IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EILEEN L. ZELL	)	
	)	
Plaintiff,	)	CASE NO: 2:13-cv-00458
	)	
v.	)	JUDGE Algenon L. Marbley
	)	
KATHERINE M. KLINGELHAFER, et al.	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR AMENDED OR ADDITIONAL FINDINGS UNDER FED. R. CIV. P. 52(a)(5), 52(a)(6), AND 52(b); FOR A NEW TRIAL OR ALTERING AND AMENDING A JUDGMENT UNDER FED. R. CIV. P. 59(a)(1)(B), 59(a)(2), AND 59(e); AND FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(3)

Plaintiff, Eileen L. Zell ("Mrs. Zell"), represented by her undersigned counsel, Jonathan R. Zell ("Mr. Zell"), hereby moves this Court -- pursuant to Fed. R. Civ. P. 52(a)(5), 52(a)(6), 52(b), 59(a)(1)(B), 59(a)(2), 59(e), and 60(b)(3) -- for a new trial, new findings, relief from the findings of fact and conclusions of law (Doc. 206) that Judge Marbley read from the bench, and relief from this Court's *Judgment in a Civil Case* dated April 21, 2017 (Doc. 200).

Leaving a discussion of the errors in Judge Marbley's conclusions of law for the Plaintiff's future appeal, this present pleading will focus on the egregious factual errors and misstatements in Judge Marbley's findings of fact. *See* Doc. 206. In a nutshell, the basis of the Plaintiff's present motions are (1) the Frost Brown Todd (FBT) witnesses' and defendants' (with the exception of Defendant Joseph Dehner) seemingly-coached, blatant, and wholesale perjury at trial; (2) the enormous contradictions and inconsistencies between the aforementioned perjured testimony on the one hand and the Defendants' prior pleadings and briefs, this Court's prior orders, and all of the voluminous evidence in the Record on the other hand; and (3) Judge Marbley's basing of a major part of the Court's ultimate judgment on three obviously-false factual allegations, some of

which seem to have come from the Defendants' trial counsel rather than from any of the witnesses at the trial and in which Mr. Zell (the Plaintiff's son and the undersigned Plaintiff's counsel) was made to be the scapegoat for the Defendants' malpractice.

A memorandum in support is attached hereto and hereby incorporated by reference.

Respectfully submitted,

/s/ Jonathan R. Zell
Jonathan R. Zell (0036831)
5953 Rock Hill Road
Columbus, Ohio 43213-2127
(614) 864-2292
jonathan_zell@yahoo.com
Counsel for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules

Other Authorities

MEMORANDUM OF LAW

INTRODUCTION

Considering Judge Marbley's various pre-trial orders and the parties' prior briefing of the pre-trial issues in the instant case, the trial held on April 10 to 14, 2017 represented an attempt to rewrite history worthy in every respect of the Soviet Union's Stalinist years. While it is tempting to blame only the Defendants for attempting to re-litigate issues previously decided by this Court, one cannot easily excuse Judge Marbley's apparent forgetfulness in overlooking what his prior orders had found. Yet, a mere one week before the trial, Judge Marbley held in his *Plenary Order* dated April 3, 2017 (Doc. 192 at 3): "Defendants may not re-raise issues that have already been decided by the Court."

In complete opposition to Judge Marbley's prior rulings and especially the parties' prior pleadings and briefs on the issues in question, former Frost Brown Todd attorney Shannah Morris and Defendant Jeffrey Rupert falsely testified at the trial that they had never advised the Plaintiff (Mrs. Zell) -- either directly or indirectly through her son, Jonathan Zell (Mr. Zell) -- that Missouri's ten-year (rather than Ohio's six-year) statute of limitations would apply to Mrs. Zell's promissory note. Yet, in his *Opinion & Order* of December 23, 2014 (Doc. 121 at 9), Judge Marbley previously found that the Frost Brown Todd attorneys had indeed erroneously advised Mrs. Zell that Missouri's statute of limitations applied to her note and that they had based their flawed statute-of-limitations analysis on the factors for determining which state's substantive law -- rather than procedural law (such as the statute of limitations) -- would apply.

However, at the trial, Ms. Morris and Defendant Rupert testified on the witness stand that they had purposefully analyzed the factors for determining which state's substantive law would apply to Mrs. Zell's note and that they had never even been asked to analyze the factors for determining which state's procedural law (or statute of limitations) would apply prior to the

appellate proceedings in *Mindlin v. Zell*. To reach this absurd conclusion, they falsely claimed that the use of the term "choice of law" in their email correspondence with Mr. Zell and billing statements to Mrs. Zell had meant substantive -- not procedural -- choice of law. Since the main issue in *Mindlin v. Zell* was which state's statute of limitations applied to Mrs. Zell's note, Ms. Morris' and Defendant Rupert's claim was pure nonsense -- and a bald-faced lie. Naturally, this ridiculous claim had never even been raised before in any of the Defendants' many pleadings or briefs during the over three-year pendency of the instant case.

Similarly, the testimony at trial of Aaron Bernay (who had been a first-year associate working under Ms. Morris) and Defendant Katherine Klingelhafer (who had been a second-year associate working under Defendant Rupert) was equally perjurious and contrary to all of the evidence in the voluminous Record. Both Mr. Bernay and Defendant Klingelhafer -- who had authored the first and second versions of the FBT attorneys' erroneous choice-of-law analyses, respectively -- incredibly claimed on the witness stand that they had no knowledge of either the purpose or the use to which their research on the choice-of-law issue was or would be put.

With regard to Mr. Bernay (who had first found and analyzed the *Standard Agencies* case), Judge Marbley previously found that the *Standard Agencies* case was the basis for the first version of the choice-of-law error regarding which state's -- Missouri's or Ohio's -- statute of limitations applied to the note. Moreover, the email correspondence between Mr. Bernay and Ms. Morris, Ms. Morris and Mr. Zell, and Mr. Zell and Defendant Rupert regarding the *Standard Agencies* case also clearly showed this.

With regard to Ms. Klingelhafer, the email correspondence between Mr. Zell and Defendant Rupert and between Defendant Rupert and Defendant Klingelhafer also clearly showed that Defendant Klingelhafer was fully aware that her Restatement-based research on the choice of law

was for the purpose of determining which state's -- Missouri's or Ohio's -- statute of limitations applied to the note.

The Frost Brown Todd attorneys' consistent -- but perjurious -- testimony was so bold that the Plaintiff's counsel took the time to have the Plaintiff's expert, James Leickly, review the FBT attorneys' email correspondence on this issue. And, as Mr. Leickly then made clear in his testimony, the FBT attorneys representing Mrs. Zell had indeed been researching procedural choice of law -- i.e., the statute of limitations applicable to Mrs. Zell's note -- rather than substantive-law issues as they had falsely claimed. Other, much more serious -- because they impacted the results of the trial -- incidents of the FBT attorneys' perjuries will be discussed in the Argument section of this pleading. However, perjury is still perjury. Therefore, below is a short sampling of Mr. Leickly's testimony on the question of whether former FBT attorney Shannah Morris, Defendant Rupert, and Defendant Klingelhafer were testifying truthfully when they all denied having researched the applicable statute of limitations on Mrs. Zell's note during the trial-court proceedings in *Mindlin v. Zell*:

(COUNSEL) Q: What was the issue before the courts [in *Mindlin v. Zell*] and how did that -- what was the issue before the courts?

* * *

(LEICKLY) A: The issue before the Court -- the issue before the Court was the statute of limitation. There was some other issues, but the major issue was whether or not this note was enforceable under the statute of limitations.

* * *

(LEICKLY) A: **** I saw a ton of time [in the FBT attorneys' billing statements to Mrs. Zell] that's called, quote, conflict of laws, choice of laws, and that's -- when we get to that *Standard Agencies* case and other things, but -- but that's what they are doing. They are not looking at the enforceability of the note.

They are looking at the statute of limitations. They are looking at what -- whose state's laws will apply, and that's why as to the first malpractice section of my brief, the -- we called it choice of law malpractice because that's what the Frost Brown attorneys called it.

* * *

(LEICKLY) A: 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.

* * *

The research *** [on the] statute of limitation was going to determine whether Mrs. Zell was going to get her money back that she lent to her nephew or not.

(COUNSEL) Q: **** This is my question: Was Frost talking about statute of limitations or substantive choice of law in their bills?

* * *

(LEICKLY) A: I -- I was -- actually, what I was referring to was a little more expansive than their bills. It shows up in their invoices, but it also shows up in emails as well. When you read those, it's clear what is meant by it.

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, and all we're arguing about is the amount.

* * *

(COUNSEL) Q: What did you mean when you used those terms "choice of law, conflict of law" in the Frost bills?

(LEICKLY) A: Well, what I mean, what I interpret from the entire context of seeing all of them and what has happened in this case, that that was research that they were doing on that central issue.

**** They were talking about the key question, procedural, which is statute of limitations.

* * *

(COUNSEL) Q: **** Have you seen Shannah Morris' legal research and writing on the issue of statute of limitations in the emails that she sent to me?

(LEICKLY) A: I saw some of that in late 2010 from Shannah Morris.

* * *

(COUNSEL) Q: This is another email from Mr. Rupert to me. This is dated July 14th, 2011. Are you familiar with this email?

* * *

(COUNSEL) Q: And in just as fewest words as possible, can you look at -- in this email chain, which now we're looking at my questions to Mr. Rupert that's attached, and then we'll look at his answer. So if you look at question number one, can you -- don't read it. Just tell me in a few words what is the issue that I'm asking about.

(LEICKLY) A: Statute of limitations.

(COUNSEL) Q: Thank you. If you look at my third -- will you read number three out loud, third question.

(LEICKLY) A: Third question. “How sure are you that Missouri law applies to the note?”

COUNSEL) Q: And if you have an opinion, what is the subject of that question also?

(LEICKLY) A: Well, the only thing relevant about Missouri law applying to this note being litigated in Ohio would be statute of limitations.

* * *

COUNSEL) Q: -- the same exhibit, and thank you for the short answer.

Now, let's look at Mr. Rupert's answers to, I believe it was, questions one and questions three. What is the subject of -- I tell you what, can you read those out loud?

* * *

COUNSEL) Q: What is the subject of question one?

(LEICKLY) A: Statute of limitations.

COUNSEL) Q: What is the subject of *** three?

(LEICKLY) A: Statute of limitations. It couldn't be anything else.

COUNSEL) Q: And what are these -- do you recognize the legal authority for these factual patterns he's talking about?

* * *

(LEICKLY) A: Well, I'm assuming -- those, Your Honor, are just kind of *** from the Restatement on Conflicts of Law.

* * *

COUNSEL) Q: Are you familiar with these emails? It's -- first, it's an email from Mr. Rupert to his associate, Katherine Klingelhafer, and underneath, it's an email from me to Mr. Rupert.

* * *

COUNSEL) Q: If -- if I read the second sentence, "Recent cases apply the *Restatement's* factor-driven test elements listed below," is that the *Restatement* that you were talking about before?

(LEICKLY) A: Yes.

COUNSEL) Q: And what -- what is the issue on that?

(LEICKLY) A: Statute of limitations. I'm unaware of anything else it could be, and it's clearly statute of limitations.

COUNSEL) Q: Okay. And if we go below that, here is the research memo from Katherine Klingelhafer to Mr. Rupert that he's referring to. ***

* * *

(LEICKLY) A: **** So what it tells me is that they are looking to those factors to help them in their conflict of laws quest, which is really a statute of limitations quest, and the Tenth District ultimately blew that out of the water by saying it isn't conflicts of law. It's statute of limitations. It's lex loci. It's the law of the forum.

COUNSEL) Q: So what does -- what -- to what legal issue do these *Restatement* factors apply?

(LEICKLY) A: They are looking -- they are looking at statute of limitations.

* * *

COUNSEL) Q: Okay. The statute of limitations. Thank you.

And why doesn't that -- does that apply in this case, that -- those *Restatement* factors?

* * *

(LEICKLY) A: They argued standard conflicts of law. ***

* * *

COUNSEL) Q: **** Is there -- was there anything in the record that would tell you whether they [the FBT attorneys representing Mrs. Zell] knew what lex loci was or not? ***

THE COURT: You may answer.

(LEICKLY) A: **** So my overall answer would be no. My belief is they didn't get it; that the epiphany doesn't occur, from the record, in my opinion, until *** a couple of months after the Judge Sheward decision.

* * *

But, no, I don't see any evidence that they understood that there's procedural law, there's substantive law, you know****

Doc. 204 at p. 11, line 17 to p. 36, line 19.

APPLICABLE LAW

I. Perjured Testimony

In *Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 455-456, 71 Fed.R.Serv.3d 477, 87 U.S.P.Q.2d 1923 (6th Cir. August 18, 2008), the Sixth Circuit held that:

> Rule 60(b)(3) …. allows a district court to grant relief in cases of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed.R.Civ.P. 60(b)(3)…. Rule 60(b)(3) clearly requires the moving party to "show that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding [in] question," *Jordan* [*v. Paccar, Inc.*, No. 95–3478], 1996 WL 528950, at *6 [(6th Cir. Sept.17, 1996) (unpublished).]
>
> * * *
>
> [W]e will, for the purpose of evaluating Rule 60(b)(3) motions, employ the following general definition of fraud: Fraud is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment. See … 12 MOORE'S FEDERAL PRACTICE § 60.43[1][b] (3d ed. 1999) ("Pursuant to [Rule 60 (b)(3)], judgments have been set aside on a wide variety of alleged frauds, such as … claims that evidence presented at trial itself consisted of perjured testimony or false documents.")…. Accordingly, to establish grounds for relief under Rule 60(b)(3), the moving party need not demonstrate that the adverse party has committed all the elements of fraud specified in the law of the state where the federal court is sitting, but rather must simply show that the adverse party's conduct was fraudulent under this general common law understanding.

See also Miller v. Wilkinson, No. 2:10-cv-917 (S.D. Ohio, E.D., July 23, 2015).

As the Sixth Circuit explained in *Gordon v. U.S.*, 178 F.2d 896 (6th Cir. 1949), *cert. denied*, 339 U.S. 935, the four-part test for allegations of perjury is:

> [1] the testimony given by a material witness is false, [2] that, without it, the jury might have reached a different conclusion, [3] that the party seeking the new trial was taken by surprise when the false testimony was given, and [4] was unable to meet it or did not know of its falsity until after the trial.

II. Right to a New Trial Free of Perjury

In *Traylor v. Pickering*, 324 F.2d 655 (5th Cir.1963), the Fifth Circuit held:

> New trial may be granted on ground that witness willfully testified falsely to material fact, especially where perjured testimony was induced by opposite party or false testimony was that of opposite party.

See also Hunter v. Thomas, 173 F.2d 810 (10th Cir.1949).

In *Gordon v. U.S.*, 178 F.2d 896 (6th Cir. 1949), *certiorari denied*, 339 U.S. 935, the Sixth Circuit held:

> A new trial should be granted where the court is reasonably well satisfied that the testimony given by a material witness is false, that, without it, the jury might have reached a different conclusion, ***that the party seeking the new trial was taken by surprise when the false testimony was given, and was unable to meet it*** or did not know of its falsity until after the trial. [Emphasis added.]

In *Phillips v. Crown Central Petroleum Corp*., 556 F.2d 702 (4th Cir. 1977), on remand, the Fourth Circuit held:

> Where it was shown for the first time, after the district court had made its findings, reached its conclusions, and entered a permanent injunction, that, according to his own admission, one of the plaintiffs had committed perjury both in pretrial depositions and at trial with respect to issues central to the litigation, and where defendant then moved for dismissal of all claims or, in the alternative, for a new trial or other relief, the district court committed reversible error when, without inquiring into the extent of the perjury, it held that it would continue to credit the witness' testimony, and, therefore, denied defendant's motion in all respects except to strike one finding.

In *Peacock Records, Inc. v. Checker Records, Inc.,* 365 F.2d 145, 147-148 (7th Cir. 1966), the Seventh Circuit held:

> The factual question which the district court failed to answer is, 'Was the judgment obtained in part by the use of perjury?' *Atchison T. & S.F. Ry. Co. v. Barrett*, 9 Cir., 246 F.2d 846, 849 (1957). If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice. Thus, in that event, this taint had affected the entire proceeding in the court below, although we find no indication that any counsel herein was a party to any wrongdoing.

* * *

> [I]n the case at bar the record affirmatively shows that the district court did have before it, in addition to the verified motion under 60(b), sworn testimony in open court, which was unimpeached and which so clearly supported the motion that it becomes incumbent upon us to hold that, in denying the motion, the court failed to exercise a sound legal discretion. This action requires that the order from which this appeal (No. 15382) was taken be reversed and that an order be entered by that court granting said motion, and, in No. 14944, vacating the judgment theretofore entered in favor of plaintiffs and against defendants and remanding said cause for a new trial.

III. Reviewing a District Court's Factual Findings for Support in the Record

The U.S. Supreme Court typically does not "grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *See Salazar-Limon v. City of Houston*, 581 U.S. ____ (2017) (Alito, J., concurring). However, on various occasions the Supreme Court has broken with this practice. *See id.* (Sotomayor, J., dissenting) (citing five cases where the Supreme Court had corrected a lower court's factual errors).

A prominent example where the Supreme Court "implicitly acknowledged the lower appellate court's factual misstatement," *see* Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 MICH. L. REV. 609-623, 1990 at 621 n.45, is *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 (1985), *revg. Burger King Corp. v. MacShara*, 724 F.2d 1505, 1512-13 (11th Cir. 1984). There, the Supreme Court held:

> [T]he Court of Appeals' assertion that the Florida litigation 'severely impaired [Rudzewicz'] ability to call Michigan witnesses who might be essential to his defense and counterclaim,' 724 F.2d at 1512-1513, ***is wholly without support in the record***. [Emphasis added.]

Since an appellate court will only review a lower court's findings of fact in the most extreme situations or where there are credible allegations of judicial bias, it is paramount that a lower court ensures that it does not ignore or misstate the critical facts or critical legal issues in a case.

ARGUMENT

I. This Court's Judgment Was Based on False and Unsupported Factual Allegations

The flaws in the seeming attempt to frame Mr. Zell for the Defendants' malpractice will be presented in three parts: (1) the malpractice identified by the Tenth District Court of Appeals as having been committed by Mrs. Zell's attorneys in *Mindlin v. Zell*; (2) Judge Marbley's previous ruling that Mr. Zell was not liable for any of this malpractice; and (3) the false and ***illogical*** finding by Judge Marbley that -- despite the absence of notes, other writings, or any documentation by Frost Brown Todd -- Mrs. Zell had supposedly agreed with FBT that her son (Mr. Zell, a non-practicing attorney with zero trial experience) would be liable for all malpractice in *Mindlin v. Zell* rather than the FBT attorneys who billed Mrs. Zell $73,857 (on a $82,075 claim) to represent her.

A. The Ohio Tenth District Court of Appeals Identified Legal Malpractice Committed by Mrs. Zell's Attorneys in *Mindlin v. Zell*

In late 2008, Plaintiff Eileen Zell ("Mrs. Zell") retained the law firm of Frost Brown Todd LLC (FBT) to represent her in connection with the collection of a bad loan, which in October 2010 became the subject of the underlying case of *Mindlin v. Zell* before the Franklin County Court of Common Pleas ("the Ohio action"). After the trial court in *Mindlin v. Zell* ruled that Ohio's six-year statute of limitations had expired on the collection of the promissory note that Mrs. Zell had received from the debtors in connection with this loan, Frost Brown Todd filed an appeal on behalf of Mrs. Zell with the Tenth District Court of Appeals of Ohio.

In its initial decision affirming the trial court, the Tenth District noted that -- unlike the ***appellate briefs*** (*see* Plaintiff's Trial Exhibit P-280) that the Frost Brown Todd attorneys had filed in *Mindlin v. Zell* -- the briefs that they had filed ***in the trial court*** (*see* Plaintiff's Trial Exhibits P-278 and 279) failed to raise the argument that Ohio's statute of limitations on the promissory note should be tolled, re-set, or did not even apply; therefore, those issues were waived on appeal. *See*

Mindlin v. Zell 10th Dist. No. 11AP-983, 2012 Ohio 3543, 2012 WL 3200718, ¶¶ 17-18 (Plaintiff's Trial Exhibit P-283). Moreover, in its second reconsideration decision, the Tenth District Court of Appeals focused in on the equitable-tolling argument that had been raised in both Mrs. Zell's trial and appellate briefs. Finding this argument to be defective in that it referred to "promissory" estoppel rather than "equitable" estoppel, the appellate court refused to consider the use of equitable estoppel to toll the limitations period on the note. *See Mem.Decision, Mindlin v. Zell*, No. 11AP-983, ¶9 (Ohio App. Dec. 31, 2012) (Plaintiff's Trial Exhibit P-284).

Accordingly, in her *Complaint* in the instant case, Mrs. Zell alleged two main acts of malpractice against the Frost Brown Todd attorneys. The first -- the choice-of-law error regarding the applicable statute-of-limitations -- was based on the Frost Brown Todd attorneys' ignorance of the doctrine of *lex fori* (the law of the forum), which then led the FBT attorneys to erroneously advise Mrs. Zell that the Ohio court in *Mindlin v. Zell* would and should apply Missouri's ten-year -- rather than its own state's (Ohio's) six-year -- statute of limitations to Mrs. Zell's promissory note. *See* ¶¶ 71 and 73-77 of *Amended Complaint* (Doc. 117 at 20 and 26-27).

The second act of malpractice was the Frost Brown Todd attorneys' failure to have properly argued in the ***trial briefs*** (*see* Plaintiff's Trial Exhibits P-278 and 279) that they filed in *Mindlin v. Zell* that Ohio's statute of limitations had been tolled, re-set, or did not apply due to equitable estoppel or to one of the numerous so-called "alternative arguments" contained in the ***appellate briefs*** (*see* Plaintiff's Trial Exhibit P-280) that the Frost Brown Todd attorneys later filed, but the Tenth District found to have been waived. *See* ¶¶ 72 and 78 of *Amended Complaint* (Doc. 117 at 20-25 and 28).

This Court -- in its *Opinion & Order* of Sept. 12, 2014 (Doc. 89 at 10) and further explained in its *Opinion & Order* of April 18, 206 (Doc. 147) -- ruled that the six-member group of Frost Brown Todd attorneys who had erroneously advised Mrs. Zell on the choice-of-law issue regard-

ing the statute-of-limitations on Mrs. Zell's loan or note (Douglas Bozell, Patricia Laub, Shannah Morris, Aaron Bernay, Jeffrey Rupert, and Katherine Klingelhafer) could not be held liable for this first act of malpractice since they had all allegedly "stopped working" (*see* Doc. 147 at 3 and 8) on Mrs. Zell's legal matter more than one year before Mrs. Zell commenced the instant malpractice suit.[1] Instead, the only one whom this Court would allow to be held liable for the statute-of-limitations error was the six-member group's alleged supervisor or team leader at Frost Brown Todd -- Defendant Joseph Dehner. *See* Doc. 89 at 12.

However, with regard to the second act of malpractice (the ***sole focus*** of this present pleading), this Court ruled that Defendants Rupert and Klingelhafer -- who had worked on and filed Mrs. Zell's briefs on the statute-of-limitations issue before both the trial and appellate courts -- as well as their alleged supervisor (Defendant Dehner) were potentially liable for the alleged malpractice "related to the [tolling-type] 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[.]" *See* Doc. 89 at 10.

B. In the Instant Case, Judge Marbley Ruled that Mrs. Zell's Son (Jonathan Zell) Was Not Liable for Any Malpractice that Might Have Occurred During Mrs. Zell's Representation by Frost Brown Todd

1. Mr. Zell's *Motion for Summary Judgment on the Third-Party Complaint*

After the Plaintiff sued the Defendants for malpractice, the Defendants then filed a *Third-Party Complaint* (Doc. 7) against the Plaintiff's son, Jonathan Zell ("Mr. Zell"). Since Mr. Zell (a

[1] Of course, as was explained in the petition for a writ of mandamus that the Plaintiff previously -- but prematurely -- filed before the Sixth Circuit Court of Appeals (in the case of *In re: Eileen Zell*, Case No. 16-3412), this Court's ruling was contrary to Ohio law, including this Court's own recent decision in *Scherer v. Wiles*, No. 2:12-cv-1101, 2014 U.S. Dist. LEXIS 121970, *5-7 (S.D. Ohio, E.D. Sept. 2, 2014). For, under Ohio law, the statute of limitations on legal malpractice begins to run not once an attorney does no further work on a client's matter, but only after the demonstration of an "unequivocal intent to terminate the attorney-client relationship." *See 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). *See also Brautigam v. Damon*, No. 1:11-CV-551 (S.D. Ohio, W.D. Feb. 14, 2014).

non-practicing attorney) had been voluntarily assisting the Frost Brown Todd attorneys in the latter's representation of Mrs. Zell, the Defendants sued Mr. Zell for contributory negligence and indemnification, arguing that if the Defendants were guilty of malpractice, then so was Mr. Zell.

Accordingly, Mr. Zell then filed a *Motion for Summary Judgment* (Doc. 50) on the Defendants' *Third-Party Complaint*. In his summary-judgment motion, Mr. Zell provided three different sets of documents to establish the limited nature of his role in Frost Brown Todd's representation of Mrs. Zell as well as the FBT attorneys' continuing -- and, indeed, ultimate -- responsibility for ensuring the legal sufficiency of all of the pleadings and briefs that they filed on behalf of Mrs. Zell in *Mindlin v. Zell*. These were:

1. An *Affidavit of Eileen Zell* dated May 17, 2011 (Doc. 50-1 at 5-7) and an *Affidavit of Jonathan Zell* dated May 20, 2011 (Doc. 50-2 at 30-34), both of which Defendant Jeffrey Rupert had attached to the brief titled *Defendant's Memorandum in Opposition to Plaintiff's Motion for "Attorney's Eyes Only" Protective Order* ***that Defendant Rupert had himself written, signed, and filed*** in *Mindlin v. Zell*;
2. Emails and other written correspondence that Mr. Zell had exchanged with the Frost Brown Todd attorneys concerning *Mindlin v. Zell* (*see* Doc. 50-2 at 7-29 and 35-55); and
3. An *Affidavit of Eileen Zell* dated March 17, 2014 (Doc. 50-1 at 1-4) and an *Affidavit of Jonathan Zell* dated March 17, 2014 (Doc. 50-2 at 1-6).

a. Affidavits of Eileen and Jonathan Zell that Were Submitted in a Brief Written Exclusively by Defendant Jeffrey Rupert

In ¶ 5 of *Jonathan Zell's Affidavit* of May 20, 2011 (Doc. 50-2 at 31) -- which, as previously stated, Defendant Rupert had attached to a brief that Mr. Rupert had himself exclusively written, signed, and filed in *Mindlin v. Zell* -- Mr. Zell described his relationship with the Frost Brown Todd attorneys with respect to their joint work on *Mindlin v. Zell* as that between "an

in-house counsel for a corporation" (Mr. Zell's role) and "outside counsel to handle specialized matters outside my area of expertise" (the Frost Brown Todd attorneys' role):

> As my mother's personal attorney, my role is analogous to that of an in-house counsel for a corporation. When, from time to time, my mother needs to hire outside counsel to handle specialized matters outside my area of expertise, I serve as a conduit between that outside counsel and my mother, supervise the work of outside counsel, and advise my mother about the matter as necessary. For example, I assisted my mother in retaining the law firm of Frost Brown Todd LLC as outside counsel to prepare a refinancing agreement for the [Mindlin] loan and later to represent my mother in the instant litigation [i.e., *Mindlin v. Zell*].

Similarly, in ¶¶ 4 and 7 of *Eileen Zell's Affidavit* of May 17, 2011 -- which, as previously stated, Defendant Rupert had attached to a brief that Mr. Rupert had himself written, signed, and filed in *Mindlin v. Zell* -- the Plaintiff averred that she had asked Mr. Zell "to find outside trial counsel" to represent her in *Mindlin v. Zell*; that representing the Plaintiff in *Mindlin v. Zell* was "outside Jonathan [Zell]'s area of expertise"; that Mr. Zell had "chose[n] Frost Brown Todd" to represent the Plaintiff in *Mindlin v. Zell*; and that the relationship between Mr. Zell and the Frost Brown Todd attorneys was the same as that between "in-house counsel" and "outside trial counsel." *See* Doc. 50-1 at 6-7.

That Defendant Rupert attached both the Plaintiff's and Mr. Zell's *Affidavits* to the brief that Defendant Rupert himself wrote, signed, and filed in *Mindlin v. Zell* demonstrates that Defendant Rupert agreed with all of the statements made in these *Affidavits*.

b. Email Correspondence Between Jonathan Zell and the Frost Brown Todd Attorneys

Mr. Zell also attached to his *Motion for Summary Judgment* on the Defendants' *Third-Party Complaint* a number of emails between himself and former Frost Brown Todd attorney Shannah Morris (who was the first lead trial counsel on *Mindlin v. Zell*) and Defendant Jeffrey Rupert (who was the second lead trial counsel on *Mindlin v. Zell*). As can be seen from all of

these emails, the Frost Brown Todd attorneys and Mr. Zell had agreed that Mr. Zell would focus on the factual issues of *Mindlin v. Zell*, leaving the legal research to the Frost Brown Todd attorneys. Moreover, under their arrangement, the Frost Brown Todd attorneys were responsible for reviewing all of Mr. Zell's work.

For example, in his email of November 5, 2010 to Frost Brown Todd attorney Shannah Morris, Mr. Zell wrote:

> To the extent that I may have superior knowledge of the facts of the case, I will take the liberty of sending to you this weekend sample motions for your consideration…. However, since your firm's legal skills and research capabilities both far exceed my own, my motions will focus more on the facts of the case than the applicable law.

Doc. 50-2 at 9.

Then, in an e-mail of April 12, 2011 to Ms. Morris, Mr. Zell wrote:

> [A]s has been our custom in the past, of course, I would be happy to draft for your review and approval the "facts" section of the MSJ [i.e., motion for summary judgment] as well as my mother's Affidavit. Also, I would expect your law firm to draft what is typically the boilerplate law section that is cited in an MSJ inasmuch as your firm has sample MSJs from which to obtain this and, since we will probably need to cite Missouri rather than Ohio law, your firm is well-equipped to do this legal research as well.

Doc. 50-2 at 36.

Mr. Zell exchanged similar emails with Defendant Jeffrey Rupert. Take, for example, the five emails dated June 29, 2011 (Doc. 50-2 at 37), June 29, 2011 (Doc. 50-2 at 38), June 30, 2011 (Doc. 50-2 at 39), June 30, 2011 (Doc. 50-2 at 40), and July 1, 2011 (Doc. 50-2 at 41). In these emails, Defendant Rupert and Mr. Zell discussed not only an upcoming meeting among themselves and Mrs. Zell -- scheduled for and ultimately held at 1:00 p.m. on July 1, 2011 -- but also their drafting of Mrs. Zell's upcoming *Motion for Summary Judgment* and Mrs. Zell's *Memorandum in Opposition to David Suttle's Motion for Relief from Judgment*.

As noted in Mr. Zell's summary-judgment motion on the *Third-Party Complaint*, the above emails set forth the agreed-upon division of labor between Mr. Zell and Defendant Rupert:

> **RUPERT**: As to the response to the Motion for Relief from Judgment, I really think that you need some case law in this and to address the legal standard that the Judge will be using in reviewing this. How about I have someone do some minimal legal research and I will then send you copies of the cases? (6/29/2011)
>
> **ZELL**: I do not have access to legal research on the Internet (unless, of course, I go to the library), 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. (6/29/2011)
>
> **RUPERT**: I will send you a few cases and some of the basic legal standard. We can discuss this on Friday. (6/30/2011)
>
> **ZELL**: Section "II. A." of Memorandum in Support of our MSJ [Motion for Summary Judgment] (pertaining to the statute of limitations issue) contains legal research performed by Shannah Morris. The rest of Section "II" is very short on legal research and needs you or someone else at FBT to write some for it. (6/30/2011)
>
> **ZELL**: I realize that my draft MSJ will have to undergo substantial revisions by one or probably both of us -- especially the addition of case law for two out of the three legal sections (which you are going to help me with). However, with regard to the factual part of the MSJ (which is my forte), I have made two new revisions. (7/1/2011)
>
> * * *

From the above, two things are clear. First, the FBT Defendants were responsible for doing all of the legal research necessary for the Plaintiff's pleadings and briefs. Therefore, how can the FBT Defendants now claim that Mr. Zell committed any legal malpractice? They can't.

Second, the FBT Defendants were responsible for reviewing all of Mr. Zell's work, correcting any errors that existed in his work, and then using only that part of his work that the FBT Defendants thought would help the Plaintiff's case. So, once again, how can the FBT Defendants claim that Mr. Zell committed any legal malpractice?

Doc. 50 at 13-15.

c. Affidavits Submitted in Support of the Motion for Summary Judgment Against the *Third-Party Complaint*

Thus, as explained in ¶¶ 4-11 of *Jonathan Zell's Affidavit* dated March 17, 2014 (Doc. 50-2 at 2) in support of Mr. Zell's summary-judgment motion on the *Third-Party Complaint*:

> 4. I told the Plaintiff [i.e., Eileen Zell] that, although I am a licensed Ohio attorney, I did not have the necessary trial knowledge or experience to represent her in the Ohio action [i.e., *Mindlin v. Zell*]. Therefore, I recommended that she retain the law firm of Frost Brown Todd ("FBT"), which she then did.
>
> 5. The Plaintiff authorized me, as her agent and/or personal attorney, to assist the Plaintiff in providing the facts concerning the loan to FBT….
>
> 6. I realized that it would be prohibitively expensive for the Plaintiff to have to pay FBT to go through the approximately ten years' worth of correspondence between the Plaintiff and the debtors concerning the loan.
>
> 7. Therefore, I proposed to the FBT Defendants, and they agreed, that I would draft the "fact" sections of the Plaintiff's pleadings and briefs for the FBT Defendants' review and consideration.
>
> 8. Since I would not be charging either the Plaintiff or the FBT Defendants for my work, my sole purpose was to reduce the fees that the FBT Defendants would charge to the Plaintiff.
>
> 9. Under our agreement, the FBT Defendants were supposed to review all of my work, correct any errors that existed in my work, and then use only that part of my work that the FBT Defendants thought would help the Plaintiff's case.
>
> 10. Under our agreement, the FBT Defendants would be responsible for doing all of the legal research necessary for the Plaintiff's pleadings and briefs.
>
> 11. I could contribute suggestions to the FBT Defendants regarding any aspect of the case.

Finally, quoting *Eileen Zell's Affidavit* dated March 17, 2014 (Doc. 50-1 at 2-4), Mr. Zell also explained in his summary-judgment motion on the *Third-Party Complaint* how illogical it would be, on the one hand, for Mrs. Zell to be paying the Frost Brown Todd attorneys to represent

her in *Mindlin v. Zell* but then, on the other hand, agree to an arrangement that would allow the FBT attorneys to shift the liability for their malpractice onto Mrs. Zell's son (and thus, in essence, onto Mrs. Zell herself):

> In her recent Affidavit of March 17, 2014 … the Plaintiff expounded on this subject, stating that she had believed that Mr. Zell would use his factual knowledge of the case to assist the FBT Defendants without altering their respective roles as the Plaintiff's "personal attorney" and the Plaintiff's "outside trial counsel," respectively:
>
> 8. My son Jonathan, although a licensed Ohio attorney, told me that he did not have the necessary trial knowledge or experience to represent me in the Ohio action. Therefore, Jonathan recommended that I have FBT represent me, which I then did.
>
> 9. However, I authorized Jonathan, as my agent and/or personal attorney, to serve as a conduit between FBT and myself, to oversee the work of FBT, and to advise me about this case as necessary.
>
> 10. This was because Jonathan was much more familiar than I was with the approximately ten-year history of the loan, having ghostwritten (for my approval) the vast majority of my correspondence with the debtors. Also, since I was 81 years old at the time, I needed Jonathan's assistance in providing the facts concerning the loan to FBT.
>
> 11. I understand that, after I filed the present malpractice action against FBT, FBT then turned around and sued Jonathan, claiming that Jonathan had represented me as co-counsel with FBT in the Ohio action and, thus, that Jonathan was partly responsible for the negligent way in which my representation was handled.
>
> 12. FBT's third-party suit against my son disturbs me greatly on a number of levels.
>
> 13. First, I specifically hired FBT -- rather than my son Jonathan -- to represent me in the Ohio action because FBT had the necessary trial knowledge and experience, which Jonathan lacked.
>
> 14. Second, since I was paying FBT for its skills and expertise, I expected FBT to use its skills and expertise -- not anyone else's -- in representing me.
>
> 15. Third, since I hired FBT to represent me in the Ohio action, I expected FBT to be liable for any legal malpractice that occurred during that representation.

16. Fourth, no one -- neither Jonathan nor any FBT attorney -- ever asked me to consent to having Jonathan represent me as co-counsel with FBT in the Ohio action.

17. As a layperson, I do not understand the full meaning or legal ramifications of the term "co-counsel." However, if the result of having Jonathan serve as co-counsel with FBT is that FBT would somehow be relieved of 100% liability for any errors that occurred during my representation or that FBT could shift any of its liability onto my son Jonathan, then I would certainly ***not*** have consented to Jonathan serving as co-counsel with FBT.

18. I asked Jonathan to use his extensive knowledge of the facts of my loan to assist the FBT attorneys in their representation of me. But it was my understanding that Jonathan would do this as my agent, and that FBT alone was representing me as my lawyer in the Ohio action.

19. Since Jonathan was acting as my agent I feel that, by suing Jonathan for legal malpractice, FBT is actually suing me, its own client.

From the above, it is clear that the Plaintiff authorized Mr. Zell to act as her agent vis-à-vis the FBT Defendants, but did not authorize Mr. Zell to represent her as co-counsel with the FBT Defendants in the Ohio action. Indeed, ***no one*** ever asked the Plaintiff to consent to having Mr. Zell represent the Plaintiff as co-counsel with the FBT Defendants in the Ohio action. But, had the Plaintiff been asked, the Plaintiff would have refused. This makes perfectly good sense because it would not have been in the Plaintiff's interests to allow the FBT Defendants to shift some of their liability for malpractice onto the Plaintiff's son. Since the Plaintiff was paying the FBT Defendants to represent her, the Plaintiff naturally wanted the FBT Defendants to be liable for any legal malpractice that occurred during that representation.

2. The Defendants' Response to Jonathan Zell's *Motion for Summary Judgment*

The Defendants had every opportunity in the World to challenge the factual allegations made in Mr. Zell's summary-judgment motion on the *Third-Party Complaint* regarding (1) Mr. Zell's statements on the agreed-upon division of labor whereby the Frost Brown Todd attorneys would be responsible for doing all of the legal research necessary for Mrs. Zell's pleadings and briefs and Mr. Zell would assist the FBT attorneys by writing the first drafts of those pleadings and briefs for the FBT attorneys' review and consideration; and (2) Mrs. Zell's statements that she never consented to having her son (Mr. Zell) serve as a "co-counsel" with the Frost Brown Todd

attorneys, that she had retained Frost Brown Todd to represent her in *Mindlin v. Zell* because that firm had the legal expertise that her son lacked, and that she would have never consented to anything that transferred any malpractice liability from Frost Brown Todd to her son.

However, in neither the Defendants' *Third-Party Complaint* (Doc. 7) nor their *Memorandum in Opposition to the Motion for Summary Judgment of the Third-Party Defendant* (Doc. 60), did the Defendants ever challenge either of the above two sets of factual allegations. For example, the only relevant allegations that the Defendants made in their *Memorandum in Opposition* were as follows:

Doc. 60 at 1-2:

> [T]he only attorney who was involved before the underlying litigation commenced, throughout the entire underlying litigation, and subsequent to the underlying litigation …. is Jonathan Zell ("Zell"), Plaintiff's son.

Doc. 60 at 3-4:

> From the initial contact in October, Zell made it clear that he was to be actively involved. Zell insisted on being listed as co-counsel, being allowed to communicate with opposing counsel, handle any and all settlement negotiations, and advise as to defense strategy. At all times, Zell gave the distinct impression that he was acting as counsel. His role as counsel was confirmed in a call with Eileen Zell. Mrs. Zell made it clear that Zell was to act on her behalf with respect to the underlying litigation.[2]

Doc. 60 at 5:

> The record is replete with support for the proposition that Jonathan Zell acted as counsel on behalf of his mother, Eileen Zell. For example,
>
> 1. Zell held himself out as counsel on behalf of Eileen Zell to FBT:

[2] Although the Defendants' *Memorandum in Opposition* cited here the "Declaration of Shannah Morris" (*see* Doc. 60-2), Ms. Morris' *Declaration* did not allege that Mrs. Zell had consented to having Mr. Zell serve as co-counsel with the Frost Brown Todd attorneys. Instead, in ¶ 3 -- which was the only paragraph in Ms. Morris' *Declaration* even referring to Ms. Morris' communications with Mrs. Zell -- Ms. Morris stated only that Mrs. Zell had advised her that "Jonathan Zell was acting on her behalf with respect to the litigation." *See* Doc. 60-2 at 1. Obviously, acting on someone else's behalf as an agent is much different from representing them as a co-counsel.

2. Zell held himself out as counsel to opposing counsel and Plaintiffs [i.e., the Mindlins] in the underlying litigation; and

3. Zell held himself out as counsel to the court.

Doc. 60 at 7:

[I]n Plaintiff's discovery responses in this case, she identifies Jonathan Zell as her personal attorney in the underlying litigation.

Doc. 60 at 7-9:

Zell cites to various "snippets" of email exchanges which he had with the FBT attorneys to suggest a very limited role in representing his mother in the underlying action. A review of these emails in their entirety, however, demonstrates a different picture of the subservient, uninvolved, outsider attorney role that Zell has attempted to create. In fact, these emails reveal that Zell insisted on appearing as co-counsel to the Ohio court and to opposing counsel in the underlying action, and that he further attempted to exert control over the litigation. By way of example,

- Zell insisted on being identified as co-counsel in the underlying litigation[.]

* * *

- Zell wanted opposing counsel to believe that he was co-counsel and would take an active role at trial [.]

* * *

- Zell recognized that FBT would view him as co-counsel[.]

* * *

- The [Mindlin] plaintiffs in the underlying case attempted to have him disqualified as counsel, viewing him as a necessary fact witness[.]

* * *

- Zell instructed FBT when to file substantive motions and assisted in the drafting of these pleadings[.]

* * *

- Zell wanted to retain control over initial drafts and discovery documents[.]

Doc. 60 at 10:

> In her Affidavit, Mrs. Zell claims that no one ever asked her consent to having Jonathan act as co-counsel; yet Jonathan, acting as his mother's "agent," instructed FBT to list him as co-counsel. Further, Jonathan Zell insisted that, as his mother's "agent," he was to handle the initial drafting of all pleadings, prepare the defense strategy, conduct all settlement negotiations, and determined not to preemptively file suit in Missouri (or anywhere). FBT was following the instructions of what were believed to be the wishes of Mrs. Zell, expressed through Jonathan Zell.

Doc. 60 at 12:

> Zell was dictating the course of the underlying litigation. He drafted all pleadings, reviewed all documents, communicated with opposing counsel, and was the only attorney who was allowed to conduct settlement negotiations.

Thus, from the Defendants' *Memorandum in Opposition to the Motion for Summary Judgment of the Third-Party Defendant*, we see that the Defendants never specifically challenged either (1) Mr. Zell's description of the agreed-upon division of labor whereby the Frost Brown Todd attorneys would be responsible for doing all of the legal research necessary for Mrs. Zell's pleadings and briefs and Mr. Zell would assist the FBT attorneys by writing the first drafts of those pleadings and briefs for the FBT attorneys' review and consideration; or (2) Mrs. Zell's statements that she never consented to having her son (Mr. Zell) serve as a "co-counsel" with the Frost Brown Todd attorneys, that she had retained Frost Brown Todd to represent her in *Mindlin v. Zell* because that firm had the legal expertise that her son lacked, and that she would never have consented to anything that transferred any malpractice liability from Frost Brown Todd to her son.

3. Judge Marbley's *Opinion & Order* Dismissing the *Third-Party Complaint*

After the parties had briefed the issue of Jonathan Zell's alleged liability for any malpractice that might have occurred in the representation of Mrs. Zell, Judge Marbley granted summary judgment to Mr. Zell and dismissed the Defendants' *Third-Party Complaint* with prejudice. *See* this Court's *Opinion and Order* dated December 23, 2014 (Doc. 121). Later, in ¶ 8

of his *Plenary Order* dated April 3, 2017 (Doc. 192 at 3), Judge Marbley reaffirmed his earlier ruling that Jonathan Zell was not liable for any malpractice that might have occurred:

> 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.

Since Judge Marbley's decision dismissing the *Third-Party Complaint* was based on the Defendants' failure even to allege any malpractice by Mr. Zell, *see* Doc. 121 at 11-12, Judge Marbley did not need to make any rulings regarding the nature of Mr. Zell's role in Frost Brown Todd's representation of Mrs. Zell or the extent of Mrs. Zell's knowledge of and consent to the role played by Mr. Zell. Another reason (as previously demonstrated) was that both of these issues were uncontested. Nevertheless, in his *Opinion and Order* dated December 23, 2014 (Doc. 121 at 4-5), Judge Marbley accepted Mr. Zell's version of the limited role that Mr. Zell had played in Frost Brown Todd's representation of Mrs. Zell and Mrs. Zell's even more limited understanding of that role:

> Mr. Zell, Plaintiff's son, has served as her "personal attorney" since January 1, 2001. (*Aff. of Eileen Zell*, Doc. 50-1 at ¶ 4; *Aff. of Jonathan R. Zell*, Doc. 50-2 at ¶ 5). According to Plaintiff, Mr. Zell's role generally was to oversee the work of outside counsel and advise her about matters as necessary. (Doc. 50-1 at ¶ 4). Plaintiff asserts that Mr. Zell has served as a "conduit" between herself and outside counsel when she has hired outside counsel for matters related to the loan. (*Id.* at ¶ 7).
>
> Specifically, as related to the $90,000 loan at issue, Mr. Zell assisted Plaintiff by: advising her to seek outside counsel to prepare a refinancing agreement for the $90,000 loan when the statute of limitations was approaching; selecting FBT, the law firm employing the Defendants in this case, as the firm tasked creating a refinancing loan document and representing Plaintiff in the litigation related to the underlying action; assisting Plaintiff in communicating with the borrower by "consult[ing]" with FBT and "continu[ing] to give [Plaintiff] extensive advice" regarding the loan; and generally assisting FBT in preparation of Plaintiff's case. (*Id*. at ¶ 4-9; Doc. 50-2 at ¶ 5-11). Mr. Zell also requested to conduct all settlement negotiations related to the $90,000 loan, and indicated to FBT his mother's approval of his request.

(Doc. 64-5). Mr. Zell further states that he suggested trial strategy to the FBT attorneys, drafted documents or portions of documents for filing, and was listed on court filings in Plaintiff's state court case as "of counsel." (Doc. 50-2 at ¶ 5-11; Doc. 64 at 4). Neither Mr. Zell nor Defendants have presented to the Court evidence of a formal agreement memorializing the terms of the relationship between Mr. Zell and the Defendants.

C. In Rendering Judgment for the Defendants, Judge Marbley Illogically Found that the Plaintiff Had Agreed to Make Her Son -- Rather than the Frost Brown Todd Attorneys -- Liable for All Malpractice

1. Additional Email Evidence in the Record that Was Not Cited in the Briefing of the *Third-Party Complaint*

a. All of the Evidence Was Contained in the Parties' Emails

As noted in ¶ 62 of Mrs. Zell's *Complaint* (Doc. 2 at 18) and ¶ 62 of Mrs. Zell's *Amended Complaint* (Doc. 117 at 18): "[O]ver ninety-nine percent (99%) of the communications between Mr. [Jonathan] Zell and the [original six Frost Brown Todd attorney] Defendants took place via e-mail and the substance of those few conversations that occurred by phone were later memorialized in the parties' e-mails." The truth of this was essentially confirmed in the email correspondence of October 17, 2011 between Frost Brown Todd attorneys Shannah Morris and Jeffrey Rupert (*see* Plaintiff's Trial Exhibit P-248 at 1):

RUPERT: We [Jonathan Zell and I] have not yet talked about the decision (he seems to avoid calling me for some reason), but have exchanged a number of emails.

MORRIS: Typical Jonathan [Zell]. He seems to like to do everything in email.

Because hundreds of pages of emails had been exchanged between Mr. Zell and the Frost Brown Todd attorneys, naturally only the emails deemed to be the most relevant to the issues being raised were attached to the pleadings and briefs that the parties filed in the instant case. For example, since the previously-discussed emails that were attached to Mr. Zell's summary-judgment motion on the *Third-Party Complaint* addressed all of the issues that the Defendants had raised in their *Third-Party Complaint*, less-relevant emails that had been quoted in Mrs. Zell's

Complaint and *Amended Complaint* were not used. Other less-relevant emails that were attached to other pleadings and briefs or later entered into evidence at the trial in the instant case were also not used in Mr. Zell's briefing of the *Third-Party Complaint*, either.

However, these additional emails -- which also constitute part of the record of this case -- are now relevant to ***three obvious falsehoods*** that the Defendants made for the very first time at trial and that Judge Marbley then accepted, even expanded upon, and promptly turned into the erroneous findings of fact on which his Decision in this case was based.

b. Three Obvious Falsehoods in the FBT Attorneys' Testimony Were Incorporated into this Court's Findings of Fact

Specifically, the Frost Brown Todd attorneys falsely testified at the trial and (as documented in the accompanying boxes) Judge Marbley then incorporated into his erroneous findings of fact the following three obvious falsehoods:

1. The Frost Brown Todd attorneys (such as Defendant Klingelhafer) focused their research in *Mindlin v. Zell* on certain ***unstated*** substantive choice-of-law issues -- not procedural choice-of-law issues, such as the applicable statute of limitations -- even though the issue of which state's statute of limitations applied to Mrs. Zell's loan was ***the sole determining factor*** in Mrs. Zell's ability to prevail in *Mindlin v. Zell* and collect on the bad loan.

From the Findings of Fact in Judge Marbley's Decision:

Next, Ms. Klingelhafer [i.e., Defendant Katherine Klingelhafer]. Per her testimony, which the Court found credible, she completed limited research assignments for Mr. Rupert [i.e., Defendant Jeffrey Rupert]. This is uncontroverted. One of these assignments was to complete, quote, choice of law, quotes closed, research. There is some confusion as to the meaning of choice of law, whether it's substantive or procedural. However, Ms. Klingelhafer was not involved in the strategy, analysis, or drafting. So there's no evidence that should have researched statute of limitations when she was asked to research choice of law.

I find, therefore, that … there is no basis for a cause of action of legal malpractice to lie against Ms. Klingelhafer."

See Doc. 206 at p. 5, line 24 to p. 6, line 12

2. When the Frost Brown Todd attorneys (such as Defendant Rupert) did nevertheless research the relevant statute-of-limitations issue, Jonathan Zell supposedly "severely restricted" their research on this issue.

From the Findings of Fact in Judge Marbley's Decision:

Even before the June 24th, 2011 e-mail, Defendant's Exhibit 16, Mr. Zell -- Jonathan Zell -- had severely restricted Mr. Rupert's and FBT's research. Mr. Zell asked and authorized Mr. Rupert to research only *Standard Agencies*, not procedural choice of law.

If you look at the response to the Mindlin's motion for summary judgment, that response did not mention statute of limitations until page 26. And that section did not cite the *Standard Agencies* case, the case that Mr. Zell has insisted was the seminal case on the matter, lending support to the thought that the statute of limitations was just a small section. And Mr. Zell did not discuss *Standard Agencies* in the statute of limitations even though he believed that it was important, at least that's the representation that he's made here. So I don't find that Mr. Rupert, under these set of circumstances, breached his duty of care with respect to his work in this case. And so an action for legal malpractice also does not lie against Mr. Rupert.

See Doc. 206 at p. 7, line 13 to p. 8, line 5

3. The division of labor between Jonathan Zell and the Frost Brown Todd attorneys radically changed on July 1, 2011 -- the date of a meeting among Defendant Jeffrey Rupert, Jonathan Zell, and Mrs. Zell in Defendant Rupert's office[3] -- where it was supposedly agreed upon by Defendant Rupert (on behalf of Frost Brown Todd), Mrs. Zell, and Jonathan Zell that Mr. Zell would now accept sole responsible for the legal sufficiency (with the exception of obvious errors) of all of Mrs. Zell's pleadings and briefs in *Mindlin v. Zell*.

[3] *See* Doc. 50-2 at 37, Doc. 50-2 at 38, Doc. 50-2 at 39, and Plaintiff's Trial Exhibit P-131 (giving date of meeting).

From the Findings of Fact in Judge Marbley's Decision:

[P]ursuant to a June 24, 2011 email, Defendant's Exhibit 16, Mr. [Jonathan] Zell asked for a change in the role of the attorneys in this case. He, Jonathan Zell, would do all the drafting, and limited Frost Brown Todd to correcting obvious errors in his writing.

Mindlin's motion for summary judgment was filed on July 5th, 2011. That's Exhibit 276. So Mr. Rupert was involved in the whole motion for summary judgment briefing but entirely under Mr. Zell's requested division of labor. By July 19, 2011, the date of the response to Mindlin's motion for summary judgment, Plaintiff's Exhibit 278, Mr. Rupert had met with Eileen Zell [on July 1, 2011, *see* p. 27 n. 19, *supra*] and she confirmed that she wanted this change in role.

See Doc. 206 at p. 7, lines 1-13

c. The Emails Revealed the True Facts, Which Were Not Reflected in the FBT Attorneys' Testimony or this Court's Findings of Fact

To demonstrated the obvious falsity of the three aforementioned falsehoods (including the accompanying details contained in Judge Marbley's findings of fact), we will now review the ***email correspondence*** between Jonathan Zell and the Frost Brown Todd attorneys that was first quoted in ¶¶ 81-148 from the "First Claim for Relief (Professional Negligence/Legal Malpractice)" of Mrs. Zell's *Amended Complaint* (Doc. 117), which exact same paragraphs were also included in Mrs. Zell's original *Complaint* (Doc. 2), and later quoted in Mrs. Zell's and the Third-Party Defendant's other pleadings and briefs as well as in Jonathan Zell's testimony and arguments at the trial in the instant case.

This email correspondence will demonstrate that (1) the Frost Brown Todd attorneys representing Mrs. Zell focused their research on the central and determinative issue in Mrs. Zell's case -- the statute-of-limitations -- not substantive choice-of-law issues; (2) Jonathan Zell did *not* restrict the FBT's attorneys' research on the statute-of-limitations issue; and (3) the essential division of labor between Jonathan Zell and the FBT attorneys -- whereby the former were respon-

sible for ensuring the legal sufficiency of Mrs. Zell's pleadings and briefs -- never changed even after July 1, 2011.

i. The FBT Attorneys Focused Their Research on the Statute-of-Limitations Issue and Jonathan Zell Did *Not* Restrict Frost Brown Todd's Legal Research

With regard to the first and second issues, Mrs. Zell stated in ¶¶ 81-89, 91, 94, 96, 102-104, 106-107, 120-135, 141-143, and 145-147 of her complaints as follows:

81. On January 8, 2009, ATTORNEY LAUB sent Mr. Zell an e-mail, stating: "I am following up on the two loans made by your mother, Eileen Zell, about which you have requested information regarding their current status/enforceability…. [W]e have some concerns regarding statute of limitations issues. To complete the analysis, we will need some additional information."

82. On January 8, 2009, Mr. Zell sent an e-mail to ATTORNEY LAUB providing the *** [requested] information ****

83. In response, ATTORNEY LAUB sent Mr. Zell an e-mail dated 2/5/2009 stating that "suit [against the debtors] must be brought before December 31, 2011," which was ten years after the due date of 12/31/2001 stated in the parties' one-year Promissory Note (hereinafter, "the Note").

84. ATTORNEY LAUB's opinion was based on an e-mail dated 2/4/2009 from ATTORNEY BOZELL, a law partner in FBT's Louisville, Kentucky, office. ATTORNEY BOZELL's e-mail stated that, according to section 516.110 of the Missouri statutes -- which applied to both contracts and term notes (such as the Note in question) -- the statute of limitations on the loan was ten years.

85. Based on ATTORNEY LAUB's written legal opinion of 2/5/2009 that MRS. ZELL had over two and one-half years (or until December 31, 2011) to bring suit against the debtors, MRS. ZELL refrained from filing suit against the debtors at that time and instead began negotiations with the debtors.

86. On January 4, 2010, Mr. Zell sent an e-mail to ATTORNEY LAUB, stating that MRS. ZELL's negotiations with the debtors had failed and that MRS. ZELL was now prepared to sue the debtors in court. Mr. Zell wrote:

> As a result, I assume that the next step is for my mother to threaten the debtors with a lawsuit unless they agree to renegotiate their loan…; and, if that threat does not work, then to actually file suit against the debtors.

> You have previously told me that Missouri's 10-year statute of limitations will apply to this case. Therefore, since the loan agreement was dated January 30, 2001, the statute of limitations will expire on or about January 30, 2011 (or about one year from now). However, I do not think that we should tolerate much further delay.

87. On October 16, 2010, Mr. Zell sent a letter to ATTORNEY LAUB via fax and e-mail. Mr. Zell informed ATTORNEY LAUB that MRS. ZELL was presently visiting Mr. Zell in Columbus, Ohio, and that the debtors knew this. Furthermore, the debtors' attorney had sent two mailings to MRS. ZELL. The first was a letter dated 10/1/2010 "in which he [the debtors' attorney] encouraged her [MRS. ZELL] to accept $58,400 from the debtors as payment in full by implying that the statute of limitations on the loan may have already expired." The actual language in the attorney's letter referred to "the questionable enforceability of the original note."

While MRS. ZELL had not yet been served, the second mailing from the debtors' attorney was "a copy of a 10/12/2010 date-stamped 'Complaint for Declaratory Relief' … filed in the Franklin County (Ohio) Court of Common Pleas…. [in which the debtors had] asked the court to determine whether or not the statute of limitations on the [parties'] Note has expired."

88. In his correspondence of 10/16/2010 [Doc.], Mr. Zell also reminded ATTORNEY LAUB that, "[a]ccording to your e-mail to me of 2/5/2009, the 10-year Missouri statute of limitations (which commences on the date the last payment was due) will end on 12/31/2011." Mr. Zell then asked ATTORNEY LAUB:

> [H]ow certain are you that the Missouri statute of limitations, rather than the shorter Ohio statute of limitations (as the debtors plan to argue), would apply? The last time I checked, Ohio Revised Code 1303.16 (A) provided that the statute of limitations on any action at law to collect on this note expires six years after the due date stated in the note. Because that due date on the Note involved this case is December 31, 2001, under Ohio law the statute of limitations would have expired on December 31, 2007.

89. In his correspondence of 10/16/2010, Mr. Zell next commented on the debtors' choice of forum. Noting that neither MRS. ZELL nor the debtors lived in Ohio, Mr. Zell opined that the debtors had chosen to file their suit in Ohio "in an attempt to … claim that Ohio's statute of limitations governs the Note." Mr. Zell then discussed ways to defeat this attempt by seeking a change of forum:

> [S]ince I am aware of the Plaintiff's intent to argue that the Note is subject to Ohio's (short) statute of limitations, I am especially leery of granting an Ohio court jurisdiction over this case.

> **Fourth, assuming that the Franklin County Court of Common Pleas does not properly have jurisdiction over this case, should one of us (meaning your law firm or me) mail a letter (see sample letter in Exhibit C attached) to Plaintiffs' counsel stating that, since my mother is a Florida resident, the Franklin County Court of Common Pleas has no jurisdiction and the Plaintiffs should therefore withdraw their Complaint. If that tactic does not work, then should one of us make an appearance on my mother's behalf in the Franklin County Court of Common Pleas solely for the purpose of challenging the court's jurisdiction?**
>
> Fifth, assuming that the Franklin County court case is withdrawn or dismissed, where should my mother file suit against the debtors?
>
> Based on the state residencies of the parties, it would appear to me that a court in either Florida or Missouri would have jurisdiction. Since the parties have diversity of citizenship and the amount in controversy is over $75,000 (according to my calculations), either a state or federal court in Florida or Missouri should have jurisdiction over this case.
>
> (By the way, while the Plaintiffs would probably not object if we removed the Franklin County court case to federal district court in Columbus, I would view even an Ohio federal court as a less-than-ideal venue. This is because … in order to avoid having Ohio's statute of limitations applied to the Note, I think it is wise to stay away from the Ohio courts altogether.)
>
> It also appears to me that the $75,000 threshold amount for federal jurisdiction based on diversity of citizenship has been met.

91. On October 18, 2010, Mr. Zell sent an e-mail to ATTORNEY LAUB authorizing her to consult with a litigator in her firm and repeating his "fear that by conceding Ohio jurisdiction we might be helping the Plaintiffs to make their argument that the law of Ohio -- rather than of Missouri, where the Note was made… -- governs the Note. This is crucially important because the Ohio statute of limitations has expired, while the Missouri statute of limitations has not." Mr. Zell also reminded ATTORNEY LAUB that "my mother has **NOT** yet been formally served with the Complaint."

94. In her initial e-mail to Mr. Zell of 10/26/2010, ATTORNEY MORRIS wrote: "Interestingly, I also did some research for Patti [ATTORNEY LAUB] about a year and half ago regarding the applicability of the statute of limitations in Ohio in regards to the promissory note that is at issue in this case."

96. In his e-mail of 10/27/2010 to ATTORNEY MORRIS, Mr. Zell noted that "the most important consideration is the likelihood that a court would find the statute of limitations on the Note to have expired. Your firm has previously told me that the Note is governed by Missouri law and that, under Missouri law, the statute of limitations has not expired. Does your firm still stand by that opinion?" Mr. Zell then proposed that they challenge the Ohio court's jurisdiction, get the Ohio Action dismissed, and then get the case before an out-of-state court.

102. On 11/15/2010, Mr. Zell sent a second e-mail to ATTORNEY MORRIS, asking: "Is he [opposing counsel] right that … Ohio's statute of limitations governs the loan agreement?"

103. On 11/16/2010, Mr. Zell sent an e-mail to ATTORNEY MORRIS, stating: "[A]s we discussed on the phone today, …. you are going to … inform me whether … you have changed your opinion that Missouri's -- rather than Ohio's -- statute of limitations applies to the loan agreement/Promissory Note in the instant case."

104. On 11/16/2010, ATTORNEY MORRIS sent Mr. Zell an e-mail stating that, in her opinion, opposing counsel was wrong and that Missouri's -- rather than Ohio's -- statute of limitations applied to the Note: "I believe that Patterson [opposing counsel Peterson] [h]as read the statute [ORC 1321.17] completely out of context and greatly expanded its scope…. Second, as the court in *Standard Agencies* [*v. Russell*, 100 Ohio App. 140, 143 (2d Dist. 1954)] notes, the general rule is that a contract is governed by the law of the place in which it was entered into" (which, in this case, was Missouri).

106. Referring to ATTORNEY MORRIS' e-mails of November 16 and 22, 2010, Mr. Zell sent an e-mail to ATTORNEY MORRIS on 11/23/2010, stating: "I now see that you were **right** all along and, accordingly, my mother and I have decided to go along with your initial advice to try the Mindlin action in Ohio! **** Now that I finally understand your reasoning, I see that trying this action in an Ohio court … is the best we can do. Therefore, please cease all work on the Motion to Dismiss."

107. As indicated in Mr. Zell's above-quoted e-mail dated 11/23/2010, MRS. ZELL decided to abandon her previously-stated wish to move the Ohio Action to another state's court and instead to consent to the jurisdiction and venue of the Franklin County (Ohio) Court of Common Pleas. Furthermore, MRS. ZELL did this based on the written legal opinions of ATTORNEYS MORRIS, LAUB, and BOZELLE that an Ohio court should apply Missouri's unexpired 10-year statute of limitations rather than Ohio's expired six-year statute of limitations on the Note. Since the only thing that could have prevented MRS. ZELL from receiving a court judgment for the balance due on the loan was the statute-of-limitations issue, MRS. ZELL was confident that she would prevail in the Ohio Action based on the written legal opinions of ATTORNEY MORRIS and the other FBT attorneys.

120. On 7/7/2011, Mr. Zell sent an e-mail to ATTORNEY RUPERT stating that opposing counsel had recently filed a Motion for Summary Judgment arguing that Ohio's -- not Missouri's -- statute of limitations should apply to the Note and that Ohio's limitations period had expired.

121. On 7/11/2011, ATTORNEY RUPERT sent Mr. Zell an e-mail stating: "Do you want me to have someone research the points I raised in my prior email?"

122. On 7/11/2011, Mr. Zell sent ATTORNEY RUPERT an e-mail reply answering "Yes" to the question about wanting ATTORNEY RUPERT to have an FBT attorney research the issue of whether Missouri's or Ohio's statute of limitations governed the Note.

Mr. Zell also attached for ATTORNEY RUPERT's consideration the previous legal memoranda from ATTORNEY LAUB and ATTORNEY BOZELL opining that Missouri's statute of limitations applied to the Note. "However," Mr. Zell wrote, "if your research suggests [otherwise; that is, contrary to ATTORNEYS LAUB's and BOZELL's opinions,] that we might have a statute-of-limitations problem (i.e., that Ohio law applies), please let me know and my mother will then reconsider the idea of a settlement."

123. On 7/13/2011, ATTORNEY RUPERT sent Mr. Zell an e-mail stating: "I had an associate do some limited research on whether Missouri law would apply…. [R]ecent cases apply the Restatement's factor-driven test. ATTORNEY RUPERT then attached a legal memorandum from ATTORNEY KLINGELHAFER, a senior associate attorney in FBT's Columbus office.

124. On information and belief, ATTORNEY KLINGELHAFER knew about the position that ATTORNEY MORRIS had taken in her 11/16/2010 e-mail to Mr. Zell, including the legal research upon which that position had been based. To recap, ATTORNEY MORRIS' position was, first, that the case of *Standard Agencies v. Russell*, 100 Ohio App. 140, 143 (2d Dist. 1954) -- which (in ATTORNEY MORRIS' words) stated that "the general rule is that a contract is governed by the law of the place in which it was entered into" -- represented good or controlling law. The second part of ATTORNEY MORRIS' position was that, based on *Standard Agencies v. Russell*, the court in the Ohio Action should find that the parties' Note was subject to Missouri's -- not Ohio's -- statute of limitations.

125. In her memorandum of 7/13/2011 (which was sent to ATTORNEY RUPERT via e-mail), ATTORNEY KLINGELHAFER addressed what she called the "choice of law" issue. She first noted: "Modern cases cite to the Restatement of the Law 2d, Conflict of Laws, while there are older cases that rely on old traditional tests and generalizations." She then added: "The traditional rules were applied inconsistently, and … the modern trend is away from the rigid adherence to the traditional rules and toward following the Restatement rules."

Thus, she explained: [I]t seems that the Restatement factor-driven test should be applied and would negate the old traditional tests and generalizations that we focused on earlier…. [D]ecisions dating back to 1984 have described these types of decisions as following the old 'traditional' rules.'" As examples of cases based on the old rules, she referred to "the 1954 *Standard Agencies, Inc. v. Russell* … case cited by [Mr.] Zell," which held "that the law of the state where a contract is 'made' is the applicable law," as well as the cases cited in the debtors' Motion for Summary Judgment, which held that the law where the contract was to be performed is the applicable law.

Finally, ATTORNEY KLINGELHAFER set forth the "factor-driven test…. [found in] Restatement of the Law 2d, Conflict of Laws Section 188 …. at 575," which she concluded should be the controlling law on the question currently before the court in the Ohio Action as to which state's -- Missouri's or Ohio's -- statute of limitations applied to the parties' Note. As she explained: "This test considers: "(a) the place of contracting, (b) the place of negotiations of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."

126. Using the legal research in ATTORNEY KLINGELHAFER's memorandum, Mr. Zell sent an e-mail to ATTORNEY RUPERT on 7/13/2011 arguing that, under the Restatement's factor-driven test, Missouri -- rather than Ohio -- law should govern the parties' Note.

127. On 7/14/2011, ATTORNEY RUPERT sent an e-mail to Mr. Zell generally agreeing that the factor-driven test pointed to Missouri's law being applied, but called it "a close call":

> 3. On the question of whether Missouri law applies, that will be a based on the facts and will be influenced how courts have decided similar factual patterns. I do not know what the case law research would lead to, but I think this will be a close call from the facts that you have told me – your mother's lawyer drafting documents in Ohio, and Mindlin in Missouri. I think the fact that the makers signed the Note in Missouri will be a very helpful factor, and will hopefully be the decisive factor.
>
> 4. I think the conflict of law analysis should be covered. You will need to distinguish the old Ohio case cited by Peterson, and explaining to the conflicts case law is a very good way to do that. It will also show that he doesn't know what he is talking about [by citing cases that used the old traditional rules].

128. Mr. Zell then prepared a draft Memorandum in Opposition to the debtors' Motion for Summary Judgment, which he e-mailed to ATTORNEY RUPERT on 7/15/2011. In this draft, Mr. Zell argued that, under the Restatement's factor-driven test, Missouri -- rather than Ohio -- law should govern the parties' Note.

129. In response, ATTORNEY RUPERT sent Mr. Zell an e-mail dated 7/15/2011 stating: "I thought this [the draft Memorandum in Opposition] was good." The only suggestion that ATTORNEY RUPERT made "[o]n the Choice of Law issue that Missouri law applies" was that he would "like to see some case law with similar facts" to the instant case.

130. On 8/2/2011, ATTORNEY RUPERT sent Mr. Zell an e-mail informing Mr. Zell that opposing counsel had filed a reply brief on the summary-judgment issue and advising Mr. Zell on what to say in their Reply Brief. ATTORNEY RUPERT wrote:

> You may have already received Plaintiffs' Memo Contra/Reply on the Summary Judgment Motions in the mail[.]… [Y]ou are allowed to file a Reply brief if you want to do so…. The thing that jumped out to me in Plaintiffs' filing was that they totally ignore the sections of your briefs that discuss choice of law concepts and why Missouri law applies. I suggest that you highlight those arguments for the Court again in a reply brief.

131. On 8/3/2011, Mr. Zell e-mailed to ATTORNEY RUPERT a draft Reply Brief.

132. On 8/3/2011, ATTORNEY RUPERT sent Mr. Zell back an e-mail reply, stating:

> I thought this brief was good, but I had a few comments…. I suggest that that (sic) you argue that Missouri law was intended to apply at the time of contracting -- the Note says St. Louis, Missouri…. I would argue that the choice of law analysis would select Missouri, and that the choice of law rules would apply regardless of whether the parties had a specific provision in the Note regarding what law would apply. I thought your section on the choice of law was good. I would suggest that you mention that they have not cited any cases applying the correct legal standard that leads to Ohio law applying [i.e., the Restatement's factor-driven test].

133. After Mr. Zell sent ATTORNEY RUPERT a revised "Amended Reply Brief," ATTORNEY RUPERT sent Mr. Zell an e-mail on 8/8/2011, stating: "In reviewing this brief, I think …. [t]he sections on Missouri law are very good, and are focused."

134. Mr. Zell sent ATTORNEY RUPERT an e-mail dated 8/9/2011, referring to a 35-year-old *Emanuel* contracts outline dating back to his law-school days that Mr. Zell had been perusing for ideas to use in their brief. Mr. Zell stated that, in this outline, he had found some references to the *Restatement of Law (Second) Contracts* that would support the argument that, even if *arguendo* Ohio's six-year statute of limitation applied to the parties' Note, that statute of limitations had been tolled and, thus, did not expire. After presenting this argument to ATTORNEY RUPERT, Mr.

Zell then requested legal-research assistance from FBT so that he could better support this tolling argument when drafting their brief.

135. On 8/9/2011, ATTORNEY RUPERT sent Mr. Zell back an e-mail reply, stating that he was "having someone" at FBT research Mr. Zell's tolling argument. ***

141. On 10/12/2011, the Franklin County (Ohio) Court of Common Pleas ruled that the parties' Note was subject to Ohio's six-year statute of limitations and, therefore, that the debtors were released from their obligation to repay their loan to MRS. ZELL.

142. Consistent with the advice that he had been giving MRS. ZELL (via Mr. Zell) all along, ATTORNEY RUPERT advised MRS. ZELL that, in his opinion, the trial court had made an error of law in ruling that Ohio law governed the Note. However, while the trial court had not given the proper reason for his ruling, the decision that Ohio law governed the Note could pass legal muster for other reasons (as the appellate court would later hold).

143. However, based on ATTORNEY RUPERT's erroneous opinion, MRS. ZELL authorized ATTORNEY RUPERT to file an appeal.

. 145. On 11/28/2011, ATTORNEY RUPERT sent Mr. Zell an e-mail, stating that he was going to assign an associate lawyer at FBT to research the choice-of-law issue for the appeal.[4]

146. On 1/4/2012, ATTORNEY RUPERT sent Mr. Zell an e-mail giving the result of this new research, which was like a bombshell. ATTORNEY RUPERT stated that everything that he -- and, by implication, the other FBT attorneys -- had been telling MRS. ZELL (via Mr. Zell) regarding which state's statute of limitations would apply to the Note, and why, were all wrong. His new research showed that, instead of Missouri's ten-year statute of limitations, Ohio's six-year statute of limitations would apply.

Accordingly, ATTORNEY RUPERT concluded that MRS. ZELL was in grave danger of losing her appeal, stating: "The results of the Choice of Law research are not encouraging at all. Frankly, my opinion is that … the chances of having Missouri law apply seem very low…. I believe that it is very unlikely that the Missouri statute of limitations will apply.

[4] Specifically, this email stated in pertinent part that "On the research re the Small Loans Act [which raised solely a statute-of-limitations issue], I will have an associate [i.e., Defendant Klingelhafer] take care of that. On the other possible research, I still think that research on the choice of law issue would be helpful. While the facts are unique here, it seems that there should be some case law applying choice of law concepts to loan documents drafted in one state with payment in another. I would think that this case law [on the statute-of-limitations issue] would favor your mother. Let me know if you want me to have someone research this." *See* Plaintiff's Trial Exhibit P-198.

* * *

147. However, at the same time, ATTORNEY RUPERT offered a ray of hope. Referring to the tolling argument based on the doctrine of promissory estoppel that they had made in MRS. ZELL's "Amended Reply Brief" before the trial court, ATTORNEY RUPERT noted that, if this argument were accepted, then MRS. ZELL would win her appeal. As he stated: "I recognize that you have theories where your mother prevails under Ohio law, and this research would not affect those theories. To assist your Ohio law based theories, I had the associate pull a case [for you]." Of course, their tolling argument was doomed to fail because it was erroneously based on promissory estoppel instead of equitable estoppel.

From the above, it can be seen that -- contrary to the Frost Brown Todd attorneys' testimony at the trial and the findings of fact in Judge Marbley's decision -- the FBT attorneys focused their legal research in *Mindlin v. Zell* on the factor that would determine Mrs. Zell's ability to prevail in the case and collect on the bad loan: the statute-of-limitations (which even the FBT attorneys called the "choice of law issue").[5] Moreover, Jonathan Zell did *not* restrict the FBT's attorneys' research on the statute-of-limitations issue. On the contrary, Jonathan Zell ***repeatedly*** sent the Frost Brown Todd attorneys a number of emails during the pendency of *Mindlin v. Zell* asking that they not only ***fully research*** all aspects of the statute-of-limitations issue applicable to Mrs. Zell's loan (i.e., which state's -- Missouri's or Ohio's -- statute of limitations governed), but also ***re-research*** and ***re-re-research*** this issue.

Indeed, although (as will be discussed below) the Frost Brown Todd attorneys were solely responsible for all of the legal research that went into Mrs. Zell's pleadings and briefs, Jonathan Zell correctly suggested -- on the following two occasions -- legal theories that the FBT attorneys had overlooked and that would and should have ensured a victory for Mrs. Zell in *Mindlin v. Zell* had the FBT attorneys not then screwed it up.

[5] The Defendants had every opportunity to deny, in their *Answers* (*see* Docs. 7 and 122) to Mrs. Zell's original and amended complaints, any and all of the above characterizations of Mr. Zell's email correspondence with the FBT attorneys. However, the Defendants chose not to do. Instead, for each piece of correspondence, the Defendants stated that "the email speaks for itself."

The First Time that Mr. Zell Tried to Correct the FBT Attorneys' Errors. Despite the FBT attorneys having told Mr. Zell that the Ohio court in the underlying case of *Mindlin v. Zell* would apply Missouri's unexpired ten-year statute of limitations (rather than Ohio's expired six-year limitations period) to Mrs. Zell's loan, Mr. Zell told the FBT attorneys that he did not want to take the chance that the FBT attorneys might be wrong (which they were), correctly surmising that an Ohio court would want to apply its own state's statute of limitations. Therefore, Mr. Zell told the FBT attorneys that Mrs. Zell wanted them to file a motion to dismiss for the purpose of getting *Mindlin v. Zell* transferred to a court outside of Ohio instead of acceding to the Ohio court's jurisdiction and venue as the FBT attorneys had planned to do.

Soon thereafter FBT attorney Shannah Morris advised Mr. Zell (based on legal research by Ms. Morris' associate, Aaron Bernay) that Ms. Morris had legal authority supporting her opinion that an Ohio court would apply Missouri's statute of limitations. Specifically, Ms. Morris stated that, under the *Standard Agencies* case, a court would apply the law of the state in which the contract (here, Mrs. Zell's promissory note) had been made. Based on Ms. Morris' statement, Mr. Zell told Ms. Morris that Mrs. Zell now rescinded her request for the filing of a motion to dismiss. Unfortunately, however, Ms. Morris and Mr. Bernay had misinterpreted *Standard Agencies* because *Standard Agencies* dealt with only substantive choice-of-law issues -- not procedural choice-of-law issues, such as which state's statute of limitations would apply to Mrs. Zell's loan. Moreover, unbeknownst to Ms. Morris and Mr. Bernay, under the well-established doctrine of *lex fori* (the law of the forum) a court will apply the procedural law (such as the statute of limitations) of the state in which the court sits. That meant that, as Mr. Zell had correctly surmised, the court in *Mindlin v. Zell* would apply Ohio's ***already-expired*** six-year statute of limitations to Mrs. Zell's note.

After Defendant Jeffrey Rupert (assisted by his associate, Defendant Katherine Klingelhafer) later replaced Ms. Morris and Mr. Bernay as lead counsel for Mrs. Zell in *Mindlin v. Zell*, Mr. Zell sent Defendant Rupert several emails advising Defendant Rupert that, based on the case of *Standard Agencies*, Ms. Morris had previously advised Mr. Zell that Missouri's statute of limitations would apply to Mrs. Zell's loan. Defendant Rupert then forwarded Mr. Zell's emails to Defendant Klingelhafer, asking her to verify the correctness of Ms. Morris' opinion on the statute-of-limitations issue. Defendant Klingelhafer then sent Defendant Rupert an email noting that the *Standard Agencies* case, which based the choice-of-law determination on only one factor, represented the traditional method, which in the more modern cases had now been replaced by the multiple-factor test set out in the Restatement of the Law 2d, Conflict of Laws Section 188.

Defendant Rupert then sent Mr. Zell an email stating that, based on the Restatement's multiple-factor test, it was now a closer question but that he nonetheless still believed Missouri's statute of limitations would apply to Mrs. Zell's promissory note. Accordingly, in his email Defendant Rupert advised Mr. Zell ***to emphasize the Restatement factors previously identified by Defendant Klingelhafer*** (rather than the one-factor rule enunciated in *Standard Agencies*) when preparing the first draft for his review of Mrs. Zell's memorandum in opposition to the Mindlin debtors' summary-judgment motion based on the statute of limitations. Thereafter, Defendant Rupert revised and eventually filed the final draft of Mrs. Zell's *Memorandum in Opposition to the Mindlins' Motion for Summary Judgment* (*see* Plaintiff's Trial Exhibit P-278), which argued that -- based on the Restatement factors -- Missouri's unexpired statute of limitations applied to Mrs. Zell's loan.

Unfortunately, however, just as *Standard Agencies* had dealt with only substantive choice-of-law issues -- not procedural choice-of-law issues, such as which state's statute of limitations would apply to Mrs. Zell's loan -- so, too, did the Restatement factors. Moreover, just like Ms.

Morris and Mr. Bernay, neither Defendants Rupert nor Klingelhafer was aware of the well-established doctrine of *lex fori* (the law of the forum), whereby a court will apply the procedural law (such as the statute of limitations) of the state in which the court sits. As previously stated, this meant that the court in *Mindlin v. Zell* would apply Ohio's ***already-expired*** six-year statute of limitations to Mrs. Zell's note -- and this is exactly what the Tenth District Court of Appeals later ruled in *Mindlin v. Zell*. Thus, Defendants Rupert and Klingelhafer had not corrected, but instead had merely compounded, Ms. Morris' and Mr. Bernay's previous error on the choice-of-law issue concerning which state's (Ohio's or Missouri's) statute of limitations applied to Mrs. Zell's loan.

The Second Time that Mr. Zell Tried to Correct the FBT Attorneys' Errors. As previously stated, in response to the Mindlin debtors' filing of a summary-judgment motion based on Ohio's already-expired statute of limitations, Defendant Rupert approved and then filed a memorandum in opposition erroneously arguing that Missouri's unexpired statute of limitations applied to Mrs. Zell's loan. Shortly thereafter, Mr. Zell found -- in a 20-year-old *Emanuel* contracts study guide that he had used in law school -- the legal theories of detrimental reliance and promissory estoppel under which a statute of limitations could be tolled or otherwise made not to apply. So, in connection with Mr. Zell's preparation of a first draft for Defendant Rupert's review of Mrs. Zell's reply brief in support of her own summary-judgment motion, Mr. Zell sent Defendant Rupert several emails concerning the tolling-type theories of detrimental reliance and promissory estoppel. Specifically, Mr. Zell quoted these theories from the *Emanuel* study guide, explained how these theories might apply to *Mindlin v. Zell* based on the numerous extensions that the Mindlin debtors had obtained on the loan, and expressly asked Defendant Rupert to research the application of these tolling-type theories to Mrs. Zell's case.

Defendant Rupert then forwarded Mr. Zell's emails to Defendant Klingelhafer, who in turn sent Defendant Rupert several emails analyzing the tolling-type theories of detrimental reliance

and promissory estoppel. Based on Defendant Klingelhafer's research, Defendant Rupert then sent Mr. Zell several emails advising Mr. Zell to include in Mrs. Zell's reply brief the alternative argument that, even if *arguendo* Ohio's statute of limitations applied to Mrs. Zell's loan, Ohio's limitations period had been tolled due to promissory estoppel based on the extensions that had been granted on the loan. Defendant Rupert did not advise Mr. Zell to argue for tolling based on detrimental reliance (a term that was no longer used in Ohio) or based on equitable estoppel (the new term that is now used in Ohio for detrimental reliance). Accordingly, Mr. Zell then sent to Defendant Rupert for his review and approval a draft of Mrs. Zell's reply brief arguing for tolling Ohio's statute of limitations based on promissory estoppel. Thereafter, Defendant Rupert revised and filed the final draft of Mrs. Zell's *Amended Reply Brief* (*see* Plaintiff's Trial Exhibit P-279), which contained the alternative argument that, even if it applied, Ohio's statute of limitations had been tolled due to promissory estoppel.

Unfortunately, however, as the Tenth District Court of Appeals later ruled, Mrs. Zell's *Amended Reply Brief* should have referred to "equitable" estoppel (which, as previously stated, is called detrimental reliance in other states) rather than "promissory" estoppel. For this reason, the Tenth District refused even to consider whether equitable estoppel would have tolled Ohio's statute of limitations. However, as the Plaintiff's expert (James Leickly) testified at the trial, it would and should have. Accordingly, for a second time, Mr. Zell had correctly suggested legal theories that the FBT attorneys had overlooked and that would and should have ensured a victory for Mrs. Zell in *Mindlin v. Zell* had the FBT attorneys not then screwed it up. Here, by informing Defendants Rupert and Klingelhafer of not only the existence of arguments for tolling the statute of limitations -- which they had left out of Mrs. Zell's *Memorandum in Opposition to the Mindlins' Motion for Summary Judgment* -- but also providing them with the exact tolling argument applicable to Mrs. Zell's case -- i.e., detrimental reliance (which, in Ohio, is called

equitable estoppel) -- Mr. Zell had handed Defendants Rupert and Klingelhafer the winning argument, as it were, on a silver platter. Yet, Defendants Rupert and Klingelhafer misinterpreted the passages that Mr. Zell had quoted to them from the *Emanuel* contracts study guide, negligently advising Mr. Zell to argue in Mrs. Zell's *Amended Reply Brief* the elements of detrimental reliance, but to call it "promissory estoppel."

ii. The Essential Division of Labor Between Jonathan Zell and the Frost Brown Todd Attorneys Never Changed

As previously noted, Judge Marbley stated in his findings of fact and conclusions of law that the division of labor between Jonathan Zell and the Frost Brown Todd attorneys radically changed after a meeting in Defendant Rupert's office on July 1, 2011 among Defendant Jeffrey Rupert, Jonathan Zell, and Mrs. Zell where Defendant Rupert (on behalf of Frost Brown Todd), Mrs. Zell, and Jonathan Zell had supposedly agreed that Mr. Zell would now accept sole responsible for the legal sufficiency (with the exception of obvious errors) of all of Mrs. Zell's pleadings and briefs in *Mindlin v. Zell*. Specifically, Judge Marbley stated:

> [P]ursuant to a June 24, 2011 email, Defendant's Exhibit 16, Mr. [Jonathan] Zell asked for a change in the role of the attorneys in this case. He, Jonathan Zell, would do all the drafting, and limited Frost Brown Todd to correcting obvious errors in his writing.
>
> Mindlin's motion for summary judgment was filed on July 5th, 2011. That's Exhibit 276. So Mr. Rupert was involved in the whole motion for summary judgment briefing but entirely under Mr. Zell's requested division of labor. By July 19, 2011, the date of the response to Mindlin's motion for summary judgment, Plaintiff's Exhibit 278, Mr. Rupert had met with Eileen Zell and she confirmed that she wanted this change in role.

See Doc. 206 at p. 7, lines 1-13.

Although a meeting among Defendant Jeffrey Rupert, Jonathan Zell, and Mrs. Zell did take place in Defendant Rupert's office on July 1, 2011, no such agreement was ever made.

We begin with an email dated June 24, 2011 (Doc. 86-19)[6] -- which was sent two weeks prior to the filing of the Mindlin debtors' July 5, 2011 summary-judgment motion on the statute-of-limitations issue. In this email, Mr. Zell made multiple proposals to Defendant Jeffrey Rupert in an attempt 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* Doc. 86-19 at 2 (emphasis added). Specifically, Mr. Zell proposed that he be given more responsibility in *Mindlin v. Zell* over "the run-of-the-mill pleadings," *see id* (of which, incidentally, a memorandum in opposition to the Mindlin debtors' summary-judgment motion was definitely ***not*** one).

These proposals ranged from tweaking their respective roles on Mrs. Zell's case ("I will continue to write the first draft of our pleadings. But, as a change, you will merely correct the OBVIOUS and/or SERIOUS DEFICIENCIES in those pleadings and will let me sign the pleadings by myself. In this way, you will not be responsible for these pleadings and, thus, will not feel compelled to spend so much time rewriting and/or perfecting my drafts") to having Defendant Rupert "formally withdraw from the case during the pre-trial stage with the explicit understanding that you will re-enter the case during the trial stage."

The relevant portion of Mr. Zell's June 24, 2011 email follows below:

> Considering that we are still in the very early stages of this litigation, I just cannot justify having my mother continue to pay bills to FBT of over $8,000 per month simply to respond to the plaintiffs' attorney's series of dilatory motions. Clearly, the plaintiffs are trying to force my mother to the settlement table by running up her legal bills. There must be some other solution than to give in to the plaintiffs' extortion.
>
> One idea is for me to quickly put together a Motion for Summary Judgment, which even Shannah Morris thought we had a chance of winning. But, before that can be filed, various other pre-trial issues will be popping up, such as possible hearings on

[6] This same email is also Plaintiff's Trial Exhibit P-256 and Defendants' Trial Exhibit D-16.

> the plaintiffs' motions to remove me as co-counsel, for a protective order, and for relief from judgment as to third-party defendant Suttle. Handling these issues could cost my mother another $10,000 or more in your legal fees.
>
> Accordingly, I would please like you to check with Joe Dehner (or whomever else at FBT you think appropriate) to see if I can become the so-called "lead attorney" or even the sole attorney in the PRE-TRIAL STAGE ONLY of this case. Please do not misunderstand: I am very happy with your work so far and I would still like you to handle the TRIAL STAGE of the case by yourself. But I see no need for such high-powered legal guns as yourself to handle the run-of-the-mill pleadings that plaintiffs' counsel is churning out.
>
> So what I propose is twofold: First, I will continue to write the first draft of our pleadings. But, as a change, you will merely correct the OBVIOUS and/or SERIOUS DEFICIENCIES in those pleadings and will let me sign the pleadings by myself. In this way, you will not be responsible for these pleadings and, thus, will not feel compelled to spend so much time rewriting and/or perfecting my drafts. Second, unless the Court removes me from the case or otherwise objects, I will be the only one who will handle the hearings in court on all of the pre-trial motions.
>
> If you think that the above arrangement -- bifurcating our respective responsibilities between the pre-trial and trial stages of the case -- requires Court approval, you may seek it. Also, if you think it is necessary, you may formally withdraw from the case during the pre-trial stage with the explicit understanding that you will re-enter the case during the trial stage. Hopefully, nothing so drastic will be required. But I just wanted you to know that I am open to almost anything that will minimize my mother's pre-trial litigation costs -- without, however, making my mother wholly dependent on my own inadequate legal research and writing skills.

Doc. 86-19 at 2.

Because Mr. Zell had not yet received any response to his June 24, 2011 email, Mr. Zell sent a follow-up email to Defendant Rupert on June 26, 2011[7], explaining what Mr. Zell meant in his earlier email when he had proposed that "you [Defendant Rupert] … let me sign the pleadings by myself. In this way, you will not be responsible for these pleadings and, thus, will not feel

[7] The June 26, 2011 email (identified as Plaintiff's Trial Exhibits P-134 and P-220) was also extensively quoted in ¶ 52 of Mrs. Zell's *Complaint* (Doc. 2 at 14-15) and ¶ 52 of Mrs. Zell's *Amended Complaint* (Doc. 117 at 15).

compelled to spend so much time rewriting and/ or perfecting my drafts." Consistent with everyone's understanding of Mr. Zell's lack of access to online legal research and limited legal knowledge, Mr. Zell made it clear in his June 26, 2011 email that his proposal intended to relieve Defendant 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 of Mrs. Zell's pleadings or briefs might contain:

> I noticed that, in the last bill that my mother received from FBT, your fee for revising my draft memorandum in opposition to a previous motion by the plaintiffs was over $2,000 (including some ancillary matters, such as e-mail exchanges).
>
> As I have stated in a recent e-mail, I realize that as long as you have to sign your name on my mother's pleadings, you will want those pleadings to be the best you can make. Also, you will want those pleadings to give the kind of professional impression that you want to leave on the Court -- as opposed to the much-more aggressive and confrontational stance that my pleadings take. Because the more changes you make in my drafts, the larger your charges will be, in some of my recent e-mails I have suggested some ways in which you might minimize those charges.
>
> Thus, in revising my draft memorandum, please consider what you can do to minimize your charges. For example, if you feel that you have to substantially rewrite my draft -- not because it is legally insufficient, but because it does not have the tone that would befit a pleading that you could sign -- please consider allowing me to sign the pleading by myself.

Plaintiff's Trial Exhibit P-134. *See* ¶ 52 of Mrs. Zell's *Complaint* (Doc. 2 at 14-15) and ¶ 52 of Mrs. Zell's *Amended Complaint* (Doc. 117 at 15).

Yet, the only response that Mr. Zell ever received to the multiple proposals that he made in his emails of June 24 and June 26, 2011 was an email from Defendant Rupert dated June 27, 2011 stating merely:

> 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.

Doc. 86-18. *See* ¶ 53 of Mrs. Zell's *Complaint* (Doc. 2 at 15) and ¶ 53 of Mrs. Zell's *Amended Complaint* (Doc. 117 at 15).

Because Mr. Zell had still not received any direct answer to any of his proposals, Mr. Zell sent another email to Defendant Rupert on July 5, 2011 asking:

> (a) Who -- you or me -- should sign the Memorandum in Opposition [to David Suttle's Motion for Relief from Judgment] and (b) who should be listed as "of counsel" on it?

Plaintiff's Trial Exhibit K (a.k.a., P-217) and P-127 at 2.

Then, in the closest thing to an answer that Mr. Zell ever received to his proposals, Defendant Rupert sent Mr. Zell an email on July 5, 2011 stating:

> As to how it should be signed, I think you should sign it and list me as "of counsel" in the signature block.
>
> For the signature, I don't want you to have to come down here just for that. Can you format it in such a way that the signature page can be a standalone page that you can sign today and drop in the mail to me?

Plaintiff's Trial Exhibit P-127 at 1.

Although Mr. Zell had, thus, never received a direct response to his multiple proposals:

> Thereafter, while ATTORNEY RUPERT continued to revise Mr. Zell's drafts, he allowed Mr. Zell to sign the finished product himself and to list ATTORNEY RUPERT as "OF COUNSEL." ATTORNEY RUPERT then had the pleadings and briefs filed in court.

See ¶ 53 of Mrs. Zell's *Complaint* (Doc. 2 at 15) and ¶ 53 of Mrs. Zell's *Amended Complaint* (Doc. 117 at 15).

Not only were there never any further communications between anyone from Frost Brown Todd and Mr. Zell about Mr. Zell's previous proposals but, as this Court noted in its *Opinion and Order* dated December 23, 2014 (Doc. 121 at 5), there was never anything "memorializing the terms of the relationship" between Mr. Zell and Frost Brown Todd. Furthermore, as this Court noted in its *Plenary Order* dated April 3, 2017 (Doc. 192 at 2), with one minor exception no Frost

Brown Todd attorneys had any "personal notes" concerning their representation of Mrs. Zell, let alone concerning Mr. Zell's role with Frost Brown Todd in their representation of Mrs. Zell.

The significance of this cannot be overstated. According to Defendant Rupert's June 27, 2011 email to Mr. Zell, Defendants Rupert and Dehner had discussed between themselves and even approved some version of Mr. Zell's proposals. That neither Defendants Rupert nor Dehner even bothered to take any notes during their meeting on this matter must have meant that no significant change in Mr. Zell's role was involved (other than who would sign Mrs. Zell's pleadings and who would be listed as "of counsel").

2. The Source of the Falsehoods On Which Judge Marbley's Decision Was Based

Now that the parties' email correspondence has proven the three falsehoods on which Judge Marbley based his Decision in this case, let's look at the source of these falsehoods.

a. The FBT Attorneys' Statute-of-Limitations Research

FBT attorneys Shannah Morris and Aaron Bernay as well as Defendants Jeffrey Rupert and Katherine Klingelhafer all falsely testified that the legal research that they had conducted for the *Mindlin v. Zell* litigation (prior to the appeal) focused exclusively on various ***unstated*** substantive choice-of-law issues rather than on the statute of limitations applicable to Mrs. Zell's loan. For example, Defendant Rupert was asked by the Plaintiff's counsel (Mr. Zell) to read the following excerpt from the last paragraph of Mr. Zell's email to Defendant Rupert of July 11, 2011 (Plaintiff's Trial Exhibit E -- a.k.a., P-12 -- at 2):

> Please find enclosed below previous memos on the statute-of-limitations issue from FBT attorneys Patricia Laub and Douglas Bozell. However, if 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 will then reconsider the idea of a settlement.

See Doc. 208 at p. 8, lines 13-18.

Defendant Rupert then claimed that -- despite the plain meaning of Mr. Zell's request to "research … [whether] we might have a statute-of-limitations problem (i.e., that Ohio law applies)" -- Mr. Zell had instead asked Defendant Rupert only to research the 1954 *Standard Agencies* case and, therefore, that was what Defendant Rupert had researched. *See* Doc. 208 at p. 10, lines 3-6.

Then, in reference to the above-quoted July 11, 2011 email, the following question-and-answer exchanges took place between Plaintiff's counsel (Mr. Zell) and Defendant Rupert:

(COUNSEL) Q: In response to this e-mail, not asking you to research one particular case, but asking you *** to verify that the prior research of the firm was correct to the extent that Missouri's statute of limitations applied, did you do that in response to this e-mail? Yes or no?

(RUPERT) A: As I told you, no, I did not because you told me to focus on the 1954 case [of *Standard Agencies*].

(COUNSEL) Q: Thank you for answering. Do you believe that you were representing my mother's interest faithfully by limiting your research to one case when I specifically asked in this e-mail for you to research the entire issue?

(RUPERT) A: Yes. ***

See Doc. 208 at p. 11, lines 3-15.

(COUNSEL) Q: You volunteered in your previous answer that you had told me that Ohio law applied to the statute of limitations. *** [W]asn't that during the appellate process? Wasn't that in a January 4th, 2012 e-mail, but not before?

(RUPERT) A: *** I believe that's the date of the e-mail, yes.

(COUNSEL) Q: And that was during the appeal, yes?

(RUPERT) A: Yes.

(COUNSEL) Q: You never told me that Ohio law applied during the trial phase, correct?

(RUPERT) A: Correct, because you didn't ask me to research that.

(COUNSEL) Q: Except in this e-mail that I'm bringing back **** You previously read the last paragraph. ***

See Doc. 208 at p. 13, line 24 to p. 14, line 13.

(COUNSEL) Q: **** This is an e-mail from you to me dated July 14th, 2011 [Plaintiff's Trial Exhibit P-121]. As it says here in the second line, it's about our motion for summary judgment and our memo contra, their motion for summary judg-ment in the trial court. Would you read starting with the second paragraph, please?

(RUPERT) A: (Reading) As to which law applies, I think you need to argue that Missouri law applies in both the MSJ and memo in opp. ***

(COUNSEL) Q: Thank you. At the time you wrote that, I believe it was your prior testimony that you had not, to some extent, adequately researched the issue about which you just read. Was that true?

* * *

(RUPERT) A: Sure. What I'm doing here is I'm referring to some pleadings, that you had sent me some drafts. Throughout this you would send numerous drafts, and I would give you writing tips to try to make it more persuasive. If an issue came up that you wanted research, a specific one, we would identify that specific issue. What I'm identifying here is that your argument, at least in the draft that you had sent me needed work just from a persuasive point of view. But, if you're asking did I research this -- did I research the issue that we later researched in January? No, we did not.

(COUNSEL) Q: Well, isn't it correct that on July 14th, no drafts had been written and no drafts are mentioned in this e-mail?

(RUPERT) A: I can't tell you. You're not showing me the context of it, but we certainly had been discussing it. I don't know if you had sent me a draft at that time or you had sent me an outline.

(COUNSEL) Q: Isn't it true that --

(RUPERT) A: I seem to be commenting on something.

(COUNSEL) Q: You seem to be telling me how to prepare the two motions and no drafts had been written yet?

(RUPERT) A: What's on the other -- rest of the e-mail chain there? Can I see that? I can't read it that way.

(COUNSEL) Q: Here it says -- this is July 14th which is the same date. It says, "In my memorandum in opposition, which I will submit to you shortly under separate cover." So I had not submitted the draft yet. Okay? That answers your question. So --

(RUPERT) A: **** I can't tell from the context of this if you submitted a motion ****

(COUNSEL) Q: Here it says, "As to the memo in opp, you suggest arguing." So that suggests that I didn't give you a brief, arguing it; that we had discussed it and I had suggested arguing that.

* * *

(COUNSEL) Q: At the time that you wrote this e-mail, had you researched the question of whether Missouri's statute of limitations applied to the note and the loan?

(RUPERT) A: I had not.

(COUNSEL) Q: Had your -- had the associate working with you, Katherine Klingelhafer, researched it?

(RUPERT) A: No, I don't believe she had.

* * *

(COUNSEL) Q: **** If you had not researched -- well, did anyone at Frost -- what were you basing this statement: Missouri law applies to the statute of limitations? On what basis -- if you didn't do the research, did someone else?

* * *

(COUNSEL) Q: I'm just asking for the basis of your statement: Missouri law applies to the statute of limitations on the loan.

* * *

(RUPERT) A: **** I'm had not done any research because that was our agreement.

See Doc. 208 at p. 75, line 1 to p. 80, line 6.

Thus (as shown above) Defendant Rupert was advising Mr. Zell on July 14, 2011 that Missouri's statute of limitations applied to Mrs. Zell's loan or note and that Mr. Zell should therefore make this argument in Mrs. Zell's pleadings and briefs on the statute-of-limitations issue. Yet, during the trial Defendant Rupert testified that not until the appellate proceedings in *Mindlin v. Zell* did Mr. Zell ask Defendant Rupert to research the statute of limitations or did Defendant Rupert research this issue on his own initiative. Defendant Rupert then stated that he first sent Mr. Zell the results of his (Defendant Rupert's) statute-of-limitations research in an email dated January 4, 2012:

(COUNSEL) Q: All right. I would like to show you Plaintiff's Exhibit 63. This is the e-mail you've been referring to from you to me dated January 4th, 2012. Would you read the first paragraph?

(RUPERT) A: (Reading) The results of the choice of law research are not encouraging at all. Frankly, my opinion is that you need to seriously think about settling this case as the chances of Missouri law -- as the chances of having Missouri law apply seem very low. That said, I recognize that you were theories where your mother prevails under Ohio law, and this research would not affect those theories. ***

(COUNSEL) Q: Thank you. Do you remember writing this?

(RUPERT) A: Yes.

(COUNSEL) Q: This was not the first time you researched or you conducted, quote, from your e-mail, the choice of law research, was it?

(RUPERT) A: This was the first time that we had been given an opportunity to look at the issue in full. You had had specific limited questions as the briefing can come up in summary judgment stage, but this is the first time we had more of an opportunity to look at this, and we found the appropriate law.

See Doc. 208 at p. 73, line 7 to p. 74, line 4. *See also* Doc. 208 at p. 30, lines 22-24 (RUPERT: "[W]e were not asked specifically to research the statute of limitations issue that we were later asked to research that led to the January 4, 2012 e-mail.")

Later on in his testimony, Defendant Rupert admitted that "you [Mr. Zell] had asked me to research the 1954 case [of *Standard Agencies*] because you believed that the 1954 case would lead to the application of the Missouri statute of limitations. So I researched that." *See* Doc. 208 at p. 29, lines 15-18. And Defendant Rupert also admitted that, in Mrs. Zell's pleadings and briefs before the trial court in *Mindlin v. Zell*, "*Standard Agencies* was cited for the proposition that it would be Missouri's ten-year statute of limitations" that applied to Mrs. Zell's loan and note. *See* Doc. 208 at p. 31, lines 20-23.

Yet, at the same time, Defendant Rupert also claimed contradictorily that Mr. Zell had only asked him to research "that 1954 case [of *Standard Agencies*] *** [for the purpose of determining] whether Missouri law would apply substantively" (*see* Doc. 208 at p. 26, line 25 to p. 27, line 2) and, indeed, that "the 1954 case *** was about what substantive law would apply." *See* Doc. 208 at p. 74, lines 11-12. Defendant Rupert then added that his research of *Standard Agencies* revealed to him and Defendant Klingelhafer the more modern trend of using the Restatement's multiple-factors test. *See* Doc. 208 at p. 29, lines 18-20. But, once again, Defendant Rupert stated that their research on the Restatement was also limited to certain unstated substantive choice-of-law issues -- not procedural choice-of-law issues, such as the applicable statute of limitations. *See* Doc. 208 at p. 26, lines 13-16 and p. 30, lines 12-16.

b. The Division of Labor Between Mr. Zell & Frost Brown Todd

As can be seen from the above, Defendant Rupert repeatedly attempted to explain away his failure to have correctly advised Mrs. Zell (via Mr. Zell) during the trial-court proceedings in *Mindlin v. Zell* of the statute of limitations that would apply to her loan or note by stating that he (Defendant Rupert) was merely researching the questions asked of him by Mr. Zell. Defendant Rupert then claimed that he had limited the legal research that he did on Mrs. Zell's case in accordance with some kind of unwritten agreement that he had with Mrs. Zell.

For example, Defendant Rupert testified that he and Mr. Zell initially had a division of labor in which he (Defendant Rupert) was doing the primary work on the *Mindlin v. Zell* litigation. However, based on some proposals that Mr. Zell sent to him in an email dated June 24, 2011 (Plaintiff's Trial Exhibit P-256 and Defendants' Trial Exhibit D-16), their roles then reversed:

> (RUPERT) A: **** However, your role changed after you got the bill, which I believe there is an e-mail right around June 21st or maybe June 24th, where you proposed a different way of going forward where you would take the lead in all pleading practice. And if there was a trial, I would try the case, and that I was only to correct your obvious errors of law and do limited research as requested.
>
> * * *
>
> (COUNSEL) Q: So it's correct that prior to that time we had a division of labor in which you were doing the primary work on the case?
>
> (RUPERT) A: Only for a very short time. I came into the case in May **** You then got the bill and decided it was going to be too expensive to proceed this way, and you would take the lead going forward. As I said before, I would only do assignments as requested. And if there was an obvious error of law, I would attempt to correct that. And also my other role was to try to keep you from getting sanctioned.

See Doc. 208 at p. 48, line 19 to p. 49, line 15.

Next, Defendant Rupert testified that he had supposedly discussed his and Mr. Zell's new roles on the case with Mrs. Zell during a meeting among the three of them on July 1, 2011:

> So, again, we had a meeting shortly before this [i.e., before July 11, 2011] where I had your mother come in because I was concerned that she wasn't aware of what was going on. And she made clear that she had -- you were leading the case, and she was in full support of you.
>
> But at that meeting, we also discussed how to limit the amount of the bill. So, again, if there was a specific issue that you wanted researched, I would do that. But short of that, unless it was an obvious error or it was an issue where you might be sanctioned, we were not to do that. We were not to do any research.

See Doc. 208 at p. 10, lines 11-21.

Like most fabricated statements, the ones that Defendant Rupert made about the supposed agreement and the meeting where Mrs. Zell had supposedly consented to that agreement were very vague and, although Defendant Rupert repeated them at every opportunity, they never got any more detailed:

> [A]fter our meeting I believe on July 1 where we agreed that you would take the lead in the pleadings here, and my role such that there were times would be just to keep -- identify obvious errors of law and to do specific research and keep you from being sanctioned. That happened approximately July 1.

See Doc. 208 at p. 83, lines 12-17.

> I called your mother in to make sure that she was totally behind whatever things you were saying because I had questions about that. And she verified that that indeed was the case. This was the I believe the July 1st, 2011 meeting.

See Doc. 208 at p. 64, lines 17-21. It is not surprising that, when lying about what had supposedly transpired in a meeting in his office, Defendant Rupert would mistakenly refer to that meeting as a phone call.

During the Defendants' counsel's (Brian Goldwasser's) own direct examination of Defendant Rupert during the trial, Mr. Goldwasser had Defendant Rupert read an excerpt from Mr. Zell's email to Defendant Rupert of June 24, 2011 (Plaintiff's Trial Exhibit P-256 and Defendants' Trial Exhibit D-16) in which Mr. Zell had made his multi-proposals regarding a change in their respective roles. Yet, apparently knowing that none of these proposals had ever been formally accepted (and to avoid suborning perjury), Mr. Goldwasser refrained from asking Defendant Rupert ***any*** questions about them at all. *See* Doc. 208 at p. 100, line 25 to p. 102, line 5. However, Mr. Goldwasser did ask Defendant Rupert to explain what had occurred at Defendant Rupert's meeting with Mrs. Zell and Jonathan Zell on July 1, 2011:

(GOLDWASSER) Q:	Mr. Rupert, you just referred to this meeting of July 1. We've heard a little bit about it. Can you explain for us a little bit more as to why you wanted to meet with Mrs. Zell and what was discussed in that meeting?
(RUPERT) A:	Sure. Up to that meeting I had only had contact with Jonathan Zell. He was the counsel of record, but he was also the one providing all the facts. And I wanted to make sure that indeed his mother was involved in the case and was taking the same positions that Mr. Zell was telling me, particularly on settlement, because it seemed the case was close to settling and I wanted to make sure that indeed it was her decision about how to proceed with settlement as opposed to just Mr. Zell's.
(GOLDWASSER) Q:	And what was the response you received from that conference?
(RUPERT) A:	Mrs. Zell indicated that she had full confidence in Mr. Zell and he had full authority to act on her behalf.
(GOLDWASSER) Q:	And did you accept that statement from Mrs. Zell?
(RUPERT) A:	I did.

See Doc. 208 at p. 102, line 20 to p. 103, line 12.

As can be seen from the above, Defendant Rupert did not go nearly as far in his responses to Mr. Goldwasser's questions about the July 1, 2011 meeting as he did in his volunteered statements to the Plaintiff's counsel about it. For example, to the Plaintiff's counsel, Defendant Rupert implied that Mrs. Zell had consented to a situation where the Frost Brown Todd attorneys representing her "were not to do any research" or, at least, only the legal research that was necessary to correct "an obvious error" made by Mrs. Zell's son (a volunteer co-counsel).

In contrast Defendant Rupert told Mr. Goldwasser that, "particularly on settlement," "Mrs. Zell indicated that she had full confidence in Mr. Zell and he had full authority to act on her behalf." Thus, what Defendant Rupert relayed to Mr. Goldwasser sounded merely like the kind of authority that one gives to an agent. While some inconsistency in a witness' testimony might not

be unusual, what is unusual is when an experienced attorney like Mr. Goldwasser accepts the unhelpful testimony of a witness without even attempting to get the witness to repeat his more helpful testimony. Again, it appears that Mr. Goldwasser was trying to avoid suborning perjury.

However, Mr. Goldwasser then committed an equivalent sin when he not only argued Defendant Rupert's perjured testimony in his closing argument, but also greatly embellished it:

> With respect to Mr. Rupert, as we know, Your Honor, Mr. Rupert did not appear as counsel until May 2011. At that point in time, Mrs. Zell and Mr. Zell had insisted that he not do anything but look for glaring errors in Mr. Zell's work, and do what he can to avoid Mr. Zell from getting sanctioned as part of the motion to disqualify Mr. Zell as counsel in trial court.
>
> We know that on June 24, 2011, Mr. Zell put in writing that what -- that his mother's instructions were that Mr. Rupert was to do no writing. His only job was to look for glaring errors. And we know that a meeting took place where Mrs. Zell confirmed that directly to Mr. Rupert. *** His [Mr. Rupert's] job was to basically look over, to take out vitriolic statements by Mr. Zell, and to look for glaring errors in his work.

See Doc. 209 at p. 69, lines 4-20.

Mr. Goldwasser's statements -- such as "Mrs. Zell *** had insisted that he [Defendant Rupert] not do anything but look for glaring errors in Mr. Zell's work" and her "instructions were that Mr. Rupert was to do no writing" -- were not only wholly unsupported by Defendant Rupert's testimony or any of the other evidence of record. They were unmitigated and knowing lies.

3. Proving the Falsehoods On Which Judge Marbley's Decision Was Based

The idea that Mrs. Zell would have hired Frost Brown Todd to represent her in the *Mindlin v. Zell* litigation, racking up over $73,000 in attorneys' fees from Frost Brown Todd (on an $82,075 claim), yet then turn over virtually all responsibility for the legal sufficiency of her pleadings and briefs on the crucial statute-of-limitations issue to a son who had very-limited legal experience does not even pass the straight-face test.

Yet, this Court then based its Decision in large part on that very falsehood.

There are three reasons that we know the alleged agreement to transfer liability for the legal sufficiency of Mrs. Zell's case from FBT to Mr. Zell never existed. First, if such an agreement existed, Frost Brown Todd would have had some kind of written documentation of it. Preferably, this would be a signed agreement from Mrs. Zell. However, Frost Brown Todd never provided ***any*** written documentation -- either before or at the trial -- of any such agreement. Also, Frost Brown Todd did not provide any correspondence between Defendants Rupert and Dehner documenting this agreement or even any notes that either one of them would have written had there really been such an agreement. Thus, it is obvious that no such agreement ever existed.

Second, even the very email correspondence between Mr. Zell and Defendant Rupert on which Judge Marbley supposedly relied does not document any agreement, let alone an agreement in which Frost Brown Todd is relieved of any responsibility for malpractice. Mr. Zell's proposal contained several possibilities, including at least one that we know was not accepted. Defendant Rupert's response, while somewhat positive, did not specify which (if any) of those proposals he and Mr. Dehner had agreed to. From email correspondence between Defendant Rupert and Mr. Zell four days after the July 1, 2011 meeting in which Mrs. Zell had supposedly agreed to have Mr. Zell sign her pleadings (and be responsible for their legal sufficiency), it was apparent that neither Mr. Zell nor Defendant Rupert had even discussed this issue. When Mr. Zell sent an email to Defendant Rupert on July 5, 2011 asking which one of them should sign Mrs. Zell's upcoming summary-judgment motion, Defendant Rupert stated "***I think*** you should sign it and list me as 'of counsel'" (emphasis added). That is absolute proof that no change in roles between Mr. Zell and Defendant Rupert was agreed to, let alone discussed, at the July 1st meeting.

Finally, could all of this have simply been an oversight on the part of Frost Brown Todd (an "Am Law 200" law firm) and their two specialized legal-malpractice litigation attorneys (Brian Goldwasser and David Kamp)? That is, did Mr. Zell, an inexperienced and non-practicing

attorney representing himself, pull the wool over all of these highly-experienced and skilled litigators by hiding an agreement during the briefing of the *Third-Party Complaint* in which Mr. Zell had accepted responsibility for all legal malpractice? Would Mr. Zell or any reasonable person have even made such a disadvantageous agreement? Or isn't it more likely that, in the pre-trial stages of the instant case, the Defendants and their attorneys properly limited themselves to arguing the truth, an obstacle that they later dispensed with at the trial?

CONCLUSION

For all of the above reasons and pursuant to Fed. R. Civ. P. 52(a)(5), 52(a)(6), 52(b), 59(a)(1)(B), 59(a)(2), 59(e), and/or 60(b)(3). the Plaintiff respectfully requests a new trial, new findings of fact and conclusions of law, and/or relief from this Court's *Judgment in a Civil Case* dated April 21, 2017.

Respectfully submitted,

/s/ Jonathan R. Zell
Jonathan R. Zell (0036831)
5953 Rock Hill Road
Columbus, Ohio 43213-2127
(614) 864-2292
jonathan_zell@yahoo.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via both personal e-mail and this Court's electronic filing system (ECF) this 19th day of May, 2017, on:

David P. Kamp and Brian Goldwasser
White, Getgey & Meyer Co., L.P.A.
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
Counsel for Defendants

/s/ Jonathan R. Zell
Jonathan R. Zell (0036831)
Counsel for Plaintiff