No. 17-3534

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EILEEN L. ZELL
Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

PLAINTIFF-APPELLANT EILEEN L. ZELL'S REPLY BRIEF

Jonathan R. Zell
5953 Rock Hill Road
Columbus, Ohio 43213-2127
(614) 864-2292
jzell@justice-for-pro-ses.org
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER

INTRODUCTION

As was demonstrated in Plaintiff-Appellant Eileen Zell's ("Mrs. Zell's") Opening Brief, in making its findings of fact the district court uncritically adopted Appellees Jeffrey Rupert's and Katherine Klingelhafer's testimonies even though their testimonies were directly and expressly contracted by

1. The documentary evidence in the record;
2. The expert testimony of James Leickly; and
3. The district court's earlier findings in its decision dismissing Appellee Frost Brown Todd's ("FBT's") *Third-Party Complaint* against Mrs. Zell's son (the undersigned Jonathan Zell).

In addition, the district court's conclusions of law were equally erroneous.

Nothing in FBT's responsive brief could or did refute any of that. Instead, FBT fell back on merely repeating the district court's findings of fact and conclusions of law as if this Court did not exist to review (and correct) a lower court's decision.

Accordingly, once again Mrs. Zell will demonstrate below why this Court must reverse and remand the instant case for a new (jury) trial.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS

A. The District Court's Findings of "Fact"

Based on the testimonies of Appellees Rupert and Klingelhafer, the district court found:

- *Supposedly,* none of the FBT attorneys working on Mrs. Zell's underlying case of *Mindlin v. Zell* (the "Ohio action") had ever researched the ***statute of limitations*** applicable to Mrs. Zell's loan or promissory note (the "Note") during the entire trial-court proceedings in the Ohio action — let alone erroneously advised Mrs. Zell that Missouri's limitations period applied.

- *Supposedly*, beginning on 7/1/2011, Mrs. Zell's son (the under-signed Jonathan Zell) assumed all responsibility for conducting the legal research for Mrs. Zell's litigation in the Ohio action, and thereafter the FBT attorneys were supposed to do only the legal research specifically requested by Jonathan Zell ("Mr. Zell").

***Specifically, the district court held that, during the entire trial-court proceedings in the underlying case of* Mindlin v. Zell:**

"[T]here's no evidence that she [Ms. Klingelhafer] *** researched statute of limitations[.]"

"Mr. Zell asked and authorized Mr. Rupert to research only *Standard Agencies* [*v. Russell*], not procedural choice of law [i.e., the statute of limitations]."

Then how do you explain why, during the summary-judgment briefing period in early July 2011:

- Mr. Zell sent e-mails to Rupert, which Rupert then forwarded to Klingelhafer, asking for research on "the statute of limitations"?
- In return, Mr. Zell received research memos from both Klingelhafer and Rupert on "the statute of limitations"?
- FBT's billing statements contained several time entries for Klingelhafer stating "research on statute of limitations" and "Conference with J. Rupert re research on statute of limitations"?

And why did FBT admit in its *Responses to Mrs. Zell's Request for Admissions* that, during the trial-court proceedings in *Mindlin v. Zell*, FBT attorneys provided advice to Mrs. Zell on "whether or not the Ohio statute of limitations would apply"?

B. The FBT Attorneys' Perjury Was Obvious and Material

1. *Events Prior to the Trial*

One of the peculiarities of this case is that, besides being the undersigned counsel for Mrs. Zell, I am also Mrs. Zell's son. As such, I am intimately involved with the events that occurred in the instant case. This came about, first, when I served as an intermediary between my 89-year-old mother and the FBT attorneys in the Mindlin loan matter, which is the subject of this case.

Later, being a former journalist (and a non-practicing attorney), I worked together with the FBT attorneys by serving (in a volunteer capacity) as the principal writer — as opposed to legal researcher, which was always FBT's responsibility — on my mother's pleadings in the underlying case of *Mindlin v. Zell* (the "Ohio action"). At the time, I had zero trial experience. I also had no access to online legal research (that is, until the appellate-court proceedings in the Ohio action).

However, for the ten years preceding the Ohio action, I had ghost-written virtually all of my mother's correspondence with the Mindlin debtors. Since I alone was aware of the ten-year history of the loan, I thought I could save my mother some attorney's fees if I shared my

knowledge of the facts of the case with FBT by writing the first draft of my mother's pleadings incorporating FBT's legal research.

Initially, my mother was represented by experienced trial counsel in the instant case. However, when his attorney's fees threatened to far exceed the dollar value of the case, my mother discharged that attorney and (with my assistance) began representing herself *pro se*. What little litigation experience I had gained working at the side of the FBT attorneys in the Ohio action I then parlayed into ghostwriting my mother's pleadings in this case. However, after I was dismissed as a third-party defendant, the court allowed me to officially represent my mother.

I mention this because of another peculiarity. As a neophyte attorney, I'm no match for the FBT law firm, not to mention the specialized malpractice counsel defending FBT. Yet, FBT and its counsel would have you believe I pulled the wool over their eyes by ***successfully hiding*** — throughout the entire briefing of FBT's *Third-Party Complaint* against me (of which I won a dismissal) — two things. These were:

1. FBT and my mother (with my concurrence) had *supposedly* agreed that, if anyone were going to research the statute-of-limitations issue, it would be me and me alone; and

2. *Supposedly*, no FBT attorney had ever researched the statute of limitations applicable to my mother's claim during the entire trial-court proceedings in the Ohio action — let alone erroneously advised my mother that Missouri's limitations period applied.

Although you will notice the above two claims are identical to the previously-described findings of fact in the district court's decision after the trial, in its 12/23/2014 *Opinion and Order* dismissing the *Third-Party Complaint* the court stated the ***exact opposite***:

> Mr. Zell puts forth evidence to support the claim that "the FBT Defendants were the only ones who ***negligently advised*** the Plaintiff" regarding the applicable ***statute of limitations*** in Plaintiff's underlying action....
>
> On the ***statute of limitations*** issue, Mr. Zell presents evidence of correspondence between himself and the Defendants in which he questions ***Defendants' statute of limitations analysis*** and expresses doubt as to whether ***Defendants properly considered*** the issue. Moreover, Mr. Zell presents correspondence indicating that Plaintiff's decision to move forward with the underlying case in Ohio under the belief that the ***Missouri statute of limitations*** would apply was based on a review of ***Defendants' recommendation and reasoning***, as opposed to any independent research or investigation conducted by Plaintiff or by Mr. Zell.

RE 121 at 9 & 9 n.2, Page ID # 2689 (citations omitted)(emphasis added).

Obviously, I did not fool anyone. Moreover, until the trial, no one even questioned what had occurred. *See* RE 48-1, Page ID # 528-535 (my

original allegations) and RE 77-12, Page ID # 892 (FBT's original response to my allegations). But then, at the trial, FBT came up with a new (and false) story and, inexplicably, the court went along with it.

2. *Events During the Trial*

Appellee Shannah Morris was the first FBT witness to testify that neither she nor her associate (Aaron Bernay) had researched the statute of limitations applicable to my mother's claim in the Ohio action. As soon as I heard Morris' obviously-perjured testimony, I told Judge Marbley, "[W]e just won" this case:

> [W]e have emails …. [showing] it's not even true, what she's saying…. [H]owever, I love this testimony…. We have the research that she's claiming she didn't do, and we have the opinion that she's claiming she didn't have — make. So this is just — this witness is just in the Wild, Wild West. His [opposing counsel's] whole case just fell down…. I couldn't have scripted this witness — this — we just won[!]

Transcript (RE 218, Page ID # 5436-5437).

Later, Appellees Jeffrey Rupert and his associate (Katherine Klingelhafer) also falsely testified that they, too, had not researched the statute of limitations applicable to my mother's claim during the entire trial-court proceedings in the Ohio action.

Instead, Rupert testified that, based on a 7/1/2011 *oral* limited-representation agreement between my mother and FBT, I and I alone was responsible for researching the statute-of-limitations issue. Under this so-called agreement, other than specific research issues I might direct to FBT all responsibility for performing the legal research in the Ohio action was to be placed on my shoulders — even though FBT would continue to represent my mother in that litigation. That oral agreement simply ***never*** existed — not in part, not in whole, not at all. It was completely fabricated out of whole cloth.

Rule 1.2(c) of the Ohio Rules of Professional Conduct recommends that such a limited-representation agreement be put in writing:

> A lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing.

While putting the agreement in writing is not required, not doing so is the equivalent of a police officer deactivating his or her body-worn camera when involved in a use of deadly force. If one makes a conscious choice not to create a record, then that person should not be allowed to concoct a false story to fill in the blanks that he or she has created.

Second, as noted above, the service limitation should be "reasonable under the circumstances." Although Rule 1.2 makes this requirement explicit, it is also inherent in the attorney-client relationship. A lawyer is a fiduciary, who owes duties of candor, good faith, trust and care to a client. Had it even occurred (which it did ***not***), delegating all responsibility to me for performing the legal research in one of FBT's client's cases would not have been reasonable under the circumstances.

Moreover, commonsense alone would tell you that an "Am Law 200" law firm does not enter into a limited-representation agreement with a client without having some kind of written documentation about it in its files — at least a memo to the file, the FBT attorney's personal notes after the client meeting at which the agreement was supposedly made, an e-mail to one of the other attorneys at the firm who was also working on the client's case, or a follow-up e-mail or letter to the client (or to me). Yet, FBT could produce not one shred of evidence to document this supposed agreement.

I was shell-shocked when Rupert first made the outrageous claim that, as of 7/1/2011, I had agreed to be solely responsible for all of the legal research in my mother's litigation. I then tried to demonstrate how

nonsensical this claim was, that it was untrue, and to get Rupert to retract it:

MR. ZELL: ... [W]ould you read this paragraph [from Mr. Zell's 7/8/2011 e-mail to Rupert] ...?

RUPERT: "Do you think FBT can let me see one of its sample MSJs with the names blacked out, if desired, so I can look at its boilerplate law section."

MR. ZELL: Isn't it true that I didn't even know what the law was, the standard for motion for summary judgment, and here I am asking you to give me the law section?

RUPERT: I don't know what you knew or what you didn't know....

***

MR. ZELL: Well, this would be the standard for a motion for summary judgment which I now know is there a question of fact. Do you agree if I didn't even know the standard for a motion for summary judgment, I didn't know very much about briefing this issue?

***

Do you think that someone who sends you this request should be given primary authority for your client's litigation?

Transcript (RE 219, Page ID # 5557, line 13 to # 5558, line 8.

MR. ZELL: Isn't it true that I sent you several e-mails stating that I had limited or no research capability?

RUPERT: .... I think you may have sent some down, but then you did get research capabilities at some point....

MR. ZELL: Isn't it true that prior to the appeal, I sent you several e-mails saying, I have no ... [online] legal research capability, I would like you to focus on that?

RUPERT: I don't recall exactly what you said, but the understanding was that you were going to do all the drafting and that if you had a limited research issue, I would have someone do that .... So you were the one that decided what areas should be researched....

***

MR. ZELL: [Displaying a 7/11/2011 e-mail chain between Mr. Zell and Rupert, which Rupert then forwarded the same day to Klingelhafer] Would you read point number 3. That would be a quotation from your e-mail.

RUPERT: .... [I]t says: ["]Do you want me to have someone research the points I raised in my prior e-mail?["]

MR. ZELL: And what was my response right underneath that question that you had asked me?

RUPERT: It's on the screen, obviously. You've typed "yes."

MR. ZELL: Okay. So you testified a moment ago that I told you what to research. Here this is saying that ... you suggested what you should research. So do you want to take back your first statement?

***

RUPERT: No....

***

MR. ZELL: Now, this very same e-mail [chain], would you please read the last paragraph out loud [from Mr. Zell's 7/11/2011 e-mail to Rupert (*see* RE 135-4, Page ID # 3304)].

RUPERT: .... It says: ["]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 settlement.["] [As previously stated, Rupert forwarded this e-mail to Klingelhafer on 7/11/2011.]

***

MR. ZELL: In response to this request, ["]Please research the statute of limitations issue and let me know if Ohio law applies,["] did you do that?

RUPERT: I researched the issue that you identified, which was the 1954 case [*Standard Agencies v. Russell*, 135 N.E.2d 896] about whether Ohio law applied. That's what you asked me to do and that's what we did.

MR. ZELL: Not in this e-mail, correct?

RUPERT: .... We had a meeting shortly before this [on 7/1/2011] where I had your mother come in....

But at that meeting, we also discussed .... 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.

***

MR. ZELL: Mr. Rupert, please answer my question. My question is: In response to this e-mail, not asking you to research one particular case, but asking you do 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: As I told you, no, I did not because you told me to focus on the 1954 case [*Standard Agencies*].

MR. ZELL: .... 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: Yes..... If there was a specific issue, then we would research that.

And again, you hadn't identified any....

***

MR. ZELL: You never told me that Ohio law applied during the trial phase, correct?

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

MR. ZELL: Except in this e-mail that I'm bringing back to the ELMO. You previously read the last paragraph [where Mr. Zell asks Rupert to research the statute of limitations issue and to let Mr. Zell know if Ohio law applies].

Transcript (RE 219, Page ID # 5510, line 22 to # 5521, line 12).

MR. ZELL: .... This is an e-mail from you to me dated July 14th, 2011.... Would you read starting with the second paragraph, please?

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

MR. ZELL: 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: Sure.... [I]f you're asking did I research this ...? No, we did not.

***

MR. ZELL: .... 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: I had not.

MR. ZELL: Had your — had the associate working with you, Katherine Klingelhafer, researched it?

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

***

MR. ZELL: .... [On] 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?

***

RUPERT: .... I'm had not done any research because that was our agreement. If you have a specific research issue, I would look at it.

Transcript (RE 219, Page ID # 5582, line 1 to # 5587, line 7).

Do you see how crazy Rupert's testimony is? He (falsely) claimed at the trial that the only legal research he was supposed to perform after 7/1/2011 was research I specifically asked him to do. However, after that date I had specifically asked Rupert to research whether Ohio's or Missouri's statute of limitations applied to my mother's loan. In response, Rupert (erroneously) told me that Missouri's limitations period applied. But then, at the trial, Rupert claimed that somehow his research error was my fault. This does not even pass the "red-face" test.

This same thing happened again with regard to the research on tolling the statute of limitations. Having no access to online legal research, I happened to peruse a copy of one of my old law-school study guides, called *Emanuel Law Outlines: Contracts*. There, I found some information on 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 I e-mailed excerpts from *Emanuel* to Rupert, asking Rupert specifically to research their applicability to my mother's case. As I explained in my mother's Opening Brief (Doc. 40 at 78-79):

> For example, e-mails dated 8/8-11/2011 show MR. ZELL telling RUPERT he found some possible arguments they could use, for the summary-judgment briefing on the statute-of-limitations issue, from a 20-year-old *Emanuel* study guide from law school. MR. ZELL then adds: "[S]omeone at FBT will need to review what I wrote for legal sufficiency." (Appendix, p. 182.) Two of the arguments MR. ZELL found were "***detrimental reliance*** AND ***promissory estoppel***" (original emphasis). (Appendix, p. 185.)
>
> In response, RUPERT wrote on 8/9/2011: "I am having someone research the two points you identified" (Appendix, p. 174) and again on 8/10/2011: "I will have an associate research these [additional] issues" (Appendix, p. 185). Then, on 8/11/2011, RUPERT wrote: "Below is the results of the research." (Appendix, p. 190.) RUPERT's e-mail contained a legal memo written by KLINGELHAFER to which RUPERT had added his own legal analysis.

What happened next was noted in my mother's *Reply Brief in Support of the Motion for a New Trial* (RE 217, Page ID # 5269-5270):

> Mr. Zell incorporated Defendant Klingelhafer's research into a draft of Mrs. Zell's *Amended Reply Brief*, which he emailed to Defendant Rupert. After making various suggestions and revising Mr. Zell's drafts, Defendant Rupert approved the final version of Mrs. Zell's *Amended Reply Brief*, which Defendant Rupert then filed in court. Email chains [*see* Appendix, pps. 174-201] consisting of Mr. Zell's emails together with Defendant Rupert's and Klingelhafer's email replies — all dated from August 7 to 11, 2011 — show that these emails were all shared among the participants....

> Unfortunately, as the Tenth District Court of Appeals later found, Mrs. Zell's *Amended Reply Brief* had mixed up the terms "promissory estoppel" and "equitable estoppel." Therefore, the appellate court refused to use equitable estoppel to find that the statute of limitations on Mrs. Zell's note had been tolled. That, of course, was clearly the fault of Defendants Klingelhafer and Rupert, who had improperly researched the theories of detrimental reliance and promissory estoppel and then had approved and filed a brief containing the fatal error.

Although Mr. Leickly could not opine on the existence or nonexistence of the *oral* limited-representation agreement, Mr. Leickly did spend several hours on the witness stand contradicting the FBT attorneys' false characterizations of the evidence. First, Mr. Leickly showed the FBT attorneys had indeed researched the statute-of-limitations issue (including tolling) both before and after 7/1/2011. *See, e.g., Transcript*, RE 221, Page ID # 5969-5983 (regarding Bernay and Morris); and RE 220, Page ID # 5719-5948 (regarding Rupert and Klingelhafer).

Second, as will be discussed below, Mr. Leickly also demonstrated that the FBT attorneys had researched the statute-of-limitations issue (including tolling) ***incorrectly***. That proves (1) the FBT attorneys' perjury concerning the statute-of-limitations research they performed; (2) the malpractice their flawed research represented; and (3) their motive and willingness to fabricate the existence of a supposed oral

agreement designed to ***immunize themselves from that malpractice.***

Judge Richard Posner's words in overturning the district court's findings of fact in *Hutchens v. Chicago Board of Education*, No. 13-3648 (7th Cir. Mar. 24, 2015), would apply equally well to the instant case:

> Remarkably in light of our summary of the record, the district judge said that the honesty of the defendants' ... [testimony] could not reasonably be questioned. In fact, as our summary of the evidence reveals, there is considerable doubt about the honesty of ... the main witnesses for the defense....
>
> The judge did not remark the surprising fact that the defendants failed to submit a single document that might have corroborated any of the[ir] testimony....

This is precisely why FBT and their experienced malpractice counsel are opposing my request for oral argument. *See* Appellees' Brief, Doc. 43 at 1. With the Truth against them, they fear giving this Court an opportunity to ask them the three questions I stated on pages 6-7 of my mother's Opening Brief that "FBT *cannot* answer."

As expected, FBT did not even attempt to answer any of those three questions in its responsive brief. Yet, on those three questions this entire appeal hinges. So I implore this Court to ask FBT's counsel those questions at the oral argument. If he can give an adequate answer to any *one* of those questions, my mother will instantly drop this appeal.

II. THE DISTRICT COURT'S CONCLUSIONS OF LAW WERE FLAWED

A. The FBT Attorneys' "Choice-of-Law" Error

In his testimony, Mrs. Zell's expert witness (James Leickly) did more than merely demonstrate that the FBT attorneys' research during the trial-court proceedings in the Ohio action had indeed focused on the procedural-law issue of the *statute of limitations* applicable to my mother's loan — rather than on any substantive choice-of-law issue. Mr. Leickly also demonstrated that the FBT attorneys had researched the *statute-of-limitations* issue inadequately and then erroneously advised my mother (via me) on that issue.

Specifically, Mr. Leickly testified that (1) Morris and her associate (Aaron Bernay) had misinterpreted the case of *Standard Agencies*; (2) Rupert and his associate (Katherine Klingelhafer) had misinterpreted the *Restatement of the Law 2d, Conflict of Laws*; (3) both the Morris/ Bernay and the Rupert/Klingelhafer teams had then erroneously informed my mother (via me) that the court in the Ohio action would apply Missouri's unexpired 10-year — rather than Ohio's expired six-year — statute of limitations to my mother's Note; (4) this was because none of the FBT attorneys knew about the rule of *lex loci* (the law of the

forum) under which the court in the Ohio action would apply Ohio's statute of limitations to my mother's Note, while a court in Missouri would apply Missouri's limitations period to the Note; and (5) these errors were below the standard of care.

MR. ZELL: .... I'm going to show you Plaintiff's Exhibit P128 [*see* RE 132-2, Page ID # 2958] from the binder. Have you seen this email?

It is from me to [FBT attorney] Shannah Morris [on] July 1st, 2011.

.... [I]f you look at the second paragraph, ... [it says] "I have already incorporated into our MSJ" -- which stands for Motion for Summary Judgment -- "your excellent legal research and writing on the issue of the statute of limitations...."

Does that email substantiate your testimony that the main issue in the Motion for Summary Judgment briefing was statute of limitations?

***

LEICKLY: .... Yes. That's — that's one of many pieces ...[.] I've never seen anything that would lead me to the substantive research argument.

Everything I've seen — and this is directly on point — everything I've seen leads me to believe that the research, the issue in the case, the obvious issue in the case, they [FBT] knew what it was. Whether they [FBT] addressed it right or not, they knew what the issue was. It was a statute of limitations, Your Honor.

***

MR. ZELL: .... 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: I saw some of that in late 2010 from Shannah Morris.

***

MR. ZELL: You saw research on the statute of limitations under her signature?

LEICKLY: Yeah, right.

***

MR. ZELL: And are you familiar with this email from me to Mr. Rupert

***

LEICKLY: Yeah, this looks familiar.

MR. ZELL: All right. And here under legal research [it says], "Section II A of the memorandum in support of our MSJ, 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***." (Emphasis added.)

LEICKLY: I see that.

***

MR. ZELL: And did you recognize any of the research on the statute of limitations issue that Ms. Morris did under her signature in the Frost Motion for Summary Judgment briefings?

LEICKLY: It was consistent.

MR. ZELL: It was in there, you are saying?

LEICKLY: Yeah.

MR. ZELL: Okay. Was — was there one particular case that was the basis for the statute of limitations argument?

LEICKLY: Well, the case, Your Honor, that it seems that the flag was getting wrapped around was called *Standard Agencies*.

***

MR. ZELL: Would you please explain the *Standard Agencies* case.

LEICKLY: .... It's substantive law. It's a true — a true choice of law, conflict of law type of analysis... about ... a contract[.] [T]he substantive law to interpret that contract will be in the state ... where the contract was executed....

It wasn't a *lex loci* case. It didn't have to do with the law of the forum, which is what governs statute of limitations, but it was a — it's an excellent case if you ... are trying to determine ... substantive law.... But it doesn't apply to procedure.

***

MR. ZELL: I'm going to show you Plaintiff's Exhibit P122 from the binder. This is an email .... from Mr. Rupert to me. Once again, this is [dated] January 4, 2012.

Are you familiar with this email?

LEICKLY: Yes. This is a very important email.

MR. ZELL: Okay. It says here "the results of the choice of law research." Do you know what is meant by those terms and would you tell us?

LEICKLY: Yeah. This — this is evidence, to me, when I read it, that, Your Honor, Mr. Rupert, when he talks about choice of law, he's talking about the statute of limitations issue.

***

MR. ZELL: ... [I]n this email chain [dated 7/14/2011, *see* Appendix, pp. 206-209)], 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 [which asked how we could disprove "that Ohio's statute of limitations applies as the other side has argued in its MSJ"], can you ... tell me in a few words what is the issue that I'm asking about.

LEICKLY: Statute of limitations.

MR. ZELL: Thank you. If you look at my third — will you read number three out loud, third question.

LEICKLY: Third question. "How sure are you that Missouri law applies to the note?"

MR. ZELL: And if you have an opinion, what is the subject of that question also?

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

MR. ZELL: Thank you. Now, let's look at —

LEICKLY: It can't be anything else.

MR. ZELL: .... Now, let's look at Mr. Rupert's answers to ... questions one and questions three.... [C]an you read those out loud?

LEICKLY: "As to your specific questions, number one, you are correct that you must show that there is a material question of fact

> for the MSJ to be denied. However, the facts surrounding whether the ***Ohio SOL — statute of limitations*** — applies is only material if you argue that Missouri law should apply." That's number one. [Emphasis added.]
>
> Number three, "On the question of whether Missouri law applies, that will be based on the facts and will be influenced how courts have decided similar factual patterns.... [Y]ou 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."

MR. ZELL: What is the subject of ... [answer] one?

LEICKLY: Statute of limitations.

MR. ZELL: What is the subject of ... answer three?

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

***

MR. ZELL: .... The factors that he's talking about in his answer, ... were those argued in Mrs. Zell's summary judgment briefings?

LEICKLY: I believe they were .... from the *Restatement on Conflicts of Law*.

... [T]hat doesn't apply in this case....

MR. ZELL: .... I would now like to show you Plaintiff's Exhibit P120. This [e-mail chain (*see* Appendix, pp. 203-205)] is ... dated the same date. July 14th, 2011.

.... Here is an email from Mr. Rupert to me.

"I had an associate do some limited research on whether Missouri law would apply."

.... "Recent cases apply the *Restatement's* factor-driven test elements listed below," is that the *Restatement* that you were talking about before?

LEICKLY: Yes.

MR. ZELL: And what — what is the issue on that?

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

MR. ZELL: Okay. And if we go below that, here is the research memo from Katherine Klingelhafer to Mr. Rupert that he's referring to. Are you familiar with this?

LEICKLY: Yes.

MR. ZELL: And under 2, there's an A, B, C, D, E. What are those?

LEICKLY: Those are — those are factors. Yeah. These are factors that comes out of the — come out of the *Restatement of Law (Second) Conflict of Laws* section, and these are your typical factors when you are doing — dealing with conflicts of law, not statute of limitations.

***

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.

MR. ZELL: So what does — what — to what legal issue do these *Restatement* factors apply?

LEICKLY: They are looking — they are looking at statute of limitations.

***

MR. ZELL: .... And why doesn't that ... apply in this case, ... those *Restatement* factors?

LEICKLY: Based on *Mindlin v. Zell*, Tenth District case, ... no, they don't apply to this case.

MR. ZELL: Why not?

LEICKLY: Because what the Tenth District said in *Mindlin v. Zell* was it was filed in Ohio, that Mrs. Zell had taken the jurisdiction, had chosen to enforce her note in Ohio, therefore, she uses the procedural law of Ohio, the statute of limitations of Ohio, so there's a six-year statute, and the Court in *Mindlin v. Zell* said she's, therefore, out in terms of the statute of limitations.

MR. ZELL: So this *lex loci* concept you are talking about, was that argued by the Frost lawyers in the trial court below?

LEICKLY: They argued standard conflicts of law....

***

MR. ZELL: .... [W]as there anything in the record that would tell you whether they [the FBT attorneys representing Mrs. Zell] knew what *lex loci* was or not?...

***

LEICKLY: .... [N]o, I don't see any evidence that they understood that there's procedural law, there's substantive law....

***

... [P]rocedural law [says] ... it's the ... forum court's prerogative to determine when its doors are open ... in terms of the statute of limitations....

***

.... It's procedure, and, therefore, you use the law of the forum. Statute of limitations is the law of the forum.

MR. ZELL: What you've been talking about, did that have any legal ramifications to the term "malpractice" and, if so, would you explain to the Court.

***

LEICKLY: .... [T]hey are doing conflicts of law research to try to make sure statute of limitations of Missouri, which is the favorable one, can get applied elsewhere.

So they are trying to take a procedural law, statute of limitations that's favorable, and look to see, hey, can I apply it to other places, not realizing that statute of limitations applies where the forum is.

***

MR. ZELL: In your report, you gave an opinion about the advice that Frost gave Mrs. Zell through me on the statute of limitations. What was the opinion you gave?

LEICKLY: My opinion was, Your Honor, that I believe that to a reasonable degree of certainty that Frost's advice to Mrs. Zell was below the standard of care.

See Transcript, RE 220, Page ID # 5917, line 5 to Page ID # 5948, line 15.

B. The FBT Attorneys' "Alternative-Arguments" Error

As previously stated, throughout the entire trial-court proceedings in the Ohio action, none of FBT attorneys knew that Ohio's statute of limitations governed my mother's loan under the principle of *lex loci*. Therefore, both in advising my mother to stay in the Ohio action (Bernay, Morris, and Dehner) and in opposing the statute-of-limitations defense in the debtors' summary-judgment motion (Klingelhafer, Rupert, and Dehner), the FBT attorneys argued that Missouri's limitations period applied. According to Mr. Leickly, this fell below the standard of care. But so did something else that the FBT attorneys did not do — they did not consider the possibility that they might be wrong.

Mr. Leickly testified a reasonable attorney would have also considered the possibility of error and looked for "ways to toll it [the applicable statute of limitations]" or "ways to extend it," especially given the fact the debtors had asked for and received continuous extensions on repayment of the loan. *See Transcript* (RE 221, Page ID # 5968, lines 4-6).

However, the only person who brought up the issue of trying to toll the statute of limitations was me, when I asked Rupert to research the concepts of detrimental reliance and promissory estoppel, which I had

found mentioned in an old law-school study guide (*Emanuel*), during the very end of the summary-judgment briefing period. *See* pp. 18-19, *supra*.[1]

When we later found out during the appellate-court proceedings that Ohio's statute of limitations did indeed apply to my mother's loan, the alternative or tolling arguments were the only thing we had left to rely on. Rupert then informed me that my mother could win her appeal based on those alternative arguments. The alternative arguments were that Ohio's statute of limitations had been tolled or re-set, primarily due to the repeated extensions on repayment that the debtors had requested and received. When conducting the appellate oral argument for my mother, Dehner focused on these tolling-type arguments.

Yet, unbeknownst to any of us (and as the appellate court in the Ohio action later held), none of the alternative arguments advanced by FBT had been properly pled. For example, in arguing that Ohio's

---

[1] I did not consult my old law-school study guide because I had been tasked with performing the legal research on my mother's case. I did so because I wanted to leave no stone unturned in trying to ensure my mother prevailed in the Ohio action. This is another reason I would have never released FBT from its responsibility to conduct my mother's legal research. Anyway, I specifically asked Rupert to research the tolling arguments.

limitations period was tolled as a result of the extensions on repayment, FBT's attorneys had erroneously cited "promissory estoppel" instead of "equitable estoppel." *See Mem. Decision, Mindlin v. Zell,* No. 11AP-983, ¶9 (Ohio App. Dec. 31, 2012) (RE 48-4, Page ID # 556-563). The appellate court then held that this error invalidated the tolling argument. *Id.*

MR. ZELL: ... [Whom] among Mrs. Zell's co-counsel first raised the issue of tolling Ohio's statute of limitations on the note?

LEICKLY: I believe I saw it in the record that you [Mr. Zell] had brought that up.

***

MR. ZELL: Do you remember the authority I cited for that?

LEICKLY: .... I thought you cited to some sort of law school outline study guide.

***

MR. ZELL: Do you remember the name — the terms used for the tolling arguments that I suggested to the Frost lawyers?

LEICKLY: There was — the one I remember mostly was detrimental reliance being used as a potential reason to toll the statute.

***

But what you were conveying was the concept of reliance, equitable, which is appropriate here. Equitable estoppel, detrimental reliance is what was being conveyed....

***

MR. ZELL: Mr. Leickly, I'd like to identify for the record Plaintiff's Exhibit P279. This is Defendant's Amended Reply Brief to Plaintiffs' Memorandum Contra Defendant's motion for Summary Judgment in the *Mindlin* case below....

***

To your knowledge, did Mrs. Zell's lawyers make an estoppel argument of any kind in this pleading?

***

LEICKLY: .... [F]rom what the Tenth District said is that it was misnamed, that it was argued but it was argued under promissory estoppel....

MR. ZELL: What was argued under promissory estoppel?

LEICKLY: Equitable estoppel —

***

MR. ZELL: How does detrimental reliance relate to equitable estoppel?

LEICKLY: Detrimental reliance is an element. It's an element of both of them.

MR. ZELL: If you know, do the Ohio courts use the terms today, detrimental reliance, for tolling?

LEICKLY: They typically use the word equitable estoppel.

MR. ZELL: Thank you.

LEICKLY: Detrimental reliance is a portion of that, is part of the definition.

***

MR. ZELL: Did the Tenth District say that the elements of equitable estoppel were not met?

LEICKLY: No.

MR. ZELL: Did the Tenth District say the words equitable estoppel were not used?

LEICKLY: Yes.

***

MR. ZELL: Based on ... the affidavit ... [of Mrs. Zell], did Mrs. Zell's attorney attempt to supply the required factual basis to establish an equitable estoppel argument?

LEICKLY: They're supplying facts here that could buttress an equitable estoppel argument.

Transcript (RE 221, Page ID # 6025, line 21 to # 6036, line 3).

MR. ZELL: All right. Thank you. Mr. Leickly, with regard to what the appellate court called the failure to make a tolling argument based on equitable estoppel and instead using the term "promissory estoppel," do you have an opinion to a reasonable degree of certainty as to whether or not the authors of that trial brief committed malpractice?

***

LEICKLY: Yes, I do.

MR. ZELL: And what is that?

LEICKLY: .... Because equitable estoppel, given the lengthy history of the loan and the relationship between parties and all the conversations that went back and forth and all the forbearance and forgiveness that Mrs. Zell put forward, it was a very strong equitable estoppel defense to the statute of limitations. It was very strong.

So, yes, I believe that was beneath the prevailing standard of care. I believe that it caused damages to Mrs. Zell in the amounts that I indicated earlier.

***

MR. ZELL: And who was responsible — who committed that malpractice, in your opinion?

LEICKLY: Frost Brown.

***

I believe — I believe the defendants in this action, which would have been the Frost Brown attorneys, including Mr. Dehner, Ms. Klingelhafer, and Mr. Rupert, they would have been responsible for the failure to preserve and effectively argue equitable estoppel in the court below.

Transcript (RE 221, Page ID # 6124, line 0 to # 6126, line 14).

C. Mrs. Zell's Losses Were Proximately Caused by FBT's Malpractice

Now that we have determined that the FBT attorneys breached the standard of care by giving my mother (via me) flawed advice on the statute-of-limitations issue — including tolling — the next two steps are to see if this erroneous legal advice proximately caused my mother to suffer any loss and, if so, whether any of the FBT attorneys can be held liable for that loss.

In Mrs. Zell's Opening Brief, I previously explained why Bernay, Morris, Klingelhafer, Rupert and Dehner should be held liable for the choice-of-law error (*see* Doc 40 at 38-63 and 69-74) and also why Klingelhafer, Rupert, and Dehner should be held liable for the alternative-arguments error. *See* Doc 40 at 74-79. That discussion will not be repeated here. Instead, the focus of this section will be on the proximate causation for my mother's losses.

Our expert witness — James Leickly — testified about Dehner's receipt of a 1/8/2009 e-mail (RE 48-1, Page ID # 519-523) from FBT attorney Jeffrey Rosenstiel. In this e-mail, Rosenstiel had pointed out that my mother's Note would be time-barred in Ohio under Ohio's six-year statute of limitations. *See id.*, Page ID # 5994, lines 3-13.

Rosenstiel then suggested that someone research whether Missouri (where the Note was made and where the debtors lived) had a longer, unexpired limitations period.

Based on Rosenstiel's suggestion, Appellee Bozell (who is licensed in Missouri) researched the issue and reported in a 2/4/2009 e-mail to Appellee Laub that Missouri's 10-year statute of limitations had not yet expired on my mother's Note. Laub then forwarded Bozell's e-mail to me together with her (Laub's) own 2/5/2009 e-mail, stating that my mother had until 12/31/2011 in which to file suit against the debtors. *See* RE 50-2, Page ID # 609-610.

However, on 10/12/2010, the debtors preemptively sued my mother on the Note in Ohio. Mr. Leickly termed this the "race to the courthouse," which he said my mother had lost without even knowing there was a race. This is because the FBT attorneys, whose duty it was to tell my mother, did not know there was a race, either. *See Transcript* (RE 220, Page ID # 5939-5942; RE 221, Page ID # 6048, line 17 to # 6050, line 9).

By now, everyone has since learned that, under the principle of *lex loci* (the law of the forum), a court will use its own statute of limitations (unless a court in a more appropriate venue has a shorter limitations

period). This meant that, had my mother sued the debtors in a Missouri court, the Missouri court would have applied Missouri's 10-year statute of limitations to the Note. However, it also meant that the court in the Ohio action was going to apply Ohio's already-expired limitations period.

Unfortunately, throughout the entire trial-court proceedings in the underlying Ohio action, none of my mother's attorneys knew this about *lex loci*. As a result, even after my mother was sued, Morris (using Bernay's flawed *Standard Agencies* research) advised my mother to remain in the Ohio action and to file a counterclaim to recover the money on her unpaid loan.

Based on Morris' erroneous advice, my mother retained FBT to defend her in the Ohio action and turned down the debtors' offers of settlement. However, even if Morris' statute-of-limitations analysis had been correct, following Morris' advice made no economic sense because the debtors were offering to pay in settlement only about $30,000 less than the amount they owed and FBT ended up billing my mother more than $70,000 for its *losing* efforts on her behalf.

When Rupert replaced Morris as lead counsel, I sent Rupert a 7/11/2011 e-mail (RE 135-4, Page ID # 3304), asking him to re-research

the statute-of-limitations issue and then stating:

> [I]f your research suggests that we might have a statute of limitations problem, i.e., that Ohio law applies, please let me know and my mother will then reconsider the idea of settlement.

However, using Klingelhafer's flawed research from the *Restatement of the Law on Conflicts*, Rupert assured my mother (via me) that Missouri's unexpired 10-year statute of limitations applied to my mother's loan. Indeed, even after the trial court in the Ohio action had ruled against my mother, Rupert continued to give my mother this same erroneous advice. So, once again, my mother refused the debtors' settlement offers.

Even during the appellate-court proceedings in the Ohio action, the debtors continued to offer to pay my mother in settlement the lower amount that the debtors had claimed to owe her in their *Complaint*. But my mother again turned down that offer. However, as my mother testified credibly at the trial, she would have accepted the debtors' settlement offer rather than incur bills from FBT to defend against the debtors' lawsuit had my mother been advised that there was a good chance she might lose the case. *See Testimony* (RE 222, Page ID # 6259, lines 6-14).

Thus, the ***key*** to the instant appeal is the fact that, in reliance on the FBT attorneys' erroneous advice, my mother turned down large settlement offers from the debtors throughout both the trial- and appellate-court proceedings.

This is key because Judge Marbley held in his *Findings of Fact and Conclusions of Law* that the "race to the courthouse" was not merely determinative of whether my mother would collect on her Note in the Ohio action, but also whether FBT's alleged legal malpractice had proximately caused my mother's damages. *See Transcript* (RE 222, Page ID # 6357, lines 15-24). In other words, Judge Marbley concluded that the loss that my mother suffered in the Ohio action was not caused by the malpractice of the FBT attorneys. Instead, he held that her loss was due to the debtors having prevailed over my mother in the race to the courthouse. For this reason, Judge Marbley held that that my mother could prove no "element of damages proximately caused by the alleged breach." *See id.,* Page ID # 6357, lines 15-16.

However, as I had explained first in Mrs. Zell's *Motion for Leave to File a Motion for Summary Judgment* (RE 160, Page ID # 3719-3722) and later in my closing argument at the trial (*see Transcript*, RE 222,

Page ID 6339, lines 1-22), Judge Marbley himself had previously acknowledged in *Scherer v. Wiles*, No. 2:12-CV-1101 (S.D. Ohio, July 24, 2015), that a plaintiff in a legal-malpractice action need *not* prove that it would have prevailed in the underlying action if it can show *instead* that, "but for the attorney's negligence, the plaintiff would be in a *more favorable position*" (emphasis added). In other words, a plaintiff need only "show it sustained some loss *regardless of any eventual outcome*" of the underlying case. *Id.* (citing *Vahila v. Hall*, 77 Ohio St.3d 421, 428, 674 N.E.2d 1164, 1169 (1997)) (emphasis added). And the loss of a settlement offer has been repeatedly held to be a sufficient loss.

Yet, inexplicably, Judge Marbley ignored his own precedent.

III. THE FACTUAL MISSTATEMENTS IN FBT'S BRIEF

In the little space that remains, I would like to correct some of the purposeful factual misstatements — contained in the "Statement of the Case" section of FBT's brief (Doc. 43) — that have not already been rebutted above. (Page numbers refer to those in FBT's brief.)

- Prior to the appellate-court proceedings in the Ohio action, FBT's attorneys did ***not*** tell my mother or me that the Note was governed by Ohio's statute of limitations or that the Note had "expired" (p. 26). On the contrary, Rosenstiel told us that, if the Note were subject to Ohio's limitations period (which he did not know), then it would be time-barred. Later, all of the other FBT attorneys told us that the Note would be governed by Missouri's unexpired limitations period even if the Note were adjudicated by an Ohio court.
- Thus, neither my mother nor I knew that my mother needed to sue the debtors in Missouri to have Missouri's statute of limitations apply. For example, I sent an e-mail to FBT on 10/16/2010 asking: If the Ohio action is dismissed for improper venue, in which state (Florida or Missouri) "should my mother file suit against the debtors?" *See* RE 50-2, Page ID # 614. That question was never

even answered.

- Bozell recommended that my mother retain Missouri counsel ***only*** to learn if Missouri's 10-year limitation period could be extended for partial payments, which my mother did not need to do (p. 17). *See* RE 50-2, Page ID # 609-610.
- My mother was never advised "to immediately pursue counsel in Missouri" (p. 24). Each time FBT suggested retaining Missouri counsel to research some aspect of Missouri law, FBT then obviated that need by having its own Missouri-licensed attorney do the research.
- While Rosenstiel did write a memo generally warning about the effects of missing a statute of limitations, subsequent FBT attorneys persuaded my mother that, in her case, there was no need for any hurry because her deadline — based on Missouri's limitations period — was still several years away (pp. 24-25).
- I didn't ask Morris to misrepresent my role as "of counsel." Instead, I told Morris I never knew what "of counsel" meant. Now that I knew, I wanted to explain my previous ignorance to the court and then relinquish that position (p. 18). *See* RE 132-2, Page ID # 2956.

CONCLUSION AND PRAYER FOR RELIEF

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

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

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

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

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

Respectfully submitted,

/s/ Jonathan R. Zell
Jonathan R. Zell
5953 Rock Hill Road
Columbus, Ohio 43213-2127
(614) 864-2292
jzell@justice-for-pro-ses.org
Attorney for Plaintiff-Appellant

CERTIFICATE OF BAR MEMBERSHIP

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

CERTIFICATE OF COMPLIANCE

I hereby certify to that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 28A(c). The preceding statement was made in reliance on the word-count utility in the Microsoft Word 2010 software program that was used to prepare this brief, consistent with Fed. R. App. P. 32(g)(1).

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

This brief is virus-free.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2018, I electronically filed the foregoing *Plaintiff-Appellant's Reply Brief* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, causing notice of such filing to be served on the following registered CM/ECF participants in this case:

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-Appellees

/s/ Jonathan R. Zell
Jonathan R. Zell
5953 Rock Hill Road
Columbus, Ohio 43213-2127
(614) 864-2292
jzell@justice-for-pro-ses.org
Attorney for Plaintiff-Appellant