19 to # 5862, line 6). This shows, as DEHNER admitted at trial, he was aware of the Ohio action (*id.*, Page ID # 5863, lines 8-19) and he knew MRS. ZELL's Note was the subject of that action. (*Id.*, Page ID # 5870, lines 4-7.)

2. DEHNER was also aware MORRIS was planning to represent MRS. ZELL in the Ohio action (rather than try to get the case transferred to Missouri). In fact, although MORRIS had not yet filed an Answer or otherwise acquiesced to the Ohio court's jurisdiction, DEHNER thought she had. This is because DEHNER thought both MORRIS and MR. ZELL had already jointly filed pleadings in the case, and he

expected they would file more later. (*Id.*, Page ID # 5877, line 22 to # 5878, line 6.)

3. Before that, DEHNER received a 1/8/2009 e-mail from Jeffrey Rosenstiel (RE 48-1, Page ID # 519-523), stating Ohio's SOL, if it applied to MRS. ZELL's Note, would have expired on 12/31/2007. Transcript (RE 220, Page ID # 5859, Line 11 to # 5860, line 5). Thus, as DEHNER admitted at trial, he was aware, under Ohio law, MRS. ZELL's Note was already time-barred. (*Id.*, Page ID # 5871, lines 10-15.) And he further testified he knew — under the rule of *lex loci* — if the Note was before an Ohio court, then Ohio's SOL would apply. (*Id.*, Page ID # 5882, line 17 to # 5883, line 6.)

Therefore, when MORRIS discussed with DEHNER her intention to use MR. ZELL as a witness on behalf of MRS. ZELL in the Ohio action, DEHNER should have realized MRS. ZELL would have a potential SOL problem by remaining in the Ohio action. That is, DEHNER should have realized, under the rule of *lex loci*, the Ohio court was going to apply Ohio's SOL and find the Note unenforceable.

Thus, DEHNER should have made sure both MORRIS and MRS. ZELL knew this. Then, they would know MRS. ZELL needed to get the

Ohio action transferred to a Missouri court (which would apply Missouri's SOL) ***or*** accept the debtors' settlement offer. But DEHNER did not do this. Consequently, the following month, MORRIS filed both an *Answer* and a *Counterclaim*. That doomed the case. As the appellate court in the Ohio action later held: "[B]y choosing Ohio as the forum for pursuing her action, appellant was subject to Ohio's statute of limitations even if her claim would be timely in Missouri." *Decision, Mindlin v. Zell*, No. 11AP-983, ¶ 15 (Ohio App. Aug. 7, 2012).

Yet, even though DEHNER had been given all the information needed to recognize this, DEHNER claimed he had no duty to act. He claimed it was not his job — as either one of MRS. ZELL's attorneys or the team leader — to pay attention to what the other team members were doing. When a team member asked him a question about MRS. ZELL's case, he answered it. But, in so doing, he did not consider the question in the context of what other team members might have previously told him. So, because the team members he was overseeing did not ask him whether they were putting MRS. ZELL in harm's way: "I did not consider it" (Transcript, RE 220, Page ID # 5883, line 14-15) and "I was not thinking about it" (*id.*, Page ID # 5885, lines 20-21).

According to MRS. ZELL's expert witness (James Leickly), this kind of "shifting the ball" among the members of a client team "when the blame comes down" is contrary to the very concept of a team. For, according to FBT's website (*see* section "V," *supra*), the client is supposed to obtain better — not worse — results from a team and its leader (DEHNER) because the members all work together, not apart. Transcript (RE 221, Page ID # 6004, line 21 to # 6014, line 20). Consequently, Mr. Leickly testified DEHNER's actions (or, rather, inaction) fell below the standard of care concerning both the choice-of-law error and the flaws in the alternative arguments. (*Id*., Page ID # 5960, line 9 to # 5965, line 13; # 5969, line 10 to # 5997, line 24.) *See* Leickly Report, RE 160-1, Page ID # 3739-3757.

B. The Tolling Arguments that Were Waived Because They Were Not Timely Raised

Besides the choice-of-law error, MRS. ZELL noted the appellate court in the Ohio action had also identified fatal flaws in FBT's alternative or tolling-type arguments. *Amended Complaint* at ¶¶ 72 & 78 (RE 117, Page ID #2627-2632 & 2635). One such flaw was some of the tolling-type arguments FBT made in its appellate brief — Trial Exhibit P-280 (Appendix IV) — were waived because they had not been made in

its trial-court brief — Trial Exhibits P-277, P-278 & P-279 (Appendix I, II & III). *See Decision, Mindlin v. Zell*, No. 11AP-983, ¶¶ 17-18. *See also* RE 89, Page ID # 1737.

C. <u>The Defective Estoppel Argument</u>

Another kind of flaw pointed out in the appellate court's reconsideration decisions concerned specific defects in the alternative arguments FBT had raised in the trial court, such as the estoppel argument. *See Mem. Decision, Mindlin v. Zell*, No. 11AP-983, ¶9 (Ohio App. Dec. 31, 2012) (RE 48-4, Page ID # 556-563). *See also* RE 89, Page ID # 1737.

As MRS. ZELL's expert (James Leickly) testified:

1. FBT had argued in both MRS. ZELL's trial and appellate briefs (*see* Appendices III & IV) the debtors were estopped from raising a SOL defense due to the extensions they had obtained from MRS. ZELL on repayment of the Note. Transcript (RE 221, Page ID # 6031-6032).

(This is because, as FBT had pointed out in those briefs, estoppel can prevent a party that has asked for an extension from then turning around and using the resulting delay to run out the SOL. Indeed, as FBT later noted in its *Appellate Reply Brief*, estoppel can be used to toll the SOL for negotiable instruments just as it can for simple contracts

under UCC § 1-103(b) and O.R.C. § 1301.103(B).)

2. FBT even attached to its trial-court brief an Affidavit from MRS. ZELL supplying the required factual basis for its estoppel argument. (*Id*., Page ID # 6035, line 23 to # 6036, line 3.)

3. Estoppel most certainly applied to MRS. ZELL's situation and was therefore a "very strong" argument. (*Id*., Page ID # 6028, line 9 to # 6029, line 16; # 6125, lines 18-23.)

4. Based on estoppel, there was a "very good opportunity [for MRS. ZELL] to win this case [i.e., the Ohio action]" — but for one little mistake FBT made. (*Id*., Page ID # 6029, line 1.)

5. FBT mistakenly used the term "***promissory*** estoppel" rather than "***equitable*** estoppel." Transcript (RE 221, Page ID # 6031, line 3 to # 6033, line 10). This distinction is important: While the former will toll the SOL, the latter will not. (*Id*., Page ID # 6027, line 24 to # 6029, line 16.)

(Indeed, this is why the appellate court in the Ohio action ruled against MRS. ZELL. For it held: "Given the differences between the two doctrines, we cannot agree that appellant's references to promissory estoppel ... [will invoke] the tolling of the six-year statute of limitations"

on MRS. ZELL's Note as a proper reference to equitable estoppel would have done. *Mem. Decision, Mindlin v. Zell*, *supra,* ¶9.)

6. It was malpractice for FBT to have misnamed the kind of estoppel argument it was making. Transcript (RE 221, Page ID # 6033-6035; # 6122, lines 5-23; # 6124, line 9 to # 6126, line 14; # 6128, line 14 to # 6130, line 3). Therefore, DEHNER, KLINGELHAFER, and RUPERT all fell below the standard of care. (*Id*., Page ID # 6033, line 23 to # 6036, line 3; # 6122, lines 8-18; # 6124, line 9 to # 6126, line 14.) *See* Leickly Report (RE 160-1, Page ID # 3755-3756).

7. MR. ZELL's participation as co-counsel didn't relieve the FBT attorneys of responsibility for their malpractice:

> They fell below the standard of care, Your Honor, in the sense that they were the attorneys responsible from Frost Brown on this particular case at this particular point in time.
>
> ***
>
> Whether they physically signed the pleadings or were of counsel …. [i]t doesn't make one whit of difference ….
>
> [T]hey were the people that were doing the research, sending the emails related to the research, looking at the stuff.

> From the emails that I had seen, they were vetting. There were discussions going on about what arguments would be made in this summary judgment category, and their job, it seems to me, I mean, certainly they charged — they charged Mrs. Zell for this responsibility, and whether or not they charged them, they owed her this responsibility or they needed to .... get off the case and don't bill them anymore, and then Mrs. Zell will know that .... I won't have this great law firm watching my back. I'm just going to have Jonathan, my son. But they decided not to do that.

(*Id*., Page ID # 6128, line 19 to # 6130, line 3.)

Mr. Leickly was correct that RUPERT's and KLINGELHAFER's actions were more than enough to make them liable. As MR. ZELL noted in his testimony (Transcript, RE 222, Page ID # 6199-6207; # 6213-6214), this can be seen by the e-mails contained in Plaintiff's Trial Exhibits P-90, P-92, P-93, P-94, & P-95 (Appendix VII-XI). For example, e-mails dated 8/8-11/2011 show MR. ZELL telling RUPERT he found some possible arguments they could use, for the summary-judgment briefing on the statute-of-limitations issue, from a 20-year-old *Emanuel* study guide from law school. MR. ZELL then adds: "[S]omeone at FBT will need to review what I wrote for legal sufficiency." (Appendix, p. 182.) Two of the arguments MR. ZELL found were "***detrimental reliance*** AND ***promissory estoppel***" (original emphasis). (Appendix, p. 185.)

In response, RUPERT wrote on 8/9/2011: "I am having someone research the two points you identified" (Appendix, p. 174) and again on 8/10/2011: "I will have an associate research these [additional] issues" (Appendix, p. 185). Then, on 8/11/2011, RUPERT wrote: "Below is the results of the research." (Appendix, p. 190.) RUPERT's e-mail contained a legal memo written by KLINGELHAFER to which RUPERT had added his own legal analysis. One of the things KLINGELHAFER wrote was: "In Ohio detrimental reliance is not a separate cause of action[.]" (Appendix, p. 195.)

Based on RUPERT's and KLINGELHAFER's research, MR. ZELL drafted an *Amended Reply Brief* (which RUPERT reviewed, revised, and then filed) arguing both detrimental reliance and promissory estoppel. However, based on KLINGELHAFER's remark about detrimental reliance not being a term used in Ohio, MR. ZELL left that identifying name out of his argument, but still included the name "promissory estoppel." This is where the error pointed out by the appellate court occurred, for in Ohio "detrimental reliance" ***is called*** "equitable estoppel"!

VII. THE DISTRICT COURT ERRED IN GRANTING FBT'S RULE 52(c) MOTION FOR A JUDGMENT ON PARTIAL FINDINGS

Judge Marbley made several errors in granting FBT's Rule 52(c) motion for a Judgment on Partial Findings at the close of both parties' trial presentations. Transcript (RE 221, Page ID # 6175, lines 12-24).

Procedurally, as MRS. ZELL's counsel pointed out at the time, a Rule 52(c) motion is only appropriate after just one side (the plaintiff's) has presented its case — not both sides. Transcript (RE 222, Page ID # 6248, lines 7-10). But, more importantly, by suggesting only halfway through the trial and only to FBT's trial counsel that he make a Rule 52(c) motion, Judge Marbley telegraphed his prejudging of the issues and preordained *Judgment*. Transcript (RE 220, Page ID # 5951, line 19 to # 5952, line 20). Of course, as previously stated, Judge Marbley did the same thing in the *Plenary Order* he issued one week before trial.

Substantively, of course, Judge Marbley's decision was against the overwhelming weight of the evidence and the credibility findings that went into that decision were themselves not credible. Below are two additional errors also requiring reversal.

A. <u>The Court Violated the "Law of the Case Doctrine"</u>

As will be discussed in the following section ("VIII"), taking its cue from the obviously-coached and -perjured testimony of MORRIS, RUPERT, KLINGELHAFER and BERNAY, the district court ended up blaming MR. ZELL for everything that went wrong in the Ohio action. *See Findings of Fact and Conclusions of Law* (RE 222, Page ID # 6356, line 10 to # 6357, line 14). However, as also previously pointed out, the court's findings cannot be reconciled with the court's previous decision dismissing FBT's *Third-Party Complaint* against MR. ZELL or the court's later decision banning FBT from even raising the issue at trial of MR. ZELL's potential negligence. Thus, the court's finding violates the law-of-the-case doctrine.

B. <u>The Court Failed to Address Some Essential Issues</u>

The general rule is, when there are issues in a case that have not been determined in the trial court, an appellate court will usually order a new trial after reversal. In the discussion of Issue "II," *supra*, we already documented two instances involving the SOL where the district court had failed to consider an essential issue. But here the court failed to consider two issues that involved the merits of MRS. ZELL's claims.

First, having blamed MR. ZELL for everything that went wrong in the Ohio action, the court sidestepped the central issue in the case by refusing to say whether "everything" included the legal malpractice pointed out by the state appellate court. By failing to address this question, the court thought it could avoid having to reverse its earlier decision dismissing MR. ZELL from the case. However, if MR. ZELL was going to be made the scapegoat and take the blame for having caused MRS. ZELL's losses, then MR. ZELL should also be held liable for those losses, too. But he wasn't.

Since malpractice clearly occurred (and since no SOL would protect at least MR. ZELL), the court's purpose was to immunize ***all*** of MRS. ZELL's attorneys. But, if neither MR. ZELL nor FBT was liable for the malpractice, then who was? The unspoken answer left by the court's *Judgment* was: No one. Yet, at least one of MRS. ZELL's attorneys had to be liable for the obvious malpractice occurring in the Ohio action.

Second, even assuming ***arguendo*** MR. ZELL's liability, the court also needed to consider how much of this liability should be apportioned to FBT (the issue raised in MR. ZELL's ***unaddressed*** *Counterclaim*), the way the court had analyzed FBT's third-party claim against MR. ZELL.

For example, switching "FBT and the FBT attorneys" on the one hand with "[Mr.] Zell" on the other hand in ¶ 5 of FBT's *Third-Party Complaint* (RE 7, Page ID # 110), it is clear: "To the extent that Mrs. Zell suffered damages as the result of the negligence of [Mr. Zell] …, Plaintiff has likewise suffered damages due to the negligence of [FBT and the FBT attorneys]."

Of course, the e-mails exchanged between MR. ZELL and the FBT attorneys demonstrated MR. ZELL was the one asking the FBT attorneys for legal advice and they were the ones giving that advice. Thus, MR. ZELL could ***not*** be responsible for the flaws in that advice.

Nonetheless, even assuming ***arguendo*** some liability for MR. ZELL, one may not ignore FBT's role and fail to consider the allotment of liability between MR. ZELL and FBT under the law of apportionment. As MRS. ZELL's expert (Mr. Leickly) testified at the trial, turning over responsibility for the legal research in a client's litigation case to a co-counsel does ***not*** relieve a law firm of malpractice liability for the joint work product (in the form of legal pleadings and briefs) that the firm and its co-counsel then submit to a court on the client's behalf. Transcript (RE 221, Page ID # 6128, line 14 to # 6130, line 3).

Also, given MR. ZELL was a non-practicing attorney with zero trial experience who had repeatedly told FBT he had no access to online legal research, MR. ZELL was obviously not competent to be made lead trial counsel by FBT in the Ohio action or to have responsibility for the legal research in MRS. ZELL's case turned over to him. Therefore, since this is what the district court found FBT had done, FBT is liable to MRS. ZELL for the losses she allegedly suffered from MR. ZELL's actions. *See Restatement (Second) of Agency* § 405(2). For, as FBT's own expert witness testified, if an attorney associates himself with an incompetent co-counsel, the attorney "need[s] to supervise" the co-counsel, "revise[] [the co-counsel's work] as necessary" and "remains responsible for the case." Transcript (RE 219, Page ID # 5645, line 12 to # 5647, line 10).

VIII. THE DISTRICT COURT ERRED IN DENYING MRS. ZELL'S POST-TRIAL *MOTION FOR A NEW TRIAL BASED ON FBT'S PERJURY*

A. Big Lie # 1

There were two Big Lies in the FBT attorneys' testimony. The first came in RUPERT's testimony and involved an ***unanswered*** 6/24/2011 e-mail MR. ZELL had sent to RUPERT before the debtors filed their summary-judgment motion on the SOL issue on 7/5/2011. With regard

to "the run-of-the-mill pleadings that plaintiffs' [i.e., the debtors'] counsel is churning out," MR. ZELL suggested in that e-mail several possible ways to "minimize my mother's pre-trial litigation costs — without, however, making my mother wholly dependent on my own inadequate legal research and writing skills." *See* RE 86-19, Page ID # 1629.

Although other suggestions were also made, the only one later implemented was that MR. ZELL would start signing MRS. ZELL's pleadings and list RUPERT as "of counsel" so RUPERT wouldn't have to make so many stylistic changes to the first drafts of MRS. ZELL's pleadings that MR. ZELL would continue to submit to MR. RUPERT to revise and review. *Amended Complaint* at ¶¶ 52-54 (RE 117, Page ID # 2622-2623); Transcript (RE 221, Page ID # 6137, line 11 to 6138, line 22)(testimony improperly struck).

Since MR. ZELL had received no response to his 6/24/2011 e-mail, he sent a 6/26/2011 e-mail explaining the signing change was intended to relieve RUPERT of responsibility ***only*** for the professional "tone that would befit a pleading that you would sign," but ***not*** for any "legal[] insufficien[cy]" that MR. ZELL's first drafts might contain. *See* ¶ 52 of *Amended Complaint* (RE 117, Page ID # 2622-2623). MR. RUPERT's

only response on 6/27/2011 was: "I talked with Joe [DEHNER], and I think we may be able to work something out. I'll get back to you shortly on that." E-mail (RE 86-18, Page ID # 1627).

RUPERT then testified that, in the 6/24/2011 e-mail proposing that MR. ZELL sign MRS. ZELL's pleadings, MR. ZELL was actually asking FBT "not to do any[more legal] research" in the Ohio action unless "there was a specific issue that [MR. ZELL] wanted researched." Transcript (RE 219, Page ID # 5555, line 19 to # 5556, line 15). RUPERT falsely added he and the Zells then agreed, in a meeting in his office on 7/1/2011, that this is what they would do in the Ohio action going forward. (*Id*., Page ID # 5517, lines 11-21; # 5571, lines 17-21; # 5590, lines 12-17.)

RUPERT's testimony was demonstrably false for eight reasons:

1. RUPERT's characterization of the 6/24/2011 e-mail was belied by the e-mail's own words. The e-mail did not say that MR. ZELL wanted MRS. ZELL to be dependent on MR. ZELL for all the legal research on her case. On the contrary, it stated that MR. ZELL did ***not*** want MRS. ZELL to be "wholly dependent on my own inadequate legal research and writing skills."

2. RUPERT's testimony ignored the later e-mail dated 6/26/2011, which emphasized that, under MR. ZELL's proposal, RUPERT was still to revise MR. ZELL's drafts if they were "legally insufficient," but not simply to make the "tone" sound more "professional." Yet, of the two e-mails, this was the only one to which RUPERT responded.

3. While arranging a meeting with RUPERT for himself and MRS. ZELL on 7/1/2011, MR. ZELL stated in his 6/29/2011 e-mail to RUPERT:

> I do not have access to legal research on the Internet … so you are right that the drafts I give to you will ***always*** be lacking such research. In the past, both you and Shannah Morris have simply added the relevant case law where necessary to my drafts. However, if instead you would like to send me the relevant cases and have me weave them into my drafts by myself as a way to further minimize my mother's legal fees, then I am certainly willing to try that.

(RE 50-2, Page ID # 637) (emphasis added). Does this e-mail sound like it was written by someone who, a few days later on 7/1/2011, would have agreed to an arrangement whereby the legal sufficiency of his mother's pleadings would now become his own ***sole*** responsibility and not that of the law firm his mother was ***continuing*** to employ?

4. While a meeting did take place on 7/1/2011, there was never any discussion, let alone any agreement, on even the key ***signing*** component

of MR. ZELL's proposal. Proof is that, on 7/5/2011, MR. ZELL sent RUPERT an e-mail asking: "(a) Who — you or me — should sign [the next pleading] … and (b) who should be listed as 'of counsel' on it?" RUPERT then replied back: "I think you should sign it and list me as 'of counsel' in the signature block." *See* Trial Exhibit P-127 (Appendix V).

5. Long before FBT dreamed up this fictitious agreement, both Zells had filed Affidavits before the district court averring FBT (rather than MR. ZELL) was always to be responsible for the legal sufficiency of MRS. ZELL's pleadings in the Ohio action. *See* RE 50-1, Page ID # 593-596; RE 50-2, Page ID # 600-605. Although FBT challenged the motion to dismiss the third-party complaint that these Affidavits were supporting, FBT never challenged their averments. *See* Deposition (RE 81-1, Page ID # 1166-1168, 1240-1241, 1302).

6. FBT could produce no personal notes, no notes to the file, no e-mails, or any other documentation to back up this supposed agreement. However, in his 6/27/2011 e-mail to MR. ZELL, RUPERT stated that he had discussed MR. ZELL's proposal with DEHNER (RE 86-18, Page ID # 1627), who did ***not*** testify about it.

7. In almost four years of pretrial litigation — including litigation on

the *Third-Party Complaint* specifically concerning MR. ZELL's potential liability — FBT never even once mentioned this supposed agreement.

8. MR. ZELL's testimony was that he was to do a large part of the writing, but the FBT's attorneys were ***always*** responsible for doing the legal research, for MRS. ZELL's pleadings and briefs. (Transcript, RE 222, Page ID # 6189, line 16 to # 6190, line 11; RE 221, Page ID # 6137, line 11 to 6138, line 22.) More importantly, the e-mails cited in section "VIII.B," below support MR. ZELL's testimony by showing the FBT attorneys always provided MR. ZELL with the legal research he used — ***even after*** the 7/1/2011 meeting.

For example, the last nail in FBT's coffin is the following statements taken from MR. ZELL's and RUPERT's e-mails relating to the drafting of MRS. ZELL's *Amended Reply Brief* on the SOL issue.

ZELL (8/8/2011): "[S]omeone at FBT will need to review what I wrote for legal sufficiency." (Appendix VII, p. 183)

RUPERT (8/9/2011): "I am having someone research the two points you identified" (Appendix VII, p. 175)

RUPERT (8/10/2011): "I will have an associate research these [additional] issues." (Appendix VIII, p. 186)

RUPERT (8/11/2011): "Below is the results of the research." (Appendix IX, p. 191)

B. Big Lie # 2

The second Big Lie was testified to by MORRIS, BERNAY, KLINGELHAFER, and RUPERT. These FBT attorneys all testified that — throughout the pendency of the trial-court proceedings in the Ohio action — MR. ZELL had ***never*** asked any FBT attorney to research the SOL applicable to MRS. ZELL's Note nor had any FBT attorney ***ever*** indicated to MR. ZELL that Missouri's SOL would apply to the Note.

Specifically, BERNAY (Transcript, RE 220, Page ID # 5787, lines 21-23; # 5800, line 11 to # 5801, line 19; # 5804, line 9 to # 5805, line 7; # 5822, line 8 to # 5826, line, 14; # 5834, lines 1-10; # 5837, lines 4-16) and KLINGELHAFER (*id.*, Page ID # 5741, lines 16-18; # 5748, line 21 to # 5749, line 2; # 5750, line 9 to # 5759, line 25; # 5765, line 12 to # 5767, line 25; # 5776, lines 6-10; # 5776, line 21 to # 5777, line 20; # 5782, line 21 to # 5784, line 16) testified they did not even know the ***purpose*** of the legal research they were performing on the choice-of-law issue — except, of course, that it supposedly wasn't the SOL.

In contrast, MORRIS and RUPERT admitted to knowing the purpose of their (and their associates') legal research. But they testified to a purpose that was at odds with MRS. ZELL's goals in the Ohio action. For example, RUPERT testified: "[W]e were not asked specifically to research the statute of limitations issue" prior to the appellate proceedings. Transcript (RE 219, Page ID # 5537, lines 22-24).

Instead, although the debtors had raised a SOL defense, RUPERT testified MR. ZELL nevertheless asked him to research ***only*** "that 1954 case [of *Standard Agencies*] … [and, moreover, to do so ***only*** for the purpose of determining] whether Missouri law would apply substantively" — ***not*** procedurally, i.e., ***not*** with regard to the SOL that would govern the Note. (*Id.*, Page ID # 5533, line 25 to # 5534, line 2.) RUPERT also answered "No" to the court's question: "[W]as Klingelhafer's research directed towards the issue of which state's statute of limitations applied to the loan?" (*id.*, Page ID # 5537, lines 12-16), adding this included KLINGELHAFER's *Restatement*-based research (*id.*, Page ID # 5533, lines 13-16).

MORRIS' testimony was similar. She categorically denied researching the SOL issue on MRS. ZELL's Note. Transcript (RE 218,

Page ID # 5430, lines 3-7, 18-20; # 5431, lines 6-9; # 5434, lines 3-4). Instead, she stated: "choice of law question … is what we were researching … once the case was filed in Ohio." (*Id*., Page ID # 5455, lines 20-22.) Then, she explained: "[S]tatute of limitations … [and] choice of law …. are two separate things." (*Id*., Page ID # 5456, lines 14-16.)

The claims of MORRIS, BERNAY, KLINGELHAFER, and RUPERT do not even pass the smell test.

First, both as shown above and as MR. ZELL proved in his testimony, the e-mails he sent both before and after the debtors filed their summary-judgment motion on the SOL specifically asked the FBT attorneys ***to research the SOL applicable to MRS. ZELL's Note*** (including arguments for tolling); and those e-mails also indicated the FBT attorneys had answered that even the court in the Ohio action would apply Missouri's SOL. Transcript (RE 221, Page ID # 6159, line 23 to # 6169, line 20). Indeed, as a string of 7/11/2011 e-mails shows, the ***only*** work MORRIS and BERNAY did on MRS. ZELL's case besides their "excellent legal research … on the issue of the statute of limitations" (RE 132-2, Page ID # 2960) was to "pull," but not analyze, a few cases on oral modification of a promissory note (RE 132-2, Page ID # 2959).

Second, ***unlike FBT***, MR. ZELL's allegations both as to the erroneous SOL advice FBT provided and the malpractice this represented have ***never*** changed since MR. ZELL first made these allegations in a 4/20/2012 letter to DEHNER (RE 48-1, Page ID # 528-535). *See* Transcript (RE 220, Page ID # 5846, line 8 to # 5848, line 14). Significantly, that letter analyzed some of the very same e-mail correspondence between MR. ZELL and the FBT attorneys whose meaning the parties are now disputing. But FBT did not dispute those allegations. Moreover, how likely is it MR. ZELL would have misrepresented FBT's own e-mails in a letter to FBT while FBT was still representing MRS. ZELL?

Third, in his testimony, MRS. ZELL's expert witness (James Leickly) confirmed the ***obvious falsity*** of the FBT attorneys' testimonies that they had not researched the SOL or erroneously advised MRS. ZELL (via MR. ZELL) on the SOL applicable to MRS. ZELL's Note and, thus, the ***truthfulness*** of MR. ZELL's testimony that these attorneys had indeed done both of those things — and even did them ***in writing*** via numerous emails to MR. ZELL.

Fourth, for the almost four years prior to the trial, FBT never chal-

lenged MR. ZELL's version of these events — even when the two of them litigated FBT's *Third-Party Complaint*.

Fifth, even the district court confirmed MR. ZELL's version of events in its decision dismissing the *Third-Party Complaint* (RE 121, Page ID # 2689, n.2).

C. Mrs. Zell's Counsel Was "Sandbagged" by FBT's Perjury

During the trial, MRS. ZELL's counsel unsuccessfully moved to recall RUPERT to the witness stand. Transcript (RE 220, Page ID # 5807, line 1 to # 5810, line 4). MRS. ZELL's counsel made this motion because, as he had repeatedly told the court, the perjurious testimonies of MORRIS, BERNAY, KLINGELHAFER, and RUPERT had taken him by surprise (Transcript, RE 218, Page ID # 5436, line 20 to # 5437, line 8; RE 219, Page ID # 5526, lines 4-16; RE 220, Page ID # 5797, lines 3-13); "sandbagged" him (Transcript, RE 220, Page ID # 5806, line 9 to # 5809, line 16); and "ambushed" him (Transcript, RE 219, Page ID # 5650, line 5 to # 5651, line 3).

D. Three Questions FBT *Cannot* Answer

FBT cannot explain the numerous inconsistencies between its attorneys' testimonies and virtually every piece of documentary evidence.

For example:

1. How could the Appellees testify truthfully they didn't think they were supposed to research the SOL applicable to MRS. ZELL's Note or that MR. ZELL had not asked them to do so?

2. Why did FBT have no notes about what RUPERT testified was an agreement under which MR. ZELL — rather than FBT — was to be responsible for the legal sufficiency of MRS. ZELL's pleadings?

3. Why, in almost four years of litigation, did FBT never even once mention this supposed agreement before?

CONCLUSION AND PRAYER FOR RELIEF

For all of the forgoing reasons, MRS. ZELL respectfully requests that this Court:

1. Reverse the district court's April 21, 2017 *Judgment* (Doc. 200) in favor of FBT.

2. Remand this case back to the district court for a new trial, allowing MRS. ZELL to reassert her right to a jury.

3. Vacate the district court's grant of summary judgment to LAUB, MORRIS, BOZELL, KLINGELHAFER, and RUPERT on the issue of the

choice-of-law error.

4. Vacate the district court's denial of MRS. ZELL'S *Motion for Leave to File Second Amended Complaint* to make BERNAY a party defendant.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that Jonathan R. Zell, counsel to the Plaintiff-Appellant, is a member of the bar of this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify to that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 16,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 28A(c). The preceding statement was made in reliance on the word-count utility in the Microsoft Word 2010 software program that was used to prepare this brief, consistent with Fed. R. App. P. 32(g)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2010 in 14 point, Century Schoolbook.

This brief and its accompanying addendum are virus-free.

/s/ Jonathan R. Zell
Jonathan R. Zell
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2018, I electronically filed the foregoing *Plaintiff-Appellant's Opening Brief* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, causing notice of such filing to be served on the following registered CM/ECF participants in this case:

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ADDENDUM

RE 2	Mrs. Zell's original Complaint, Page ID # 2-48
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