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 REPLY BRIEF

IN SUPPORT OF PLAINTIFF'S MOTION FOR

AMENDED OR ADDITIONAL FINDINGS UNDER FED. R. CIV. P. 52(a)(5), 52(a)(6), AND 52(b);

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

RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(3)

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INTRODUCTION

A trial is supposed to be a search for the Truth. However, the trial in the instant case was a search for its obverse. And, what one searches for, one will inevitably find.

Throughout the Plaintiff's *Motion for a New Trial, Etc*. (Doc. 211) and this present reply brief -- as well as during the trial itself -- the undersigned repeatedly characterized the Frost Brown Todd (FBT) attorney-defendants' and witnesses' testimonies as being "obviously" perjured and accused the Defendant Frost Brown Todd law firm and Defendant FBT attorneys of having based their entire defense on those obvious perjuries. One implication of this is that anyone possessing even a passing familiarity with this case would have surely recognized the falsity of the FBT defendants' and witnesses' testimonies. Another implication is that such a prominent law firm as Frost Brown Todd would never risk its reputation, and its attorneys would never risk their law licenses, by committing such a serious offense as perjury and in such a way that it would be so obvious to all -- that is, unless they had some reason to believe that they would get away with it.

Nonetheless, for the purposes of this present motion only, the undersigned will give Judge Marbley the benefit of the doubt, allowing for the possibility that he was actually fooled into believing the FBT attorneys' false testimonies rather than simply conclude that the Judge favored an "Am Law 200" law firm and its attorneys over the interests of their client. True, the five-day trial witnessed a spurious, unremitting, and unprecedented attack by Judge Marbley on the undersigned's character in an apparent attempt to bolster the Judge's future findings in this case, which might otherwise seem unsupportable. *See, e.g.,* Doc. 209 at 111-112. But a futile attempt to use false character assassination to refute objective facts can and will be ignored.

Accordingly, none of the allegations of bad intent or other misconduct cited in this reply brief is meant to apply to Judge Marbley. Thus, to the extent that some of the allegations herein might (due to inartful drafting) appear to suggest a bad intent on the part of Judge Marbley in

making his erroneous *Findings of Fact and Conclusions of Law* (Doc. 206), what is meant is that those findings of fact and conclusions of law were poisoned by the misconduct of the FBT attorneys and the Defendants' counsel. Any inferences to the contrary are hereby expressly disclaimed.

ISSUES

I. Were this Court's credibility determinations or findings of fact clearly erroneous?
II. Did the Defendant FBT attorneys and/or other FBT attorney-witnesses testify falsely?
III. Did these false testimonies affect this Court's *Judgment*?
IV. Assuming that Judge Marbley was unaware of the Defendants' false testimonies, was the Plaintiff's counsel taken by surprise and thereby unable to meet these false testimonies?

SUMMARY OF THE ARGUMENT

I. Although Judge Marbley stated in his *Findings of Facts and Conclusions of Law* (Doc. 206) that he had found Defendant Katherine Klingelhafer's testimony to be credible (*see* Doc. 206 at p. 5, lines 24-25), Judge Marbley did not state whether he had found the testimonies of Defendant Jeffrey Rupert or of the Plaintiff's son -- the undersigned Jonathan Zell ("Mr. Zell") -- to be credible, too. However, based on everything else in the *Findings of Facts and Conclusions of Law* as well as the Court's *Judgment* (Doc. 200), it can be inferred that Judge Marbley found Defendant Rupert's testimony to be credible -- but ***not*** Mr. Zell's testimony.

If so, then Judge Marbley's credibility determinations were clearly erroneous. This was because Jonathan Zell's testimony was supported by the parties' extensive email correspondence and the other documentary evidence in the Record, while Defendants Klingelhafer's and Rupert's testimonies were directly and completely contradicted by this same correspondence and evidence. Even the Plaintiff's expert (James Leickly) confirmed the falsity of Defendants Klingelhafer's and Rupert's testimonies. Indeed, the falsity of their testimonies was so obvious that, during the trial, the Defendants never attempted to rebut Mr. Leickly's accusations -- even with the Defendants' own expert witness. Finally, while the Defendants and the Plaintiff's son are both attorneys (and, thus, generally expected to be honest), Judge Marbley's finding that the testimonies of the former

were more credible than that of the latter ignored the strong incentive that the Defendants had to lie and, thereby, hide their legal malpractice. Thus, the conclusion is compelled that either (1) ***some way, somehow, somebody*** fooled Judge Marbley or (2) Judge Marbley's credibility determinations and findings of fact were themselves ***not credible*** and, therefore, clearly erroneous.

II. Besides Defendants Klingelhafer and Rupert, FBT attorney-witnesses Shannah Morris and Aaron Bernay also testified falsely. As was documented in the Plaintiff's *Motion for a New Trial, Etc*., all four of these present and former FBT attorneys' seemingly-coached, blatant, wholesale, and obvious perjuries at the trial were contradicted by and inconsistent with the Defendants' prior pleadings and briefs, this Court's prior order, and the voluminous documentary evidence in the Record. In addition, the Plaintiff's expert (Mr. Leickly) also testified to the falsity of Ms. Morris' and Mr. Bernay's testimonies -- which the Defendants did not attempt to rebut at the trial, either.

Yet, despite the numerous allegations of perjury against Defendant Klingelhafer, Defendant Rupert, Ms. Morris and Mr. Bernay that the Plaintiff had made in her *Motion for a New Trial, Etc*., in response the Defendants did not even attempt to argue in their *Memorandum in Opposition* (Doc. 215) that these FBT attorney-defendants and witnesses had testified truthfully. That should be a ***red flag*** to this Court. Given the very obvious nature of the FBT defendants' and witnesses' perjurious testimonies, this was clearly an attempt by the Defendants' counsel to avoid a charge of suborning that perjury. Instead, in their *Memorandum in Opposition* the Defendants cited a few bits and pieces of mostly anonymous "evidence." Then, they simply relied on Judge Marbley's stated and unstated credibility determinations. However, that begs the question, which is whether Judge Marbley's credibility determinations were themselves credible or otherwise erroneous.

III. The false testimonies of Defendant Klingelhafer, Defendant Rupert, as well as FBT attorney-witnesses Shannah Morris and Aaron Bernay most certainly affected this Court's *Judgment*. As previously stated, regardless of whether or not Judge Marbley made an express

credibility determination for each defendant and witness in his *Findings of Fact and Conclusions of Law*, it is apparent that Judge Marbley ***uncritically accepted all*** of the FBT defendants' and witnesses' testimonies. In particular, Judge Marbley incorporated into the findings of fact on which this Court's *Judgment* was based Defendants Rupert's and Klingelhafer's false testimonies concerning (1) the nature of the legal research that they had or had not conducted during their representation of Mrs. Zell in the *Mindlin v. Zell* litigation and (2) the role that they played in that representation vis-à-vis Mrs. Zell's son and the undersigned counsel (Mr. Zell).

IV. The Plaintiff's counsel (Mr. Zell) was taken by surprise when the Frost Brown Todd defendants' and witnesses' false testimonies were given. For example, the Plaintiff's counsel complained to Judge Marbley at a sidebar during the trial that the FBT attorney-defendants and witnesses (except for Defendant Joseph Dehner) had sandbagged the Plaintiff by raising new issues for the very first time through obviously-perjured and coached testimonies, which testimonies were completely contradicted by the defendants' and witnesses' email correspondence (often with Mr. Zell himself). Although the court reporters have not yet transcribed most of this Court's sidebars, it is the undersigned's recollection that Judge Marbley immediately (and, thus, quite prematurely) announced as a finding of fact during that same sidebar that the FBT attorney-defendants and witnesses had ***not*** committed perjury. Also, when the Plaintiff's counsel had asked Judge Marbley during another sidebar to allow him to recall Defendant Rupert to the witness stand to demonstrate the perjured nature of Defendant Rupert's previous testimony, Judge Marbley refused.

As a result, to the extent that Judge Marbley was unaware of the FBT defendants' and witnesses' false testimonies, thereby requiring the Plaintiff's counsel to demonstrate their falsity to the Court, the Plaintiff's counsel was apparently unable to do so. For, otherwise, Judge Marbley would not have incorporated the FBT defendants' and witnesses' false testimonies wholesale into his *Findings of Fact and Conclusions of Law* or ruled in favor of the Defendants as the Judge did.

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

- On July 5, 2011, the Mindlins (the makers of Mrs. Zell's unpaid promissory note) filed a *Motion for Summary Judgment* (Plaintiff's Trial Exhibit P-276) based on Ohio's expired statute of limitations in the underlying case of *Mindlin v. Zell*.
- On July 5, 2011, referring to the Mindlins' motion, Jonathan Zell sent an email to Defendant Rupert stating: "[I]f your research suggests that we might have a statute-of-limitations problem (i.e., that Ohio law applies), please let me know and my mother [i.e., Mrs. Zell] will then reconsider the idea of a settlement." *See* Plain-tiff's Trial Exhibit E (*a.k.a*., P-12) at 2.
- On July 11, 2011, Defendant Rupert sent an email (Plaintiff's Trial Exhibit P-116) to Defendant Klingelhafer, attaching Mr. Zell's email.
- On July 13, 2011, Defendant Klingelhafer sent Defendant Rupert a research memo containing Mr. Zell's requested statute-of-limitations research on Mrs. Zell's unpaid promissory note, which Defendant Rupert then forwarded to Mr. Zell. *See* Plaintiff's Trial Exhibits G (*a.k.a*., P-13 or P-118) at 2-3, P-49 at 3-4, P-13 at 2-4, and P-120 at 4-5.

- On July 14, 2011, Mr. Zell sent an email [Plaintiff's Trial Exhibit 121 at 3-4] to Defendant Rupert stating: "So, my questions for you are: (1) For us merely to defeat the other sides' MSJ [i.e., Motion for Summary Judgment], is the only thing that we must do is to show that there are material questions of fact that must first be determined before the Court can find that Ohio's statute of limitations applies as the other side has argued in its MSJ? (2) If so, then does my Memo in Opposition to the other side's MSJ do that? (3) How sure are you that Missouri law applies to the Note?"
- On August 9 and 10, 2011, Mr. Zell sent emails to Defendant Rupert asking Defendant Rupert to research various alternative or tolling arguments under Ohio law applicable to Mrs. Zell's note. *See* Plaintiff's Trial Exhibits P-59 at 9-12 & 14-17, P-90 at 1-6 & P-92 at 1-4.
- On August 9, 2011, Defendant Rupert forwarded to Mr. Zell a research memo that Defendant Klingelhafer had just prepared on tolling "the statute of limitations on a note." *See* Plaintiff's Trial Exhibit P-59 at 13-14.
- On August 11, 2011, Defendant Rupert forwarded to Mr. Zell a second research memo that Defendant Klingelhafer had just prepared on "debts barred by the statute of limitations." *See* Plaintiff's Trial Exhibits P-59 at 2-7, P-91, and P-93 at 2-7.
- Mr. Zell then used Defendant Klingelhafer's three research memos to prepare (for Defendant Rupert's review) initial drafts of Mrs. Zell's memorandum in opposition to the Mindlins' summary-judgment motion, Mrs. Zell's own summary-judgment motion, and Mrs. Zell's reply brief in support of her summary-judgment motion -- all of which focused on the statute of limitations applicable to Mrs. Zell's note.

- Defendant Rupert then made extensive comments on Mr. Zell's drafts. *See, e.g.*, Plaintiff's Trial Exhibits P-47 at 4-7; P-121 at 1-2; P-59 at 1, 12, and 17-20; P-90 at 6-9; P-91 at 1; P-92 at 5; and P-93 at 1.
- Mr. Zell then repeatedly revised the drafts of Mrs. Zell's pleading and briefs based on Defendant Rupert's comments. *See, e.g.,* P-47 at 7 (re "4th draft of MSJ").
- Finally, Defendant Rupert approved and filed the final version of Mrs. Zell's *Memorandum in Opposition to the Mindlins' Motion for Summary Judgment* (Plaintiff's Trial Exhibit P-278), Mrs. Zell's own *Motion for Summary Judgment* (Plaintiff's Trial Exhibit P-277), and Mrs. Zell's *Reply Brief in Support of the Motion for Summary Judgment* (Plaintiff's Trial Exhibit P-279).

Yet, Defendants Rupert and Klingelhafer both testified that they had ***never*** been asked to research the statute of limitations applicable to Mrs. Zell's note, and that they had therefore ***never*** researched the statute-of-limitations issue during the ***entire*** trial-court proceedings in *Mindlin v. Zell.* Incredibly, Defendant Klingelhafer testified that she did not ***even know*** that her research memos were going to be used to address a statute-of-limitations issue!

Based on Defendants Rupert's and Klingelhafer's obviously-false testimony, Judge Marbley stated in in his *Findings of Fact and Conclusions of Law* (Doc. 206) that:

> Next, Ms. Klingelhafer. Per her testimony, which the Court found credible, she completed limited research assignments for Mr. 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.
>
> * * *
>
> Mr. Zell asked and authorized Mr. Rupert to research only *Standard Agencies*, not procedural choice of law. *** 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.

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

Judge Marbley incorporated Defendants Rupert's and Klingelhafer's obvious lies into the Judge's *Findings of Fact and Conclusions of Law* despite the email evidence showing:

- Defendants Rupert and Klingelhafer were representing Mrs. Zell during the trial-court proceedings in the *Mindlin v. Zell* litigation, and ***procedural choice of law (e.g., the statute-of-limitations issue)*** was the ***sole*** determining factor in whether or not Mrs. Zell would prevail in that litigation.
- There was ***no*** ambiguity in the plain meaning of the words in Mr. Zell's July 5, 2011 email to Defendant Rupert, which Defendant Rupert then forwarded to Defendant Klingelhafer, stating that "if your research suggests that we might have a statute-of-limitations problem (i.e., that Ohio law applies), please let me know."
- Defendant Klingelhafer prepared and sent three research memos on the statute of limitations applicable to Mrs. Zell's note to Defendant Rupert, who then forwarded those research memos to Mr. Zell.
- Mr. Zell sent several emails to Defendant Rupert discussing the statute-of-limitations issue that was raised in the Mindlins' summary-judgment motion -- and, thus, had to be

rebutted in Mrs. Zell's response to that motion -- including one that asked "[h]ow sure" Defendant Rupert was that Missouri's limitations period applied to Mrs. Zell's note.

- Based on Defendant Klingelhafer's research memos, Mr. Zell prepared (for Defendant Rupert's review) initial drafts of Mrs. Zell's pleading and briefs on the statute of limitations applicable to Mrs. Zell's note.
- Defendant Rupert then revised, approved, and filed final drafts of those pleadings and briefs on the statute-of-limitations issue in court in the *Mindlin* litigation.

Even the Plaintiff's expert (James Leickly) confirmed (1) the ***falsity*** of Defendants Klingelhafer's and Rupert's testimonies that they had not researched the statute of limitations or erroneously advised Mrs. Zell (via Jonathan Zell) on the limitations period applicable to Mrs. Zell's note; and (2) the ***truthfulness*** of Mr. Zell's testimony that these defendants had indeed done both of those things -- and that they even did them ***in writing*** via emails to Mr. Zell.

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

> The only question of research [for Mrs. Zell's response to the Mindlin's summary-judgment motion] -- the only thing you would need to research would be that statute of limitations ****
>
> * * *
>
> *** I saw a ton of time [in Mrs. Zell's bills from Frost Brown Todd] that's called, quote, conflict of laws, choice of laws **** They [the FBT attorneys] are not looking at the enforceability of the note [i.e., substantive law]. They are looking at the statute of limitations.
>
> * * *
>
> There was no need to evaluate the substantive law of either Missouri or Ohio.***
>
> 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.
>
> * * *
>
> 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 ****

Doc. 204 at p. 14, line 20 to p. 17, line 15.

> They fell below the standard of care, Your Honor, in the sense that they were the attorneys responsible from Frost Brown on this particular case at this particular point in time.
>
> * * *
>
> **** [T]hey were the people that were doing the research, sending the emails related to the research, looking at the stuff.
>
> From the emails that I had seen, they were vetting. There were discussions going on about what arguments would be made in this summary judgment category, and their job, it seems to me, I mean, certainly they charged -- they charged Mrs. Zell for this responsibility, and whether or not they charged them, they owed her this responsibility ****

Doc. 205 at p. 10, line to p. 11, line 6.

Indeed, the falsity of Defendants Klingelhafer's and Rupert's testimonies was so obvious that, during the trial, the Defendants never attempted to rebut Mr. Leickly's opinions -- even with the Defendants' own expert witness.

ARGUMENT

I. Defendants' *Memorandum in Opposition* to the Plaintiff's *Motion for a New Trial, Etc.*

A. The Defendants Misstated the Legal Basis of the Plaintiff's Motion

From the Defendants' *Memorandum in Opposition* (Doc. 215) to the Plaintiff's *Motion for a New Trial, Etc*. (Doc. 211), it is clear that the Defendants have fundamentally misunderstood the Plaintiff's motion.

To begin with, the Defendants accurately described the factual allegations underlying the Plaintiff's motion for a new trial as follows:

> Plaintiff's entire motion for a new trial is premised upon an argument that Defendants Rupert and Klingelhafer, as well as non-defendants Morris, Bernay and Laub, were coached by counsel to perjure themselves. Plaintiff's sole contention is that the Court based its decisions on "such obviously false factual allegations[.]"

Doc. 215 at 1.

But then the Defendants continued by ***misstating*** the legal basis of the Plaintiff's motion:

> [T]he Court weighed the credibility of those who testified, including Defendants Rupert and Klingelhafer, and properly concluded that not only was the testimony credible but that Plaintiff failed to meet her burden on any of her asserted claims.
>
> * * *
>
> Plaintiff devotes most of her motion to arguing the facts alleged in her amended complaint, which is not and was not evidence during the trial…. [I]f Plaintiff and her counsel believed that the allegations set forth in the amended complaint established a claim, then it was incumbent on Plaintiff's counsel to present such evidence at trial and to prove her case through the submission of exhibits and the examination of witnesses to elicit testimony. Without such evidence, it is improper to expand consideration of extrinsic material in determining whether or not to grant a new trial….
>
> Plaintiff also devotes a substantial portion of her motion to other documents which were not admitted in to evidence and cannot be considered. For example, Plaintiff refers to Plaintiff's Trial Exhibits 134, 279, 280, 283, and 281. A review of the Court's exhibit and witness list [Doc. 199] reflects reference to such exhibits and testimony associated thereto, but no

> admission of such exhibits in to evidence. Therefore, consideration of the exhibits and quotes from such exhibits as a basis for further evaluation would be inappropriate.

Doc. 215 at 2 and 5-6.

As shown above, the Defendants have pointed out that the "Plaintiff's entire motion for a new trial is premised upon an argument that Defendants Rupert and Klingelhafer, as well as non-defendants Morris, Bernay and Laub, were coached by counsel to perjure themselves." Thus, as the Defendants acknowledges, the ***primary*** grounds for the Plaintiff's *Motion for a New Trial, Etc*. is Fed. R. Civ. P. 60(b)(3), which covers false testimony. Rule 60(b)(3) provides as follows:

> (b) **Grounds for Relief from a Final Judgment, Order, or Proceeding**. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

Moreover, in *Gordon v. U.S.*, 178 F.2d 896, 900 (6th Cir. 1949), *certiorari denied*, 339 U.S. 935, the Sixth Circuit set forth the test for when false testimony will justify a new trial:

> A new trial should be granted where [1] the court is reasonably well satisfied that 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.

See United States v. Willis, 257 F.3d 636, 642-643 (6th Cir. 2001).

Accordingly, the Plaintiff agrees with the Defendants that, in a post-trial motion, a party may not "re-argue a case" or "relitigate old matters." *See* Doc. 215 at 7. However, that is ***not*** what the Plaintiff is doing through her Rule 60(b)(3) motion. The Plaintiff also agrees that, generally, a party may not "raise arguments or present evidence that could have been [but were not] raised prior to the entry of judgment." *Id.* However, Rule 60(b)(3) provides an ***exception*** to that

general principle. Specifically, Rule 60(b)(3) allows a party to raise new arguments and to present new evidence showing that a court's final judgment was procured through "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by the opposing party"; and a party even has up to one year after the entry of the judgment to do so. *See* Fed. R. Civ. P. 60 (b)(3) and (c)(1). So that is ***precisely*** what the Plaintiff has done through her Rule 60(b)(3) motion.

To merit a new trial due to perjury, a party must meet the four-part test set forth in *Gordon*. Nowhere in that test does it say (as the Defendants have erroneously asserted) that: "[I]t is improper to expand consideration of extrinsic material in determining whether or not to grant a new trial[.]" *See* Doc. 215 at 5. Furthermore, Rule 60(b)(3) ***expressly*** permits a party to present any and all evidence -- whether "intrinsic or extrinsic." Thus, the Plaintiff was permitted to present ***new*** evidence in her 60(b)(3) motion showing that (1) the testimony given by a material witness at the trial was false; (2) without the false testimony, the fact finder might have reached a different conclusion; (3) the Plaintiff's counsel was taken by surprise when the false testimony was given; and (4) the Plaintiff's counsel was unable to meet or disprove the false testimony at trial.

In this sense, the requirements of Rule 60(b)(3) differ from those of Rule 60(b)(2), which only permits a party to present "newly discovered evidence that, with reasonable diligence, could not have been discovered[.]" However, the fact that courts often grant motions for new trials based on both 60(b)(2) and 60(b)(3) proves that neither Rule bars new evidence. *See, e.g., Abrahamsen v. Trans-State Exp., Inc.*, 92 F.3d 425, 428 (6th Cir. 1996). Also, when a party claims in a Rule 60(b)(3) motion that "[due to] surprise when the false testimony was given, … [he or she] was unable to meet it," *see Gordon v. U.S.*, 178 F.2d at 900, it is obvious that the party is allowed to present ***new*** evidence showing the falsity of that testimony.

Accordingly, to demonstrate the falsity of the Frost Brown Todd defendants' and witnesses' testimonies, the Plaintiff's *Motion for a New Trial, Etc*. quoted the parties' previous

pleadings and briefs in this case as well as this Court's prior decision although those documents were not offered into evidence at trial. As previously stated, the Plaintiff's primary purpose in quoting those documents was not to relitigate the merits of the Plaintiff's case. Instead, it was to demonstrate that certain issues had been previously raised and, in some instances, decided by this Court; and that, through their perjured testimonies at trial, the FBT defendants and witnesses were attempting to rewrite the past four-year history of this case by contradicting everything that the parties and the Court previously knew about it.

For example, in her *Motion for a New Trial, Etc*., the Plaintiff quoted emails that Defendants Rupert and Klingelhafer had sent or received that contradicted their testimonies. Although many of those emails were admitted into evidence at the trial, some of them were not. Furthermore, as the Defendants pointed out in their *Memorandum in Opposition*, the Plaintiff chose to present the vast majority of those emails by quoting the Plaintiff's *Complaint* in this case (which, in turn, had quoted the emails) because that was the most expeditious manner in which to do so. However, since there is no requirement that the documents used to demonstrate a party's perjury must have been entered into evidence at the trial, it was permissible for the Plaintiff to have presented quotations from those emails through her *Complaint*.

Moreover, since the Plaintiff's *Complaint* was a pleading filed in the instant case, this Court was permitted to take judicial notice of it, which Judge Marbley actually did by repeatedly citing the *Complaint* in his *Findings of Fact and Conclusions of Law*. *See, e.g.*, Doc. 206 at p. 10, line 11 and p. 13, line 6. Similarly, in their *Memorandum in Opposition*, the Defendants also criticized the Plaintiff for having cited in her motion exhibits P-279, P-280, P-283, and P-284 from the Plaintiff's Trial Exhibit binders submitted to this Court because those exhibits were not recorded in the Court's "Exhibit and Witness List" (Doc. 199) as having been entered into evidence at the trial. However, since P-279 and P-280 were legal briefs filed in *Mindlin v. Zell*,

while P-283 and P-284 were court decisions issued in *Mindlin v. Zell*, this Court was also able to take judicial notice of those court records, too.

In any event, the Defendants' criticism was disingenuous. For, as the Defendants well knew, this Court's "Exhibit and Witness List" (*see* Doc. 199 at 7-8) was in error in that it failed to reflect the fact that a number of the Plaintiff's trial exhibits had been admitted into evidence at the trial by agreement of the parties' counsel and this Court. *See* Doc. 205 at p. 51, line 22 to p. 57, line 18. Accordingly, contemporaneously with this present reply brief, the Plaintiff is filing a *Motion to Correct the Trial Record*, asking that the Court's "Exhibit and Witness List" be corrected in accordance with that agreement. Finally, although Plaintiff's Trial Exhibit P-284 was listed in one part of this Court's "Exhibit and Witness List" as not having been admitted into evidence, in another part it was correctly listed as having been admitted. *See* Doc. 199 at 6.

When the Defendants complained that the Plaintiff's *Motion for a New Trial, Etc*. had presented evidence that was included in the Plaintiff's Trial Exhibit binders, but was not offered into evidence at the trial, the Defendants once again revealed that they have misunderstood the legal basis of the Plaintiff's motion. As the Defendants accurately noted, the Plaintiff's counsel had before him during the trial -- in the Plaintiff's own Exhibit binders -- evidence showing that the Frost Brown Todd defendants and witnesses had perjured themselves on the witness stand. Yet, the Plaintiff's counsel then failed to present some of this evidence at the trial. However, the obvious explanation for this lapse is that the Plaintiff's counsel "was taken by surprise when the false testimony was given, and [for that reason] was unable to meet it." *See Gordon v. U.S.*, 178 F.2d at 900. This, of course, is the very basis for the Plaintiff's Rule 60(b)(3) motion and, if proven, would satisfy the Sixth Circuit's test for granting a new trial as set forth in *Gordon.*

The only other possible explanation for this lapse is that the additional evidence did not need to be admitted because the falsity of the FBT defendants' and witnesses' testimonies had

already been sufficiently demonstrated at the trial. However, this explanation implies that Judge Marbley knew that the FBT attorneys had testified falsely, but that the Judge nevertheless based his findings of fact on those false testimonies anyway. For obvious reasons, the undersigned has chosen not to focus the Plaintiff's *Motion for a New Trial, Etc*. too closely on this possibility, saving it instead for the Plaintiff's future appeal. But, if that is what truly occurred in this case, then the Plaintiff is also entitled to a new trial and/or altering or amending this Court's *Judgment* based on a clear error of law and a need to prevent manifest injustice pursuant to Fed. R. Civ. P. 59(a)(1)(B), 59(a)(2), and 59(e); as well as to amended or additional findings based on this Court's clearly-erroneous credibility determinations and findings of fact pursuant to Fed. R. Civ. P. 52(a)(5), 52(a)(6), and 52(b). While subsidiary to the primary basis of the Plaintiff's *Motion for a New Trial, Etc*., these other Rules and grounds were also cited in that motion.

B. The Defendants' Non-Response to the Plaintiff's Allegations of Perjury

Despite the numerous allegations of perjury against Defendant Klingelhafer, Defendant Rupert, Ms. Morris and Mr. Bernay that the Plaintiff had made in her *Motion for a New Trial, Etc*., in response the Defendants did not even attempt to argue in their *Memorandum in Opposition* (Doc. 215) that these FBT attorney-defendants and witnesses had testified truthfully. That should be a ***red flag*** to this Court. Given the very obvious nature of the FBT defendants' and witnesses' perjurious testimonies, this was clearly an attempt by the Defendants' counsel to avoid a charge of suborning that perjury.

Instead, in their *Memorandum in Opposition* the Defendants cited a few bits and pieces of mostly anonymous "evidence," consisting of the following:

- Paraphrasing a small aspect of Mr. Zell's testimony. *See* Doc. 215 at 3 ("Jonathan Zell admitted that he defined the role that he had requested Mr. Rupert per-form in the representation of Plaintiff. That role was to edit Jonathan Zell's work.").

- Quoting a small part of one of Mr. Zell's emails. *See* Doc. 215 at 3-4 ("Jonathan Zell *** requested on June 24, 2011 that *** Mr. Rupert would 'merely correct the OBVIOUS and/or SERIOUS DEFICIENCIES in those [Mrs. Zell's] pleadings' and **** Mr. Zell went on to state '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.'").
- Making a bald and vague assertion without any source. *See* Doc. 215 at 4 ("The content of the email was further confirmed in a meeting that took place July 1, 2011 in which Mrs. Zell advised that it was her desire to proceed in the manner outlined by Mr. Zell.").
- Cryptically referring to some anonymous "evidence." *See* Doc. 215 at 4 ("The evidence supported a finding that Mr. Zell severely restricted Mr. Rupert's research.").

However, mostly the Defendants simply relied on this Court's credibility finding regarding Defendant Klingelhafer, stating: "As to Defendant Katie Klingelhafer [but ***not*** as to Defendant Jeffrey Rupert], the Court determined that her testimony was credible." *See* Doc. 215 at 3. Yet, Defendant Rupert's testimony was the one on which this Court's *Judgment* ultimately rested. Also, relying on any of this Court's credibility determinations begs the question, which is whether this Court's credibility determinations were ***themselves credible*** or otherwise erroneous.

Because the Defendants did not even attempt to argue in their *Memorandum in Opposition* that the FBT defendants and witnesses had testified truthfully, but instead relied upon Judge Marbley's express and implied credibility determinations to this effect, this present reply brief will restate the evidence below in an attempt to remove all doubt as to the falsity of the FBT attorneys' testimonies.

II. The Defendants' and this Court's Joint Attempt to Rewrite History

A. Material Facts: *The Four-Year History of this Case Prior to the Trial*

During the pretrial proceedings in the instant case -- specifically, the dismissal with prejudice of the Defendants' *Third-Party Complaint* against Jonathan Zell -- the parties previously litigated, and this Court previously decided, the very same issues that were raised in the bench trial held in this case on April 10-14, 2017. These issues were: (1) the nature of the legal research that the Frost Brown Todd attorneys conducted during their representation of Mrs. Zell in the underlying case of *Mindlin v. Zell* ("the Ohio Action"); and (2) the role that Mrs. Zell's son (Jonathan Zell) played in Mrs. Zell's representation vis-à-vis the Frost Brown Todd attorneys.

1. The Legal Research Conducted by the Frost Brown Todd Attorneys

With regard to the first issue, Mrs. Zell explained in both her original and amended complaints that she had retained the Frost Brown Todd law firm to advise her on how to collect on a $90,000 promissory note (which Mrs. Zell had received from the Mindlins in exchange for a loan in that same amount) and then to represent Mrs. Zell in the *Mindlin v. Zell* litigation involving that note. *See* ¶¶ 14-15 of *Complaint* (Doc. 2 at 5) & ¶¶ 14-15 of *Amended Complaint* (Doc. 117 at 5).

As further described in ¶¶ 74-76 of both the original and amended complaints, a series of Frost Brown Todd attorneys had (up through and including the end of the trial-court proceedings in *Mindlin v. Zell*) erroneously advised Mrs. Zell that Missouri's unexpired -- rather than Ohio's already-expired -- statute of limitations applied to her note:

> 74. *** [F]rom early 2009 until 7/12/2011, the Defendants advised MRS. ZELL that a negotiable instrument, such as a promissory note, was subject to the statute of limitations of the place where the note was made. This advice was erroneous and, on 7/13/2011, the Defendants finally admitted this error to MRS. ZELL.
>
> 75. From 7/13/2011 to 1/3/2012, the Defendants advised MRS. ZELL that a negotiable instrument, such as a promissory note, was subject to the statute of limitations of the state that would be determined by application of the factor-driven test found in *Restatement of the Law 2d, Conflict of Laws* Section

188 at 575. This advice was also erroneous and, on 1/4/2012 [during the appeal proceedings before the Ohio Tenth District Court of Appeals], the Defendants finally admitted to MRS. ZELL this error, too.

76. As a result, from early 2009 to 1/3/2012, the Defendants erroneously advised MRS. ZELL that the $90,000 Promissory Note that she had received from the debtors was subject to Missouri's ten-year, rather than Ohio's six-year, statute of limitations; that the statute of limitations governing her Promissory Note had not expired and would not expire until 12/31/2011; that even a court sitting in Ohio should find that her Promissory Note would not expire until 12/31/2011; that, specifically in the Ohio Action, the Franklin County court should find that her Promissory Note would not expire until 12/31/2011; and, therefore, that there was no need for MRS. ZELL to object to the venue or jurisdiction of the court in the Ohio Action, or to try to get the venue of the case changed, or to file suit in another state (such as Missouri) in order to avoid having the court in the Ohio Action apply Ohio's statute of limitations and/or find that the applicable statute of limitations governing her Promissory Note had expired.

See ¶¶ 74-76 of *Complaint* (Doc. 2 at 20-21) and ¶¶ 14-15 of *Amended Complaint* (Doc. 117 at 25-26).

Finally, as Mrs. Zell noted in both her original and amended complaints, the FBT attorneys who had erroneously advised Mrs. Zell (via her son, Mr. Zell) that Missouri's unexpired -- rather than Ohio's already-expired -- statute of limitations applied to her note included Shannah Morris, Defendant Jeffrey Rupert, and Defendant Katherine Klingelhafer:

104. On 11/16/2010, ATTORNEY MORRIS sent Mr. Zell an e-mail [Plaintiff's Trial Exhibit P-240] stating that, in her opinion, opposing counsel [for the Mindlins] 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).

* * *

123. On 7/13/2011, ATTORNEY RUPERT sent Mr. Zell an e-mail [Plaintiff's Trial Exhibit G (*a.k.a.*, P-13 or P-118) at 1] 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****

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 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 [Plaintiff's Trial Exhibits G (*a.k.a*., P-13 or P-118) at 2-3, P-120 at 4-5, and P-49 at 3-4] (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 [Mindlin] 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 [Plaintiff's Trial Exhibits P-120 at 1-3 and P-49 at 1-2] 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 [Plaintiff's Trial Exhibit P-121 at 1-2] 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 [Plaintiff's Trial Exhibit P-52 at 2-3] 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 [Plaintiff's Trial Exhibit P-52 at 1-2] 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.

See ¶¶ 104 and 123-129 of *Complaint* (Doc. 2 at 28-29 and 34-36) and ¶¶ 104 and 123-129 of *Amended Complaint* (Doc. 117 at 34 and 39-41).

In his *Motion for Summary Judgment* on the Defendants' *Third-Party Complaint*, Jonathan Zell argued that "it is undisputed that the FBT Defendants … negligently advised the Plaintiff [i.e., Mrs. Zell] that Missouri's, rather than Ohio's, statute of limitations applied to the Plaintiff's note no matter in which state the note were adjudicated and then negligently advised the Plaintiff to pursue her claim on the note in an Ohio court." *See* Doc. 50 at 9.

In their *Memorandum in Opposition* (Doc. 60) to Mr. Zell's summary-judgment motion, the Defendants did not even attempt to deny that the FBT attorneys had advised Mrs. Zell (via emails to Mr. Zell) that the court in the Ohio Action should find that Missouri's -- rather than Ohio's -- statute of limitations applied to Mrs. Zell's note. Instead, the Defendants merely

asserted that such advice was not "negligent"; but, if it were negligent, then Mr. Zell was also contributorily liable to Mrs. Zell for this malpractice:

> Plaintiff alleges that FBT wrongly advised her that the Missouri statute of limitations would apply to her promissory note when she was sued by the debtors in an Ohio court…. FBT has denied that it was negligent in any way in the manner in which it represented Plaintiff. If, however, a finder of fact were to conclude otherwise, then FBT is entitled to contribution and/or indemnity from …. Jonathan Zell[.]

Doc. 60 at 1-2.

After considering both Mr. Zell's *Motion for Summary Judgment* on the *Third-Party Complaint* and the Defendants' *Memorandum in Opposition*, this Court then stated in its *Opinion and Order* dated December 23, 2014 (Doc. 121):

> 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, one of Plaintiff's main malpractice claims against Defendants.
>
> * * *
>
> 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.

Doc. 121 at 9 and 9 n. 2 (citations omitted).

2. Jonathan Zell's Role Vis-à-Vis the Frost Brown Todd Attorneys

In ¶¶ 4-11 of an Affidavit (Doc. 50-2) attached to his *Motion for Summary Judgment* on the Defendants' *Third-Party Complaint*, Mr. Zell explained his role in the *Mindlin v. Zell* litigation vis-à-vis the Frost Brown Todd law firm as follows:

> 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.

See ¶¶ 4-11 of *Jonathan Zell's Affidavit* dated March 17, 2014 (Doc. 50-2 at 2).

Similarly, in ¶¶ 8-19 of her own Affidavit (Doc. 50-1) attached to Mr. Zell's *Motion for Summary Judgment* on the Defendants' *Third-Party Complaint*, Mrs. Zell explained the extent of her knowledge at the time of Mr. Zell's role in the *Mindlin v. Zell* litigation:

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.

See ¶¶ 8-19 of *Eileen Zell's Affidavit* dated March 17, 2014 (Doc. 50-1 at 2-4).

Once again, in their *Memorandum in Opposition* (Doc. 60) to Mr. Zell's summary-judgment motion, the Defendants did not even attempt to deny any of the facts alleged in either Mr. or Mrs. Zell's Affidavits. *See* Doc. 211 at 26-28.

After considering both Mr. Zell's *Motion for Summary Judgment* on the *Third-Party Complaint* and the Defendants' *Memorandum in Opposition*, this Court then stated in its *Opinion and Order* dated December 23, 2014 (Doc. 121 at 4-5):

> 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.

Thus, for the four years prior to the trial -- the two and one-half years since this Court's decision dismissing the *Third-Party Complaint* (with prejudice) and the one and one-half years before that decision -- all of the parties and this Court had accepted as facts that:

1. The Frost Brown Todd attorneys had advised Mrs. Zell (via emails to Mr. Zell) that the court in the Ohio Action (*Mindlin v. Zell*) should find that Missouri's -- rather than Ohio's -- statute of limitations applied to Mrs. Zell's note.
2. Mr. Zell had played a very-limited role in Frost Brown Todd's representation of Mrs. Zell in the *Mindlin v. Zell* litigation. This included the agreed-upon division of labor whereby the Frost Brown Todd attorneys would be responsible for doing the legal research 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.
3. Mrs. Zell had a very incomplete knowledge of the role that Mr. Zell played in Frost Brown Todd's representation of her. This included that Mrs. Zell had never consented to having Mr. Zell serve as a "co-counsel" with the Frost Brown Todd attorneys, that Mrs. Zell had retained Frost Brown Todd to represent her in *Mindlin v. Zell* because that law firm had the legal expertise and experience that Mr. Zell lacked, and that Mrs. Zell would have never consented to anything that transferred any malpractice liability from Frost Brown Todd to her son.

Indeed, a mere one week before the trial in the instant case, this Court ruled that the issues that had been previously decided in the Court's *Opinion and Order* dismissing the *Third-Party Complaint* could not be "re-raised" at the trial. *See* ¶ 8 of this Court's *Plenary Order* dated April 3, 2017 (Doc. 192 at 3) ("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.").

B. Argument: *There is No Doubt as to the Falsity of the Frost Brown Todd Attorneys' Testimonies and the Clear Errors in this Court's Findings of Fact Incorporating those False Testimonies*

What occurred at the trial held on April 10-14, 2017 and was reflected in Judge Marbley's *Findings of Fact and Conclusions of Law* was a concerted attempt to rewrite the aforementioned four-year history of this case and to fabricate the aforementioned facts. For, as was stated in the Plaintiff's *Motion for a New Trial, Etc*. (Doc. 211 at 6), the trial in this case "represented an attempt to rewrite history worthy in every respect of the Soviet Union's Stalinist years." Moreover, as was also stated in the Plaintiff's *Motion for a New Trial, Etc*., this Court's *Findings of Facts and Conclusions of Law* represented an unprecedented attempt in the annals of legal history "to frame" (Doc. 211 at 16) the Plaintiff's son and the undersigned Plaintiff's counsel (Jonathan Zell) by making Mr. Zell "the scapegoat for the Defendants' malpractice" (Doc. 211 at 2).

As was previously documented in the Plaintiff's *Motion for a New Trial, Etc*. and will be discussed below, Defendant Katherine Klingelhafer, Defendant Jeffrey Rupert, and FBT attorney-witnesses Shannah Morris and Aaron Bernay all gave seemingly-coached, blatant, wholesale, and obviously false testimonies. For their testimonies were contradicted by and inconsistent with the Defendants' prior pleadings and briefs, this Court's prior order, the voluminous documentary evidence in the Record, and the Plaintiff's expert's (Mr. Leickly's) testimony at the trial.

Nonetheless, Judge Marbley uncritically accepted the FBT defendants' and witnesses' false testimonies and based all of his *Findings of Fact and Conclusions of Law* on those false testimonies. The FBT defendants' and witnesses' false testimonies as well as Judge Marbley's findings involved (1) the nature of the legal research that Defendants Rupert and Klingelhafer conducted during their representation of Mrs. Zell in the *Mindlin v. Zell* litigation and (2) the role that Mrs. Zell's son (Jonathan Zell) played in Mrs. Zell's representation vis-à-vis the Frost Brown

Todd law firm. Together, the FBT defendants and witnesses -- with Judge Marbley's assistance -- then created an obviously false, ***NEW***, and indeed slanderous interpretation of Mr. Zell's role in assisting the Frost Brown Todd firm.

1. Judge Marbley's Three Erroneous Findings of Fact

As previously stated in the Plaintiff's *Motion for a New Trial, Etc*., Judge Marbley made the following three erroneous findings in his *Findings of Fact and Conclusions of Law*:

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 note was ***the sole determining factor*** in Mrs. Zell's ability to prevail in *Mindlin v. Zell* and collect on the note.

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 she 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[1] -- 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*.

[1] *See* Doc. 50-2 at 37, Doc. 50-2 at 38, Doc. 50-2 at 39, and Plaintiff's Trial Exhibit P-131 (giving the date of the meeting as July 1, 2011). *See also* Defendant Rupert's testimony at Doc. 208 at p. 64, lines 17-21; p. 83, lines 12-17; and p. 102, line 20 to p. 103, line 6.

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

What Judge Marbley meant by the above three findings was that he had found as a matter of law that:

1. The Defendant FBT attorneys (e.g., Jeffrey Rupert and Katherine Klingelhafer) had no liability for the legal errors contained in Mrs. Zell's briefs opposing the Mindlin's summary-judgment motion based on the statute of limitations. This was because:
2. Jonathan Zell had supposedly requested (in his June 24, 2011 email) that this liability be shifted from the FBT attorneys to himself;
3. Mrs. Zell had supposedly agreed to this shift in liability in her meeting with Defendant Rupert and Mr. Zell on July 1, 2011; and
4. Despite having assumed liability for any legal errors contained in Mrs. Zell's briefs, Mr. Zell had supposedly prevented Defendants Rupert and Klingelhafer from researching the statute of limitations applicable to Mrs. Zell's note, asking them "to research only *Standard Agencies*, not procedural choice of law."

As will be shown below, in so finding Judge Marbley made the following factual errors:

1. ***Ignored all of the emails*** that Mr. Zell had sent to several different FBT attorneys (including Defendant Rupert), repeatedly asking them all to research the "statute of limitations," including some tolling issues, applicable to his mother's note;
2. ***Ignored all of the emails*** that the FBT attorneys (including Defendants Rupert and Klingelhafer) had written analyzing the statute-of-limitations and tolling issues applicable to Mrs. Zell's note;
3. ***Misconstrued the plain meaning*** of Mr. Zell's June 24, 2011 email to Defendant Rupert; and
4. ***Fabricated a nonexistent agreement*** between Defendant Rupert, Mr. Zell, and Mrs. Zell concerning the subject of the June 24, 2011 email.

Moreover, that fabricated agreement -- which was directly contradicted by the past four years' worth of the parties' pleadings and this Court's prior decision -- was so ridiculous that ***no reasonable person*** could have believed it. For the idea that Mrs. Zell would have turned over to her son virtually all responsibility for the legal sufficiency of her pleadings and briefs in the *Mindlin* litigation on the crucial statute-of-limitations issue ***all while still paying the law firm of Frost Brown Todd*** (which ended racking up over $73,000 in attorneys' fees on an $82,075 claim) ***to represent her in that litigation*** -- or that, given his very-limited legal experience, Mr. Zell would have subjected both his mother and himself to such liability -- does not even pass the ***straight-face test***. Yet, this is the finding on which Judge Marbley essentially based his entire decision in this case since this finding superseded all of the other ones.[2]

[2] Even assuming that Judge Marbley's findings of fact were accurate, the legal conclusion that the Judge arrived at from those findings was equally ridiculous. A law firm representing a client in litigation is not permitted to turn over responsibility for the legal research for the client's case to an incompetent co-counsel (not to mention one who has previously disclaimed any research ability or even access thereto). *See* Restatement (Second) of Agency § 405(2). And, as the Plaintiff's expert (Mr. Leickly) testified at the trial, doing so most certainly does ***not*** relieve the law firm of its malpractice liability for the joint work product (in the form of legal pleadings and briefs) that the firm and its co-counsel then submit to a court in the client's litigation. *See* Doc. 205 at p. 10, line 7 to p. 11, line 16.

2. The Findings of Fact Were Contrary to the Evidence

In examining the three erroneous findings on which Judge Marbley based the Court's *Judgment* in this case, we will look first at the third finding. This concerned (1) the supposed request that Jonathan Zell made in his June 24, 2011 email to Defendant Rupert that he (Mr. Zell) become responsible for conducting the legal research for Mrs. Zell's pleadings and briefs, thereby assuming liability for their legal sufficiency; and (2) Mrs. Zell's supposed agreement, during her meeting with Defendant Rupert and Mr. Zell on July 1, 2011, to this shift in liability from the Frost Brown Todd law firm to her son.

Then, we will look at the first and second findings, both of which involve the claim that Mr. Zell had supposedly prevented the Frost Brown Todd attorneys (including Defendants Rupert and Klingelhafer) from researching the statute of limitations applicable to Mrs. Zell's note, asking them "to research only *Standard Agencies*, not procedural choice of law."

a. The Findings that the Plaintiff's Non-Practicing Attorney Son Supposedly Relieved Frost Brown Todd of Responsibility for Ensuring the Legal Sufficiency of the Plaintiff's Pleadings and Briefs, and that the Plaintiff Supposedly Agreed to this Change

<u>From the Findings of Fact in Judge Marbley's Decision:</u>

[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

i. Mr. Zell's June 24, 2011 Email to Defendant Rupert

In his June 24, 2011 email to Defendant Rupert, Mr. Zell made several proposals designed 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, Plaintiff's Trial Exhibit P-256, Defendants' Trial Exhibit D-16 at 2 (emphasis added).

For example, when responding to the Mindlin "plaintiffs' attorney's series of dilatory motions" or "handl[ing] the run-of-the-mill pleadings that [the Mindlin] plaintiffs' counsel is churning out" (*see id.*), Mr. Zell proposed to Defendant Rupert that the two of them switch positions on Mrs. Zell's pleadings and briefs so that Defendant Rupert would now be listed as "of counsel" and Mr. Zell would now "sign the pleadings by myself. In this way, you [Defendant Rupert] will not be responsible for these pleadings and, thus, will not feel compelled to spend so much time rewriting and/or perfecting my drafts." *Id*.

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 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, Plaintiff's Trial Exhibit P-256, Defendants' Trial Exhibit D-16 at 2 (emphasis added).

ii. Mr. Zell's June 26, 2011 Email to Defendant Rupert

Because Mr. Zell's June 24, 2011 email was never answered, Mr. Zell sent Defendant Rupert a more-detailed follow-up email (Plaintiff's Trial Exhibit P-134) two days later on June 26, 2011. In his June 26, 2011 email, Mr. Zell continued to propose that the two of them switch positions on Mrs. Zell's pleadings and briefs. However, this time Mr. Zell made it even clearer that this proposal was intended to relieve Defendant Rupert of responsibility ***only*** for the "professional impression" or "tone that would befit a pleading that you [i.e., Defendant Rupert] would sign," but not for any "legal[] insufficien[cy]" that Mr. Zell's first drafts of Mrs. Zell's pleadings or briefs might contain.

Mr. Zell's June 26, 2011 email was quoted in ¶ 52 of both the Plaintiff's original and amended complaints as follows:

52. On 6/26/2011, Mr. Zell sent one of many e-mails to ATTORNEY RUPERT complaining about the large bills that FBT was sending to MRS. ZELL. However, this time, Mr. Zell proposed a solution, stating:

> 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….
>
> 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***….
>
> 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.

¶ 52 of Mrs. Zell's original *Complaint* (Doc. 2 at 14-15) and ¶ 52 of Mrs. Zell's *Amended Complaint* (Doc. 117 at 15) (emphasis added).

iii. Defendant Rupert's June 27, 2011 Email to Mr. Zell

On June 27, 2011, Defendant Rupert replied to Mr. Zell's June 26, 2011 email by stating:

> 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.

Although Defendant Rupert had ended his June 27, 2011 email to Mr. Zell by stating "I'll get back to you shortly on that," Defendant Rupert never did.

iv. Mr. Zell's and Defendant Rupert's June 29 to July 1, 2011 Email Correspondence

However, as subsequent emails between Mr. Zell and Defendant Rupert showed, the two of them continued to operate as before with Defendant Rupert being responsible for conducting the legal research for Mrs. Zell's pleadings and briefs:

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) [Doc. 50-2 at 37]

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) [Doc. 50-2 at 38]

RUPERT: I will send you a few cases and some of the basic legal standard. We can discuss this on Friday. (6/30/2011) [Doc. 50-2 at 39]

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) [Doc. 50-2 at 40]

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) [Doc. 50-2 at 41]

Doc. 50 at 13-15.

v. Mr. Zell's and Defendant Rupert's July 5, 2011 Email Correspondence

Not only did Defendant Rupert never directly reply to Mr. Zell's proposals but, as documented in the emails that Mr. Zell and Defendant Rupert subsequently exchanged, the two of them never even discussed those proposals. For example, because Mr. Zell had still not received an answer to any of his proposals, he sent an email to Defendant Rupert on July 5, 2011 asking:

> 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 Exhibits K (*a.k.a*., P-217) and P-127 at 2.

In an email dated July 5, 2011, Defendant Rupert responded 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 (emphasis added).

The above email exchange proves that -- as of July 5, 2011 -- Defendant Rupert and Mr. Zell had ***not even discussed*** Mr. Zell's proposal that he (Mr. Zell) start signing Mrs. Zell's pleadings and briefs. This means that -- during the meeting among Defendant Rupert, Mr. Zell, and Mrs. Zell held in Defendant Rupert's office four days earlier on July 1, 2011 -- the parties had also ***not*** discussed this proposal, either. And, if they did not even discuss the central issue of Mr. Zell's proposals -- a change in who would sign Mrs. Zell's pleadings and briefs -- then they did not discuss ***anything*** about Mr. Zell's proposals in the July 1, 2011 meeting.

Indeed, as this Court noted in its *Opinion & Order* (Doc. 121 at 4) dismissing the *Third-Party Complaint*, Mrs. Zell's only understanding of her son's role in the *Mindlin v. Zell* litigation was that "Mr. Zell's role generally was to oversee the work of outside counsel [i.e., the Frost Brown Todd attorneys] and …. [to] serve[] as a 'conduit' between herself and outside counsel … for matters related to the loan." Thus, as Mrs. Zell averred in the Affidavit that she submitted in connection with the *Third-Party Complaint* (the truth or accuracy of which the Defendants ***never contested***), Mrs. Zell did not even know that her son had become a co-counsel with the FBT attorneys on her case. *See* ¶ 16 of *Eileen Zell's Affidavit* dated March 17, 2014 (Doc. 50-1 at 3)

("[N]o one -- neither Jonathan [Zell] nor any FBT attorney -- ever asked me to consent to having Jonathan represent me as co-counsel with FBT in the Ohio action.").

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, Defendant Rupert and senior FBT partner and litigator Joseph Dehner had discussed between themselves and even approved some version of Mr. Zell's proposals. However, that neither Defendants Rupert nor Dehner even bothered to take any notes during their meeting on this matter must mean that no significant change in Mr. Zell's role in Mrs. Zell's representation vis-à-vis the Frost Brown Todd law firm was involved (other than who would sign Mrs. Zell's pleadings and who would be listed as "of counsel").

Finally, as this Court noted in its *Opinion and Order* dated December 23, 2014 (Doc. 121 at 5), Frost Brown Todd never created anything "memorializing the terms of the relationship" between Mr. Zell and Frost Brown Todd. Yet, if an agreement shifting responsibility from the Frost Brown Todd law firm to Mrs. Zell's son for the legal sufficiency of Mrs. Zell's pleadings and briefs had indeed existed, then Frost Brown Todd would have certainly had some kind of written documentation of it. Obviously, there was no documentation of any such agreement because no such agreement ever existed.

vi. Mr. Zell's and Defendant Rupert's July 15 to July 17, 2011 Email Correspondence

In his July 15, 2011 email (Plaintiff's Trial Exhibit P-52 at 2-3) to Defendant Rupert, Mr. Zell attached the first draft that he had prepared for Defendant Rupert's review of Mrs. Zell's

Memorandum in Opposition to the Mindlins' Motion for Summary Judgment, which was based on the statute of limitations. On page 3 of his email, Mr. Zell stated: "I will let you decide whether any of my drafts need more case research. If you think more case research is needed, just let me know or go ahead and/or ask your staff to do it."

In response, Defendant Rupert sent Mr. Zell an email on July 15, 2011 (Plaintiff's Trial Exhibits P-52 at 1-2 and P-211), stating:

> I thought this was good. A few comments: …. On the Choice of Law issue that Missouri law applies, I would like to see some case law with similar facts to the extent that it exists. That said, I recognize that you are doing this case on a budget, and that you have applied the factors to the facts that we have. If you want me to have an associate do some more research, let me know. Another other [sic] option might me [sic] to see what [opposing counsel] Peterson does in response to your MSJ, and then do some additional research for the reply brief if you feel it is necessary.

On July 16, 2011, Mr. Zell sent Defendant Rupert another email (Plaintiff's Trial Exhibit P-126 at 2-3). Since Mr. Zell had no access to online legal research, he asked Defendant Rupert: "Do you have an easy way for me to read the cases cited in opposing counsel's Motion for Summary Judgment," and then Mr. Zell listed the cases. On July 17, 2011, Mr. Rupert sent Mr. Zell an email (Plaintiff's Trial Exhibit P-126 at 1) listing some "free research websites" and, if those websites did not have the cases in question, offering to "have an associate" get them for Mr. Zell.

Do these July 15-17, 2011 emails sound as if Mr. Zell had recently entered into an agreement with Defendant Rupert under which Mr. Zell would now be responsible for conducting the legal research for Mrs. Zell's pleadings and briefs, and had therefore accepted liability for their legal sufficiency? Or do they instead confirm that nothing had changed in the division of labor existing between Mr. Zell and Defendant Rupert in that Mr. Zell was still relying on Defendant Rupert to advise him when legal research was needed and to provide that research?

b. The Finding that the Plaintiff's Son Supposedly Prevented the FBT Attorneys from Researching the Statute of Limitations Applicable to Mrs. Zell's Note

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 she 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

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

The statements above from Judge Marbley's first and second findings of fact are grossly inaccurate. For example, Judge Marbley found that, throughout the entire trial-court proceedings in the underlying *Mindlin v. Zell* litigation, Jonathan Zell ***never*** asked the FBT attorneys to research -- and, therefore, the FBT attorneys did ***not*** research -- the "procedural choice of law" (i.e., the "statute of limitations") issue at all. Judge Marbley further found that, as a result, Mrs. Zell's response (Plaintiff's Trial Exhibit P-278) to the Mindlins' summary-judgment motion -- which had raised a statute-of-limitations defense -- practically ignored the statute-of-limitations issue. Judge Marbley stated that he had arrived at this conclusion because *Standard Agencies* -- which he called the "seminal case on the matter" -- was not cited or discussed in the section of Mrs. Zell's response devoted to the statute of limitations. However, everything that Judge Marbley stated above was 100 percent wrong.

i. Mr. Zell Repeatedly Asked the FBT Attorneys to Research the Statute-of-Limitations Issue

To begin with, as the Plaintiff's expert (James Leickly) repeatedly testified at the trial, the central and determinative issue in the *Mindlin v. Zell* litigation was the "statute of limitations" (s*ee* Doc. 204 at p. 7, lines 6-9; p. 7, line 23 to p. 8, line 7; p. 10, lines 18-25; p. 12, lines 1-4; and p. 14, lines 20-21). Specifically, the issue was which state's (Ohio's six-year or Missouri's ten-year) statute of limitations applied to Mrs. Zell's promissory note. S*ee* Doc. 204 at p. 17, lines 10-15. Accordingly, as soon as the *Mindlin* litigation commenced on October 12, 2010, Jonathan Zell began repeatedly asking Frost Brown Todd attorneys Patricia Laub, Shannah Morris (who, in turn, asked her associate Aaron Bernay), and Defendant Jeffrey Rupert (who, in turn, asked his associate Katherine Klingelhafer) to research this crucial issue on behalf of Mr. Zell's mother.

For example, as was noted in ¶¶ 88, 91, 96, 102, 103, and 120-122 of both Mrs. Zell's original and amended complaints (which were previously quoted in the Plaintiff's *Motion for a New Trial, Etc.*, Doc. 211 at 35-38):

88. In his correspondence of 10/16/2010 [Doc. 50-2 at 12-16], 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.

91. On October 18, 2010, Mr. Zell sent an e-mail [Doc. 50-2 at 17] 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." ***

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?" ***

102. On 11/15/2010, Mr. Zell sent a second e-mail [Doc. 50-2 at 22] 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 [Doc. 50-2 at 23] 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."

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 [Plaintiff's Trial Exhibit E, *a.k.a.*, P-12] 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."*** (Note: Emphasis added, but the words in brackets came from the original.)

ii. Defendants Rupert and Klingelhafer Actually Did Research the Statute-of-Limitations Issue

As Judge Marbley noted elsewhere in his *Findings of Fact and Conclusions of Law*, "Mindlin's motion for summary judgment motion was filed on July 5, 2011. That's [Plaintiff's Trial] Exhibit 276." *See* Doc. 206 at p. 7, lines 6-7. And, as the Plaintiff's expert (James Leickly) pointed out, the Mindlins' summary-judgment motion was based on the statute of limitations. *See* Doc. 204 at p. 12, lines 1-7. Thereafter, Defendant Rupert and Mr. Zell naturally exchanged a number of emails about how they planned to rebut the Mindlins' statute-of-limitations defense.

One of those emails was the July 11, 2011 email (Plaintiff's Trial Exhibit E, *a.k.a.*, P-12) quoted above from ¶ 122 of Mrs. Zell's complaints. In this email, Mr. Zell told Defendant Rupert: "[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." As documented in Plaintiff's Trial Exhibit 116, Defendant Rupert then sent a copy of Mr. Zell's July 11, 2011 email to Defendant Klingelhafer, stating: "Katy, I have several research issues on the Zell case that I wanted to talk with you about. Jeff."

Thereafter, Defendants Rupert and Klingelhafer researched the statute-of-limitations applicable to Mrs. Zell's note. As first related in both Mrs. Zell's original and amended complaints:

123. On 7/13/2011, ATTORNEY RUPERT sent Mr. Zell an e-mail [Plaintiff's Trial Exhibit G, a.k.a., P-118] 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****

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 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 [Plaintiff's Trial Exhibit G, a.k.a., P-118] (which was sent to ATTORNEY RUPERT via e-mail), ATTORNEY KLINGEL-HAFER 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.

See ¶¶ 123-129 of *Complaint* (Doc. 2 at 34-36) and ¶¶ 123-129 of *Amended Complaint* (Doc. 117 at 39-41).

Since the Mindlins' summary-judgment motion was based on the statute of limitations, Mrs. Zell's response (Plaintiff's Trial Exhibit P-278) to the Mindlins' motion was devoted ***exclusively*** to the statute-of-limitations issue. However, as the Plaintiff's expert (James Leickly) explained at the trial, Mrs. Zell's response to the Mindlins' summary-judgment motion had emphasized the *Restatement's* multiple-factor test -- rather than *Standard Agencies'* single-factor test -- in arguing that Missouri's unexpired (as opposed to Ohio's already-expired) statute of limitations applied to Mrs. Zell's note. And, as Mr. Leickly further testified, this was specifically done ***in accordance*** with Defendant Klingelhafer's research memo of July 13, 2011, which was

attached to Defendant Rupert's July 13, 2011 email to Mr. Zell (Plaintiff's Trial Exhibit G, *a.k.a*., P-118 and P-120 at 3), on the question of which state's statute of limitations applied to Mrs. Zell's note. *See* Doc. 204 at p. 29, line 21 to p. 34, line 24 (which was previously quoted in Mrs. Zell's *Motion for a New Trial, Etc*., Doc. 211 at 8-12, and is reproduced below at pp. 51-54, *infra*).

In fact, all of the above was made very clear on pages 2-4 and 20 of Mrs. Zell's response to the Mindlins' summary-judgment motion:

> In his Motion for Summary Judgment, opposing counsel … [is] claiming that Ohio law governs the Note. Since the six-year statute of limitations in Ohio on such notes would have expired on December 31, 2007, counsel argues that the Note is therefore unenforceable. Mrs. Zell vigorously disputes opposing counsel's claim, presenting numerous reasons that Missouri's ten-year (or more) statute of limitations, which has not yet expired, governs the loan instead.
>
> *　　　*　　　*
>
> [E]ven if the parties did not agree that Missouri's law applies, Missouri law would still apply under the factor-driven test set forth in the "Restatement of the Law 2d" due to the numerous contacts involving that state.
>
> *　　　*　　　*
>
> The multiple-factor test was designed to replace the single-factor tests that had been enunciated in the older case law.
>
> *　　　*　　　*
>
> Accordingly, under both the traditional test of where the contract was made followed by *Standard Agencies, Inc. v. Russell* (1954), 100 Ohio App. 140, 143, 135 N.E. 2d 896 or the more expansive modern trend following the Restatement rules, it is apparent that the law of Missouri -- not Ohio -- applies to the Note.

Since it was the determining factor in whether or not Mrs. Zell would prevail in the *Mindlin* litigation or, if not, should "reconsider the idea of a settlement" (as Mr. Zell had written to Defendant Rupert on July 7, 2011), the statute of limitations applicable to Mrs. Zell's note was most definitely researched by the Frost Brown Todd attorneys. As the Plaintiff's expert (James

Leickly) also testified at the trial, this was abundantly clear from Defendants Rupert's and Klingelhafer's emails as well as Frost Brown Todd's billing statements:

(LEICKLY) A: **** [T]hat's what they [the Frost Brown Todd attorneys] 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 [i.e., Mr. Leickly's Expert's Report], 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: This is another email from Mr. Rupert to me. This is dated July 14th, 2011 [Plaintiff's Trial Exhibit P-121]. 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. [Plaintiff's Trial Exhibit P-120, dated July 14, 2011].

* * *

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.

iii. Defendants Rupert and Klingelhafer Committed Perjury to Hide their Legal Malpractice

(a) The Statute-of-Limitations Error

On July 5, 2011, the Mindlins filed a *Motion for Summary Judgment* based on the expiration of Ohio's statute of limitations. Therefore, from July 5, 2011 to July 19, 2011 (when Defendant Rupert filed Mrs. Zell's response to the Mindlins' motion), Defendant Rupert, Defendant Klingelhafer, and Mr. Zell were all working together in preparing Mrs. Zell's *Memorandum in Opposition* to the Mindlins' *Motion for Summary Judgment*.

As Mr. Leickly testified, Defendant Rupert's email of July 14, 2011 (Plaintiff's Trial Exhibit P-120) -- to which Defendants Rupert's and Klingelhafer's emails of July 13, 2011 were attached -- clearly showed Defendants Rupert and Klingelhafer researching the statute of limitations applicable to Mrs. Zell's note. However, the problem is that -- not being aware of the principle of *lex loci* (the law of the forum) -- they did their research using the ***wrong*** choice-of-law rules. Instead of using the rules for procedural-law issues -- such as the statute of limitations -- they used the rules for substantive-law issues. Then, in an attempt to hide their error, Defendants Rupert and Klingelhafer falsely testified at the trial that they had ***purposefully*** researched the substantive choice-of-law rules -- rather than the procedural ones -- because that is what Mr. Zell had supposedly asked them to do, and that they had not questioned Mr. Zell's illogical request. *See, e.g.,* Plaintiff's *Motion for a New Trial, Etc*. (Doc. 211 at 52-57) and pp. 64-66, *infra*.

Defendants' Rupert's and Klingelhafer's explanation ***might*** have seemed a little less outlandish than it did if Judge Marbley had not already known from his prior decision dismissing the Defendants' *Third-Party Complaint* (Doc. 121 at 9 n. 2) that then-FBT attorney Shannah Morris (based on her associate Aaron Bernay's research) had earlier made this very same error. The only difference was that, while Ms. Morris and Mr. Bernay had relied on the *Standard Agencies* case to advise Mrs. Zell that the Ohio court in the *Mindlin* litigation would apply Missouri's statute of

limitations to Mrs. Zell's note, Defendants Rupert and Klingelhafer had given Mrs. Zell this very same advice based on the Restatement factors. Of course, Defendants Rupert and Klingelhafer were correct to the extent that the single-factor test used in *Standard Agencies* had been replaced in the modern case law by the Restatement's multiple-factor test. However, as previously stated, their error was that both the single- and multiple-factor tests applied to substantive -- not procedural -- choice-of-law issues.

Apparently to be consistent, Ms. Morris and Mr. Bernay also falsely testified at the trial that they, too, had researched the substantive -- rather than procedural -- choice-of-law rules on purpose rather than by mistake. Of course, as previously stated, this testimony flatly contradicted the finding in Judge Marbley's prior order dismissing the Defendants' *Third-Party Complaint*. *See* Doc. 121 at 9 n. 2. However, what made Defendants Rupert's and Klingelhafer's perjuries even ***more*** obvious than those of Ms. Morris and Mr. Bernay was that the former were claiming to have ***purposefully*** avoided researching the procedural choice-of-law (i.e., statute-of-limitations) rules in connection with Mrs. Zell's response to the Mindlins' summary-judgment motion.

Of course, using the substantive choice-of-law rules to rebut the statute-of-limitations defense in the Mindlins' summary-judgment motion -- which is what Mrs. Zell's *Memorandum in Opposition* to the Mindlins' *Motion for Summary Judgment* then attempted to do -- would have been total insanity if it had been done on purpose. Yet, that is precisely what Defendants Rupert and Klingelhafer testified to at the trial, and what Judge Marbley then uncritically accepted and incorporated into *his Findings of Fact and Conclusions of Law*. If there could ever be a more obvious example of perjury, the undersigned cannot imagine it.

Defendants Rupert and Klingelhafer did, of course, engage in other instances of perjury. But what was remarkable about the attempt to hide their choice-of-law error is that this Court had previously found this instance of malpractice to be barred (against Defendant Rupert, Defendant

Klingelhafer, Ms. Morris, and others) by the statute of limitations on legal malpractice. *See* this Court's *Opinion & Order* of Sept. 12, 2014 (Doc. 89). That left Defendants Rupert and Klingelhafer potentially liable only for the malpractice related to the so-called "alternative" (i.e., tolling-type) arguments under Ohio law. In the words of this Court (Doc. 89 at 10), those were "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 [most importantly] their appeal to 'promissory' rather than 'equitable' estoppel" in Mrs. Zell's *Amended Reply Brief* (Plaintiff's Trial Exhibit P-279) in support of Mrs. Zell's own summary-judgment motion.

But, if Defendants Rupert and Klingelhafer will lie to absolve themselves from an instance of malpractice for which they cannot be charged, then they will certainly lie to absolve themselves from an instance of malpractice for which they have been charged. In any event, for Judge Marbley to have found the testimonies of Defendants Rupert and Klingelhafer to be credible regarding the promissory-estoppel vs. vs. equitable-estoppel error -- which will be discussed below -- then the Judge must have (incredibly) found their testimonies regarding the choice-of-law error to be credible, too.

(b) The Promissory-Estoppel vs. Equitable-Estoppel Error

On August 15, 2011, Defendant Rupert filed Mrs. Zell's *Amended Reply Brief* (Plaintiff's Trial Exhibit P-279) in support of Mrs. Zell's own summary-judgment motion in the underlying *Mindlin* litigation. The first twelve (12) pages of the *Amended Reply Brief* were contained in a section of the brief devoted to the argument that: "[E]ven if this Court should hold that Ohio's six-year statute of limitations (which would have expired on December 31, 2007) does apply, the [Mindlin] debtors' written promises to repay the time-barred debt … are enforceable." *See* Plaintiff's Trial Exhibit P-279 at 5. One subpart of this section was titled, "The Debtors' Promises are Enforceable under Promissory Estoppel." *Id*. at 12-16. There, the brief made the classic

equitable-estoppel argument (which, in states outside Ohio, is called detrimental reliance): "The [Mindlin] Plaintiffs' promises to repay Mrs. Zell, if she just waited long enough, were intended to, and did in fact, induce Mrs. Zell to refrain from foreclosing on the debtors' loan. (*See* Mrs. Zell's Affidavit at ¶ 8.)" *Id*. at 13.

As Mrs. Zell previously pointed out before this Court in her combined *Amended Reply Brief and Memorandum Contra* regarding the statute-of-limitations issue involved in the instant case: "In Ohio, the [equitable] estoppel doctrine may be used to prohibit the inequitable use of the statute of limitations." *See* Doc. 48 at 14 (quoting *Cooke v. Sisters of Mercy*, 1998 WL 221320 (Ohio 12th App.Dist.), *unreported*, at *4). And, as was pointed out in Mrs. Zell's *Appellate Reply Brief* (Plaintiff's Trial Exhibit P-281) in the underlying *Mindlin* litigation, this principle also applies to negotiable instruments, such as Mrs. Zell's promissory note. For, according to Ohio's version of the U.C.C., "the running of a limitations period may be tolled …. [based on] the principles of law and equity, including … estoppel." *See* Plaintiff's Trial Exhibit P-281 at 12-13 (quoting O.R.C. §§ 1301.103(B) and 1303.16). Thus, as the Plaintiff's expert (Mr. Leickly) testified at the trial, Mrs. Zell's tolling argument should have prevailed in the *Mindlin* litigation.

However, that argument did ***no***t prevail because it contained a fatal flaw. For, as the Tenth District Court of Appeals of Ohio ruled in the *Mindlin* litigation, Mrs. Zell's tolling argument was defective in that it referred to "promissory" estoppel rather than "equitable" estoppel. *See Mem.Decision, Mindlin v. Zell*, No. 11AP-983, ¶9 (Ohio App. Dec. 31, 2012) (Plaintiff's Trial Exhibit P-284). And, for this reason, the appellate court refused to consider the use of equitable estoppel to toll the limitations period on Mrs. Zell's note. *Id.*

As was explained in Mrs. *Zell's Motion for a New Trial, Etc*. (Doc. 211 at 45-47), Mr. Zell had sent several emails to Defendant Rupert specifically asking both him and Defendant Klingelhafer to research the legal theories of detrimental reliance and promissory estoppel under which a

statute of limitations could be tolled or otherwise made not to apply for use in Mrs. Zell's then-upcoming *Amended Reply Brief* in *Mindlin v. Zell*. Defendant Klingelhafer emailed her research results to Defendant Rupert, who then forwarded them to Mr. Zell. Next, 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 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. *See* Plaintiff's Trial Exhibits P-59, P-90, P-91, P-92, and P-93)

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.

Nevertheless, as noted above, in her testimony at the trial Defendant Klingelhafer claimed not even to have been aware that any of her research was going to be used to address the statute of limitations, let alone the tolling of the limitations period. In his testimony, Defendant Rupert deflected all blame for the promissory-estoppel vs. equitable-estoppel argument onto Mr. Zell, stating that, although he (Defendant Rupert) had approved and filed Mrs. Zell's brief, his "role … was just to make sure there was no obvious error of law [in it.]" See Doc. 208 at p. 47, lines 7-19. And, apparently, Defendant Rupert disagreed with the Tenth District Court of Appeals, which found this error to be quite fatal to Mrs. Zell's case.

3. The Fallacies in Judge Marbley's Finding

There are many fallacies in the Defendants' claims -- and Judge Marbley's findings -- that Jonathan Zell and Mrs. Zell supposedly made an agreement with Defendant Rupert on July 1, 2011 to shift responsibility for the legal research necessary for all of Mrs. Zell's subsequent pleadings and briefs from the Frost Brown Todd law firm (which would nevertheless continue to represent Mrs. Zell in the *Mindlin* litigation) to Mr. Zell and, thereby, make Mr. Zell solely responsible for ensuring the legal sufficiency of those pleadings and briefs. In fact, there is so much wrong with these obviously-false claims that it is difficult to believe that anyone would have even dared to make them up, let alone that anyone else would have believed them.

We have already dealt with several of those fallacies: the damning absence of any notes or other written documentation of the supposed agreement by any of the Frost Brown Todd attorneys, including Defendants Rupert and Dehner (who supposedly had discussed and approved the arrangement on behalf of Frost Brown Todd); the subsequent email correspondence on July 5, 2011 between Defendant Rupert and Mr. Zell proving that they had never even discussed the central component of that supposed agreement: a change regarding which one of them would now sign Mrs. Zell's pleadings; and, of course, the Defendants' four-year delay in making these claims despite their having previously raised and then litigated before this Court the very same issue of Mr. Zell's role and responsibility vis-à-vis the FBT attorneys in Mrs. Zell's representation.

However, as will be demonstrated below, there are still more flaws in these claims, such as the following:

1. Rather than having "ask[ed] for a [specific] change in the role of the [FBT] attorneys" in the *Mindlin* litigation (as Judge Marbley erroneously found), Mr. Zell's June 24, 2011 email contained several mutually-exclusive proposals.

2. Not only did Defendant Rupert never directly reply to any of Mr. Zell's proposals, but Defendant Rupert and Mr. Zell never even discussed these proposals. Thus, in no sense of the word can it be said that any of those proposals was accepted. For, obviously, one cannot accept something that one has not even discussed. Although Mr. Zell and Defendant Rupert later agreed to switch places as to which of them would sign Mrs. Zell's pleadings and briefs and which one would be listed as "of counsel," that was a separate arrangement (made on July 5, 2011) without any pre-conditions or terms.

3. The plain meaning of Mr. Zell's emails has been so badly misconstrued that it appears as if their meaning has been purposefully twisted. For example, Mr. Zell's June 24, 2011 email to Defendant Rupert clearly stated that the various proposals he was making in that email were designed ***only*** to "minimize my mother's pre-trial litigation costs," but ***not*** to "mak[e] my mother wholly dependent on my own inadequate legal research and writing skills." This point was then emphasized again in Mr. Zell's June 26, 2011 email to Defendant Rupert. There, Mr. Zell explained that his proposal to switch places with Defendant Rupert regarding which of them would sign Mrs. Zell's pleadings and briefs, and which one would be listed as "of counsel," was intended to relieve Defendant Rupert of responsibility ***only*** for the "professional impression" or "tone that would befit a pleading that you [i.e., Defendant Rupert] would sign," but ***not*** for any "legal[] insufficien[cy]" that Mrs. Zell's pleadings or briefs might contain.

4. Except for the proposal that Defendant Rupert "formally withdraw from the case during the pre-trial stage" -- which did ***not*** occur -- none of Mr. Zell's proposals involved making Mr. Zell solely responsible for ensuring the legal sufficiency of all of Mrs. Zell's subsequent pleadings and briefs, thereby releasing Defendant Rupert in particular and Frost Brown Todd in general from all malpractice liability. Instead, the other proposals simply dealt with non-substantive things that Defendant Rupert could do to minimize his charges to Mrs. Zell.

5. It seems quite unlikely that Jonathan Zell would have agreed to take on the responsibility for ensuring the legal sufficiency of Mrs. Zell's pleadings and briefs considering that -- both before and after July 1, 2011 -- Mr. Zell repeatedly sent emails to various FBT attorneys, including Defendant Rupert, noting that he (Mr. Zell) had no access to online legal research. *See, e.g.,* Doc. 50-2 at 38, Doc. 48-1 at 7-8, and Plaintiff's Trial Exhibit P-126 at 2-3. Accordingly, in those emails, Mr. Zell made it clear that he was relying on the FBT attorneys to conduct the necessary research for Mrs. Zell's pleadings and briefs. For example, in a July 15, 2011 email to Defendant Rupert concerning Mrs. Zell's upcoming response to the Mindlins' summary-judgment motion, Mr. Zell stated: "I will let you decide whether any of my drafts need more case research. If you think more case research is needed, just let me know or go ahead and/or ask your staff to do it." *See* Plaintiff's Trial Exhibit P-52 at 3.

6. Thus, if the supposed agreement was intended to stop the FBT attorneys from conducting legal research for the *Mindlin* litigation, then it failed to do so miserably. For not only did the emails of Defendant Rupert and Klingelhafer after July 1, 2011 show that they were continuing to conduct research for Mrs. Zell's case, but FBT's billing invoices also demonstrated that these attorneys continued to bill Mrs. Zell tens of thousands of dollars. *See, e.g.*, Plaintiff's Trial Exhibit P-268, Doc. 86-7, Doc. 86-8, Doc. 86-9, Doc. 86-11, and Doc. 86-1

7. Even if the proposal made in Mr. Zell's June 24, 2011 email limiting Defendant Rupert's role "to correcting obvious errors" could be construed as relieving Defendant Rupert, under certain conditions, from liability for the legal errors in Mrs. Zell's pleadings and briefs, those conditions were not present. For example, Mr. Zell made clear in his June 24, 2011 email that this proposal only pertained to "the run-of-the-mill pleadings" -- which would, of course, exclude Mrs. Zell's pleadings and briefs regarding the ***crucial*** statute-of-limitations issue.

8. However, even if Mr. Zell's proposal could be construed to cover Mrs. Zell's pleadings and briefs on the statute-of-limitations issue, Defendant Rupert and Klingelhafer failed to correct the "obvious errors" relating to the so-called "alternative" (i.e., tolling-type) arguments under Ohio law contained in those pleadings and briefs. For example, their failure to raise any tolling arguments at all in Mrs. Zell's *Memorandum in Opposition* to the Mindlins' summary-judgment motion was an obvious error. So, too, was their mixing up of "promissory estoppel" with "equitable estoppel" in Mrs. Zell's *Amended Reply Brief* in support of her own summary-judgment motion. The former was such an obvious error that no expert testimony is needed to establish it. Regarding the latter error, the Plaintiff's expert witness (Mr. Leickly) testified that it fell below the requisite standard of care for attorneys and, thus, constituted legal "malpractice." *See* Doc. 205 at p. 5, line 22 to p. 8, line 2; and p. 10, line 2 to p. 11, line 7.

9. Even if the mixing up of "promissory estoppel" with "equitable estoppel" in Mrs. Zell's *Amended Reply Brief* cannot for some reason be considered an "obvious error," Defendants Rupert and Klingelhafer are still liable for this error because they themselves made it. According to Defendant Rupert's testimony, although Mr. Zell had supposedly assumed responsibility for conducting the legal research for Mrs. Zell's pleadings and briefs, Defendant Rupert was still responsible for doing specific legal "research as requested." *See* Doc. 208 at p. 48, line 25.[3]

[3] Defendant Rupert repeated the manta that he only did "research as requested" so often throughout his testimony -- and without any prompting -- that it was obvious that Defendant Rupert had been coached to give this testimony in an attempt to explain why he had conducted legal research on Mrs. Zell's case, but was supposedly not responsible for the errors in that research. Indeed, a review of his testimony reveals at least eight (8) times in which Defendant Rupert kept repeating this same statement -- the sure mark of a liar. (Note: the "you" in the testimony below refers to Jonathan Zell, the Plaintiff's son and the undersigned Plaintiff's counsel.) *See, e.g.*:

- Doc. 208 at p. 4, lines 6-9 ("the understanding was that … if you had a limited research issue, I would have someone do that")

So, even if Defendants Rupert and Klingelhafer were only responsible for doing "specific research" and only "as requested," they were specifically requested by Mr. Zell to research the tolling-type theories of promissory estoppel and detrimental reliance (which is called "equitable estoppel" in Ohio). *See* Mrs. *Zell's Motion for a New Trial, Etc*. (Doc. 211 at 45-47) and pp. 58-59, *supra*. Yet, Defendant Klingelhafer in doing that research for Mr. Zell and Defendant Rupert in reviewing and approving the draft of Mrs. Zell's *Amended Reply Brief* that Mr. Zell had prepared incorporating Defendant Klingelhafer's research, fatally misunderstood and, thus mixed up, the theories of "promissory estoppel" with "equitable estoppel." *See id*. Accordingly, even if their testimonies are believed, Defendants Rupert and Klingelhafer are still liable for the promissory-estoppel/equitable-estoppel error that they themselves made.

[*FOOTNOTE 3 CONTINUED FROM PREVIOUS PAGE*]

- Doc. 208 at p. 4, lines 11-12 ("So you were the one that decided what areas should be researched")
- Doc. 208 at p. 10, line 17 ("So, again, if there was a specific issue that you wanted researched, I would do that");
- Doc. 208 at p. 27, lines 6-7 ("Only specific issues that you asked me to research would be researched")
- Doc. 208 at p. 48, line 24-25 ("I was only to … do limited research as requested")
- Doc. 208 at p. 49, lines 12-13 ("As I said before, I would only do assignments as requested")
- Doc. 208 at p. 75, line 25 to p. 76, line 2 ("If an issue came up that you wanted research, a specific one, we would identify that specific issue")
- Doc. 208 at p. 80, lines 6-7 ("If you have a specific research issue, I would look at it")
- Doc. 208 at p. 83, lines 14-16 ("my role … would be just … to do specific research")

III. The Plaintiff's Counsel Was Taken By Surprise and, as a Result, Was Unable to Meet the Defendants False Testimonies

A. Defendant Katherine Klingelhafer's False Testimony

Although he had been taken by surprise when Defendant Klingelhafer gave her false testimony, the Plaintiff's counsel nevertheless tried to get Defendant Klingelhafer to admit that her July 13, 2011 memo on the *Restatement's* multiple-factor test for determining choice of law was directed to the question of which state's statute of limitations applied to Mrs. Zell's note. To this end, the Plaintiff's counsel showed,the following two emails to Defendant Klingelhafer:

- The July 14, 2011 email from Defendant Rupert to Jonathan Zell in which Defendant Rupert had attached a copy of Defendant Klingelhafer's July 13, 2011 memo on the *Restatement's* multiple-factor test. (Defendant Rupert's July 14, 2011 was admitted into evidence as Plaintiff's Trial Exhibit G, a.k.a., P-118.).
- The July 13, 2011 email (Plaintiff's Trial Exhibit 49) that Mr. Zell sent to Defendant Rupert in response to his (Mr. Zell's) having received Defendant Klingelhafer's July 13, 2011 memo on the *Restatement's* multiple-factor test. *See* Doc. 207 at p. 47, lines 15-17.

In his July 13, 2011 email, Mr. Zell commented on the *Restatement's* multiple-factor test for determining choice of law provided in Defendant Klingelhafer's July 13, 2011 memo:

> Thanks for the case research on the conflicts-of-law issue….
>
> *　　　*　　　*
>
> As you will see in my upcoming Memo in Opposition to Plaintiff's and TPD's MSJ …, opposing counsel continually gets his facts wrong. For example, the Note was made in Missouri, not Ohio; and the place of performance/breach started out in Ohio, but then changed to Florida. Therefore, on these two issues at least -- place where contract was made and place of performance -- there is no reason that Ohio's law should apply. (However, applying Florida's law does not help us, either, because, like Ohio, Florida seems to have a short ***statute of limitations***, too.)

Plaintiff's Trial Exhibit 49 at 1 (emphasis added).

As documented in Plaintiff's Trial Exhibit P-120 -- about which the Plaintiff's expert, James Leickly, testified at the trial (*see, e.g.,* p. 53, *supra*) -- Defendant Rupert had forwarded to Defendant Klingelhafer a copy of Mr. Zell's July 13, 2011 email. As previously stated, in that email Mr. Zell commented on the *Restatement's* multiple-factor test provided in Defendant Klingelhafer's July 13, 2011 memo and also attached a copy of Defendant Klingelhafer's memo to his email.

Nonetheless, Defendant Klingelhafer continued to falsely testify that -- during the trial-court proceedings in *Mindlin v. Zell* -- she had never researched the statute of limitations applicable to Mrs. Zell's note, that she had never known that her research on choice of law was going to be used to rebut the statute-of-limitations defense raised in the Mindlins' *Motion for Summary Judgment* ("MSJ"), and that she had never even known that the statute of limitations was an issue in Mrs. Zell's litigation. *See* Doc. 207 at p. 23, line 5 to p. 40, line 25. Although the Plaintiff's counsel wanted to persist in questioning Defendant Klingelhafer on these issues, Judge Marbley cut off the Plaintiff's counsel, stating "I think this area has been finally exhausted." *See* Doc. 207 at p. 40, lines 23-24).

B. Defendant Jeffrey Rupert's False Testimony

The falsity of Defendant Rupert's testimony on the question of whether the Frost Brown Todd attorneys had researched the statute of limitations applicable to Mrs. Zell's note during the trial-court proceedings in the *Mindlin* litigation was even more obvious than Defendant Klingelhafer's false testimony. As was previously explained in Mrs. Zell's *Motion for a New Trial, Etc.* (*see* Doc. 211 at 52-53), 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., Plaintiff's Trial Exhibit 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.

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)," Defendant Rupert testified that Mr. Zell had instead asked Defendant Rupert only to research the 1954 *Standard Agencies* case and, therefore, that was all that Defendant Rupert had researched. *See* Doc. 208 at p. 10, lines 3-6. *See also* Doc. 208 at p. 30, lines 22-24 (RUPERT: "[W]e were not asked specifically to research the statute of limitations issue [during the trial phase of *Mindlin v. Zell*]").

This obvious falsity of Defendant Rupert's claim can be clearly seen in the following exchange -- which also dealing with the above-quoted July 11, 2011 email -- between the 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. ***

* * *

(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. ***

Doc. 208 at p. 11, line 3 to p. 14, line 13.

Thus, as can seen from the above trial excerpt, Defendant Rupert read out loud a July 11, 2011 email from Mr. Zell specifically asking Defendant Rupert to re-research the "statute-of-limitations" issue applicable to Mrs. Zell's note and, thereby, to determine if Ohio's limitations period applied so that, if it did, Mrs. Zell could then re-consider accepting the Mindlin debtors' outstanding settlement offer. Yet, despite the plain meaning of the words in that email -- not to mention that Defendant Rupert (and all of the other FBT attorneys) did ***in fact*** research (albeit erroneously) the statute of limitations applicable to Mrs. Zell's note -- Defendant Rupert nonetheless testified that Mr. Zell had asked him only to research the *Standard Agencies* case, not the statute-of-limitations issue and so that is what he (Defendant Rupert) then did.

C. Plaintiff's Counsel's Attempt to Expose the Defendants' False Testimonies

The Plaintiff's counsel began his closing argument at the trial by explaining that he had been taken by surprise when the Frost Brown Todd defendants' and witnesses' false testimonies were given. Before Judge Marbley cut off the Plaintiff's counsel in the middle of what even the Judge conceded was an "impassioned argument" (*see* Doc. 209 at 86, lines 10-11) and the Judge then forced the Plaintiff's counsel to move on to another subject, the Plaintiff's counsel stated:

> If it please the Court, the plaintiff would also like to make a Rule 52 (c) motion, move for judgment on partial findings, notwithstanding I see no -- I think it would be very difficult for this Court to do so, for either side, because instead of having a trial within a trial, we had two completely separate trials with two different realities. It's been said if the truth loses in public debate, the fault lies with its defender.
>
> Therefore, there are two things that I do agree with Mr. Goldwasser [Defendants' counsel] about. Number one, credibility has been made an issue in this case for all of the witnesses. And although he didn't state this explicitly, I also agree that he's the far better attorney. In fact, he has turned this case -- he has turned a losing case on the true facts into -- well, if I didn't know the true facts, I would think that he won this case in the first 15 minutes and never lost it. But I do know the true facts. And I'm astounded by everything that his witnesses said and that he has repeated today in this court.

And, as a result of that situation in which I found myself and my inexperience in not knowing how to handle it -- what was that situation he put me in? I had e-mail after e-mail, and e-mail reply, e-mail reply, e-mail reply back and forth dozens of times, dozens -- no, innumerable times between the Frost attorneys and myself on each stage of the case. And since that was virtually 99.9 percent of our communications, if anything was said, it was said in those e-mails. If it wasn't said, it wasn't in those e-mails.

So by putting those e-mails into evidence, by putting those e-mails in front of the witnesses, dumb me, I thought they would testify to what the e-mails said. He didn't. And nobody seemed to notice except Mr. Leickly whose time I had to waste, if this Court will recall, by going back over the e-mails between myself and the Frost attorneys saying what does it say. And he wasn't in court the days before when the Frost attorneys said it said something completely different. ***

[***INTERRUPTION FROM JUDGE MARBLEY*** ****]

So, as I was saying, because the defendants and the other Frost attorneys -- well, the defendants -- the Frost attorneys and their counsel I believe have taken advantage of my inexperience by presenting a totally distorted view of the evidence. And I'm not going to take too much time and belabor the point, but I would like to remind this Court that there aren't many issues in this case. But one of the issues was what has been referred to in my pleadings in this case, the choice of law error.

The defendants filed a cross-claim, a third-party claim against me saying that, well, if they committed *** [mal] practice, since I was co-counsel, so did I. And they chose just to address the choice of law error, not the alternative theories of tolling under Ohio law. And so this Court ruled -- received evidence on the choice of law error. And let me just define that because that has been misdefined in this courthouse or, rather, the defendants -- the witnesses claim that, oh, we know the difference between choice of law on the substantive law and on the procedural law like the statute of limitations. But Mr. Zell who was -- who he gave the whole case to and put the crown on his head, ordered us only to review the choice of law on substantive law even though it was a statute of limitations case. And for that reason, we didn't research the choice of law on procedural issues like the statute of limitations.

But, then, one day, I guess in the middle of the appeal process, either lightening struck Defendant Jeffrey Rupert and he suddenly said, I don't care if Mr. Zell will not allow me to research the statute of limitations, which statute of limitations applies, I'm going to do it anyway. Or I don't know if the defendants' testimony is that I suddenly got struck by lightening and decided, Well, maybe I was wrong to tell them to research substantive choice of law which has nothing to do with this case, and I decided to tell them research the statute of limitations. And then suddenly, in the middle of the appeal, the defendants say, Oh, you know, it's Ohio's six-year statute of limitations that applies to Mrs. Zell's note.

Well, what I just described was the testimony before this Court today. But in the pleadings before this Court in 2014, this Court said, this is document -- this is this Court's opinion and order ****

This Court said page 9 -- this is Doc. 121, Page 9, Footnote 2. On the statute of limitations issue -- I didn't say substantive law. "On the statute of limitations issue" -- this is a quote, by the way -- “Mr. Zell presents evidence of correspondence between himself and the defendants in which he questions defendants' statute of limitations analysis.”

No, that can't be right. We had Shannah Morris, we had her assistant [Aaron Bernay], we had Mr. Rupert, we had his assistant [Defendant Klingelhafer] all testify, no, we were not doing statute of limitations research. When we said choice of law, we meant substantive law. And I would ask them, What substantive law?

Well, there was many.

Can you name one?

No, we can't.

And no, they didn't. I think there were a couple, a few minor ones, Your Honor. But that was not the main issue. And we were dealing with the main issue. And so I was told not to use pejorative terms. So I don't think a reasonable person would believe them.

And so let me continue with His Honor's well-reasoned opinion. “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. See Doc. 64 at 11-13.”

That's the very document that I had all of -- several of the defendants and their colleagues and former colleagues explain. And they said, no, it had nothing to do with the statute of limitations.***

* * *

Well, the defendants have all claimed that when the Frost attorneys were telling me both before the Ohio litigation -- and incredibly they made the same false assertion during the litigation when we're deciding whether a motion to dismiss that we had fully drafted should be filed, or instead whether we should file the answer and counterclaim that at that time, when they're discussing the statute of limitations, it's in an academic sense. It's just, Well, we're just telling you it's ten years because it's a fact. Look it up. Missouri's statute of limitations is ten years.

Well, the context was -- and this Court in its decision knew the context. And the context was statute of limitations on this note today here and now in the Ohio courthouse. So, when they said it wasn't -- maybe somebody should talk about Rule 11 to them and me.

[***STOPPED BY JUDGE MARBLEY FROM CONTINUING WITH THIS LINE OF ARGUMENT***]

Doc. 209 at p. 78, line 1 to p. 86, line 9.

Fourteen pages later in the trial transcript, the Plaintiff's counsel was able, briefly, to return to the subject of the Frost Brown Todd defendants' and witnesses' false testimonies with respect to whether or not they had researched the statute of limitations applicable to Mrs. Zell's note. As can be seen from the excerpt from the trial transcript below, the Plaintiff's counsel also discussed one of the difficulties that he had faced when surprised with those false testimonies. Because the Plaintiff's counsel had examined the lead FBT attorneys in the *Mindlin* litigation (Shannah Morris and Defendant Rupert) on the witness stand ***before*** examining their associates (Aaron Bernay and Defendant Klingelhafer, respectively), the Plaintiff's counsel was unable, during his examinations of the associates, to use the emails that the lead attorneys had sent to Mr. Zell (who, as we know, was also the Plaintiff's counsel) to point out the inconsistencies in the lead attorneys' previous testimonies based on those emails. (By the way, this is why Plaintiff's counsel, complaining of being sandbagged, had requested permission during a sidebar from Judge Marbley -- which the Judge then denied -- to allow Plaintiff's counsel to recall Defendant Rupert to the witness stand.)

Continuing now with the Plaintiff's counsel's closing argument, here is what he said:

> From the testimony, you would not think they [the Frost Brown Todd attorneys representing Mrs. Zell] had a leader because, as I was about to say, when I asked both of the associates [i.e., Aaron Bernay and Defendant Klingelhafer] -- because, I mean, that was the order in which they came, after I had been shell shocked with the strange testimony of [FBT partners] Ms. Morris and Mr. Rupert. Then, as we [Judge Marbley and the Plaintiff's counsel] talked in the sidebar, I was attempting to go over the same issues with their [Ms. Morris' and Defendant Rupert's] associates, and I was ruled out of order -- quite properly so -- because I was showing the associates e-mails between me and their partner[s] and they couldn't opine on that. But what I did get out of them [Mr. Bernay and Defendant Klingelhafer] was: I know nothing about nothing. Basically, that's what they said.
>
> I asked them did you know any of the facts in this case? Did you know anything about this [Mrs. Zell's promissory] note? And, no, no, don't remember, or Mr. Bernay didn't remember. I don't know, didn't know. Jonathan [Zell] was supposedly the favorite client, but he [Mr. Bernay] didn't remember -- at the time he even said he didn't know anything about the case. And what did Ms. Klingelhafer say? She said I didn't know anything about the case either; in fact, I didn't even know what I was researching. She specifically said that. It was incredible, Your Honor. I could not believe my ears.

> She said I was just told to research, in general, choice of law, and I happened to pick substantive law which had nothing to do with the case. And I didn't know anything about the case so I didn't know it didn't have anything to do with the case. And it turned out to go into the pleadings, and it was repeated in the pleadings. And Mr. Rupert who obviously knew about the case approved it.
>
> [Turning around to face and point at Defendant Klingelhafer, who was sitting at the defense counsel's table] No. You knew. You knew, and Mr. Rupert knew you knew. [Now, turning back to face Judge Marbley] And if you can believe the testimony, there was no leader because a leader would have made sure that the person doing the basic research knew what the case was about, knew what the issue was. The issue was not substantive choice of law. It was statute of limitations. She [Defendant Klingelhafer] claims not to have known that, although what she was doing was statute of limitations. It was just wrong. It was substantive. It was correct. It was substantive, but she was telling us it was procedural.
>
> And now the clever defendants' attorney says -- well, he's actually pretty good. I think it's the Frost firm that is behind this fallacious testimony. And I think Mr. Goldwasser -- I couldn't do what he's doing. So I don't have a problem with him. He's doing his job. I think it's a distasteful job, but he's very honorable. I don't mean to criticize him. He thinks I do sometimes, and I try to make sure I'm not.
>
> If you believe the testimony that the people doing the basic research -- Mr. Bernay, who found *Standard Agencies* and that's what everybody used, didn't know what it was for, thought it was substantive law, then how the heck did it get in every pleading that we wrote? If it did -- let's assume they're telling the truth. That is a nuts law firm where the people doing the work don't know what they're doing. And even the partners who are supervising them put the wrong arguments in the pleadings.
>
> That's -- let's just assume they're telling the truth. Then Mr. Dehner [a senior FBT partner representing Mrs. Zell in the *Mindlin* litigation and the third defendant] did not do his job. In fact, that whole law firm is incompetent. But the truth is it's a very good law firm and very competent, and these witnesses were not telling the truth.

Doc. 209 at p. 100, line 24 to p. 103, line 9.

Later on in his closing argument (until he was cut off again by Judge Marbley), the Plaintiff's counsel also discussed Defendant Rupert's and Klingelhafer's false testimonies to the effect that these defendants had supposedly never researched the statute of limitations applicable to Mrs. Zell's note during the entire trial-court proceedings in *Mindlin v. Zell*. As can be seen from the excerpt from the trial transcript below, the Plaintiff's counsel also discussed a second difficulty that he had faced when trying to demonstrate the falsity of their testimonies -- that, as a result of

his having been surprised by Defendant Rupert's and Klingelhafer's false testimonies, the Plaintiff's counsel was unable to put all of the impeaching emails into evidence at the trial:

> [U]nder my arrangement with the Frost team [of attorneys representing Mrs. Zell] -- and this is documented in all of the e-mails -- I told them I don't have research capability. I know the facts. We had a division of labor where I was basically a writing assistant. And the only reason that I ended up in the later stages signing the pleadings is because, as I think is pretty obvious, would you want to sign your name to something that I wrote? Probably not. You might agree with the arguments. But when I say it, would you want your name associated with it? I don't think so. I think you would spend a lot of time trying to rewrite what I wrote. And Mr. Rupert did that.
>
> I'm grouping Mr. Rupert and Ms. Klingelhafer together.
>
> Because both of them were working with me on the motion for summary judgment briefings. And it's obvious and clear and explicitly stated a number of times in the e-mails that they were responsible for doing the research. And I never told them not to do research when they wanted to do research. Just read the e-mails. I think to the extent I had time, I put them there [into evidence at this trial].
>
> * * *
>
> So the point is, Your Honor, that I gave them this estoppel argument and detrimental reliance agreement, and I told them you better check this thing out because let me tell you where it's from. I specifically said because it's from the 20-year-old Emanuel contracts, it's probably worthless.
>
> Katie Klingelhafer researched -- and we did have her memo on here -- researched promissory estoppel, detrimental reliance, unjust reliance -- unjust something. Of course, she claimed that she had no idea what it applied to.
>
> Mr. Rupert, then, would write a cover letter and explain to me. And then based on her research, Mr. Rupert and I would create the pleading and then file it.
>
> [***STOPPED AGAIN BY JUDGE MARBLEY FROM CONTINUING WITH THIS LINE OF ARGUMENT***]

Doc. 209 at p. 105 line 6 to p. 106, line 17 (interruptions by Judge Marbley omitted).[4]

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[4] When Jonathan Zell testified as a fact witness at the trial, attorney James Feibel temporarily substituted for Mr. Zell as the Plaintiff's counsel. As a witness, Mr. Zell testified that the only change that ever occurred after he (Mr. Zell) began signing Mrs. Zell's pleadings and briefs was that "Mr. Rupert [no longer] had to spend a lot of time cleaning up my language, making it more diplomatic, more presentable to the courts." However, just as we saw occur in Mr. Zell's above-quoted closing argument, after testifying to this Mr. Zell was immediately cut off and Judge Marbley then struck that portion of Mr. Zell's testimony from the Record as being in "narrative form." This can be seen in the following exchange during the trial:

[***FOOTNOTE 4 CONTINUED FROM PREVIOUS PAGE***]

(MR. FEIBEL) Q: Can you identify that document?

(MR. ZELL) A: Yes. That is an email chain ending with an email from me to Mr. Rupert dated June 24, 2011, subject, results of mediation and a request.

* * *

(MR. FEIBEL) Q: And how is that relevant to this situation?

(MR. ZELL) A : **** And so at this point she [Mrs. Zell] had over $20,000 of attorney fees and no end in sight. So at that point I made a proposal that -- to Mr. Rupert, asking him to check with Joe Dehner, who was the team leader, in my opinion, on this matter.

(MR. FEIBEL) Q: Each of those individuals are parties to this action; is that correct?

(MR. ZELL) A: Yes. Defendant Joseph Dehner and defendant Jeffrey Rupert. So I said if they thought it were appropriate, I would become even the sole attorney in the pretrial stage only of this case. They rejected that.

(MR. FEIBEL) Q: Okay.

(MR. ZELL) A: But what they did accept was that I would continue to write the drafts of my mother's pleadings and briefs; they would continue to revise them and give me the law.

The only difference would be I now would sign the pleadings because I felt that the voice that I had -- I mean that in a literary sense -- was quite idiosyncratic and that the -- Mr. Rupert and before him, Shannah Morris had to spend a lot of time cleaning up my language, making it more diplomatic, more presentable to the courts since they were signing the pleadings at that time.

So they -- Mr. Rupert -- Mr. Dehner apparently agreed with Mr. Rupert that I could do it --

(MR. GOLDWASSER): Your Honor, I'm going to move to strike. This is completely nonresponsive to what was a small question.

(THE COURT): Right. The second part of the question, after Mr. Feibel said, "Okay," I'm striking. It was totally unresponsive. Mr. Zell, as a witness, your obligation is to answer the question asked. I'm going to take Mr. Goldwasser --

(MR. FEIBEL): I should have stopped him, Your Honor. I'm sorry.

(THE COURT): Well, it's not your fault. I'm going to take Mr. Goldwasser's objection as an objection to the narrative form of the answer and ask that you answer the questions asked by your attorney, please.

Doc. 205 at p. 14, line 16 to p. 17, line 14.

CONCLUSION

Regardless of what Judge Marbley did or did not know at the time that he issued his *Findings of Fact and Conclusions of Law*, from the discussion above ***at least now*** there should be no doubt that Defendants Rupert and Klingelhafer testified falsely; that Mr. Goldwasser falsely embellished a crucial part of Defendant Rupert's testimony; and that Judge Marbley then incorporated the false testimonies of Defendants Rupert and Klingelhafer and/or the false embellishments of Mr. Goldwasser into Judge Marbley's findings of fact.

As a result, to the extent that Judge Marbley was unaware of the false nature of the FBT defendants' and witnesses' testimonies, the Plaintiff's counsel was unable to demonstrate that falsity to the Court. For, otherwise, Judge Marbley would not have incorporated their false testimonies wholesale into the Judge's *Findings of Fact and Conclusions of Law* or issued a *Judgment* in favor of the Defendants as he did. Accordingly, this Court's "final judgment was procured through 'fraud … misrepresentation, or misconduct by the opposing party,'" thereby entitling the Plaintiff to a new trial and/or relief from this Court's *Judgment* under Fed. R. Civ. P. 60(b)(3).

In addition, since Judge Marbley's findings of fact and credibility determinations were clearly erroneous, the Plaintiff is entitled to amended or additional findings from the Judge's *Findings of Fact and Conclusions of Law* under Fed. R. Civ. P. 52(a)(5), 52(a)(6), and 52(b).

Finally, to the extent that the falsity of the FBT defendants' and witnesses' testimonies was indeed demonstrated at the trial, but that Judge Marbley nevertheless decided to base his findings of fact on those false testimonies anyway, then the Plaintiff is also entitled to a new trial and/or altering or amending this Court's *Judgment* based on a clear error of law and a need to prevent manifest injustice under Fed. R. Civ. P. 59(a)(1)(B), 59(a)(2), and 59(e).

Accordingly, 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,

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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 13th day of June, 2017, on:

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