APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 18a0480n.06

Case No. 17-3534

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EILEEN L. ZELL, Plaintiff-Appellant, v. KATHERINE M. KLINGEL-HAFER; FROST BROWN TODD LLC; JOSEPH J. DEHNER; JEFFREY G. RUPERT; PATRICIA D. LAUB; SHANNAH J. MORRIS; and DOUGLAS BOZELL, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO **OPINION** (Filed Sep. 24, 2018)

BEFORE: SUTTON, McKEAGUE, and THAPAR, Circuit Judges.

McKEAGUE, Circuit Judge. This legal malpractice suit all began with a family feud over money. In December 2000, Michael Mindlin borrowed $90,000 from his aunt, Eileen Zell, and agreed to pay her back in a year. The due date came, and Mindlin couldn't pay. A decade later, Mindlin and Zell went to court over the unpaid debt. Zell's son Jonathan—a lawyer since

1983—represented her. But as a self-proclaimed "non-practicing attorney with zero trial experience," Jonathan wanted other attorneys to double-check his work. Appellant Br. 18. So, he and Zell hired lawyers from Frost Brown Todd LLC ("FBT") to be Jonathan's co-counsel.

At the end of a contentious lawsuit, Zell lost her claim. Unhappy with that outcome, Zell had her son bring another lawsuit—this time, a legal malpractice case against the FBT attorneys who helped Jonathan litigate her case. Not surprisingly, Zell lost again. The district court dismissed some of her malpractice claims at summary judgment and the rest at the end of a bench trial. Zell appeals both of those rulings as well as various evidentiary rulings made before and during trial. Finding no error, we affirm.

I

Mindlin promised to pay back the $90,000 he borrowed from his aunt Zell within a year. But by the time the due date rolled around, Mindlin could pay only a third of what he owed. For years, Zell seemed content to forgive the remaining debt—that is, until her son Jonathan took an interest in it.

Jonathan's interest piqued during a January 2009 meeting between him, Zell, and an estate-planning lawyer at FBT, Patricia Laub. At that meeting, the three of them discussed a one-million-dollar gift Zell planned to leave Jonathan. Jonathan wanted Zell to include her loan to Mindlin—which took the form of a

promissory note—in the gift. But Laub advised against it, informing Zell and Jonathan that if the note remained uncollectable, it would dilute the gift. Nevertheless, for reasons unknown, Jonathan was adamant that the note be included.

He asked whether Zell could sue Mindlin to collect the remaining debt. Another FBT attorney, Jeffrey Rosenstiel, emailed Jonathan with the bad news later that day: Zell's claim was blocked by Ohio's six-year statute of limitations. Rosenstiel, however, suggested that Zell might not be completely out of options. He thought Missouri, where Mindlin lived, might not pose the same obstacles. He advised Jonathan and Zell to consult with "an attorney licensed in Missouri as soon as practicable" to avoid losing "the ability to bring this claim in a Missouri court if the Missouri statute of limitations should run." Shortly after that, Douglas Bozell (an FBT attorney licensed in Missouri) confirmed Rosenstiel's suspicions and emailed Laub that Missouri's statute of limitations was more favorable. Laub passed the good news along to Jonathan and Zell. And since FBT had no office in Missouri, she offered to help them find an attorney in the state to represent them in a lawsuit before time ran out.

But Zell decided to let sleeping dogs lie—at least while Mindlin's mother (Zell's then 84-year-old sister) was still alive. So, despite the impending ten-year deadline, Zell waited to sue her nephew over the debt.

In the meantime, Mindlin learned that Zell was considering bringing him to court. On October 2010,

eager to resolve things, Mindlin filed a declaratory judgment action against Zell in the Franklin County, Ohio Court of Common Pleas. *Mindlin v. Zell*, No. 10CVH-14965 (Franklin Cty. C.P. Oct. 12, 2011). At that point, Jonathan got back in touch with Laub to get FBT's help. Laub referred the Zells to Shannah Morris, one of the firm's litigation attorneys. Although Jonathan was happy for Morris's help, he made clear from the outset that he expected to remain intimately involved in case strategy, including drafting demand letters, deciding what settlement offers to accept, and taking a first shot at the pleadings. He and Morris together drafted an answer to Mindlin's declaratory judgment complaint and brought a counterclaim to enforce the note. But this attempted collaboration didn't last long. In May 2011, after Morris refused Jonathan's demands to tell the court that she was lead counsel—a statement Morris believed was untrue—she withdrew her representation with Jonathan's approval.

Jeffrey Rupert replaced Morris. Just as he did with Morris, Jonathan heavily restricted Rupert's role. Specifically, Jonathan did not permit Rupert to research issues without Jonathan's approval. And a month into the relationship, Jonathan notified Rupert that, from that point forward, Jonathan would be "the so-called 'lead attorney' or even the sole attorney" during the pretrial proceedings. R. 86-19, p. 2, Page ID 1629. Rupert's only function, according to Jonathan, was to assist with research and correct "obvious and/or serious deficiencies" in pleadings drafted and signed by Jonathan. *Id.* (capitalization removed). Hearings, too, would

be Jonathan's responsibility. Jonathan believed these limitations would relieve Rupert of having "responsib[ility] for the[] pleadings and, thus," allow him to spend less "time rewriting and/or perfecting [Jonathan's] drafts." *Id.* After receiving these instructions, Rupert arranged a meeting with Zell to ensure that she understood and approved of the division of labor instituted by her son. Jonathan also attended. Zell confirmed that Jonathan had full authority to act on her behalf. While acting on his mother's behalf, Jonathan rejected several settlement offers from his cousin, at times because the settlement terms would require Jonathan to give up his "secret desire to seek attorneys fees at the end of [the] case." R. 86-19, p. 1, Page ID 1628. Whether that "secret desire"—not to mention Jonathan's rejection of settlement offers—was known to Zell is unclear. In any event, with Jonathan at the helm, the litigation charged ahead.

On March 2012, Rupert left FBT, and Joseph Dehner worked with Jonathan through the end of the case. And in the end, Zell lost her claim to enforce the note. Just as Rosenstiel predicted two years earlier, the Franklin County Court of Common Pleas concluded that Ohio's six-year statute of limitations barred Zell's claim. *Mindlin*, No. 10CVH-14965. The Ohio Court of Appeals for the Tenth District affirmed. *Mindlin v. Zell*, No. 11AP-983 (Ohio Ct. App. Aug. 7, 2012).

For Jonathan and Zell, however the matter didn't end there. Blaming FBT for the outcome of the litigation, Zell—again, with Jonathan as her attorney—sued FBT and virtually every FBT attorney that ever

touched her case. Zell asserted two primary acts of malpractice[1] against the attorneys. First, she said that FBT's attorneys erroneously advised her that Missouri's ten-year statute of limitations would apply to any action to enforce a note—even to an action brought in Ohio. Second, she asserted that the FBT attorneys failed to argue certain points before the trial court and thereby doomed her case on appeal.

On summary judgment, the district court dismissed Zell's malpractice claims against three of the attorneys as barred by Ohio's statute of limitations and allowed the rest of the claims to proceed to a bench trial. After the trial, the district judge granted the remaining defendants' Rule 52(c) motion for judgment on partial findings, concluding that Zell failed to prove her claims. The district court thus entered judgment in the defendants' favor and dismissed Zell's case.

II

A. Summary Judgment

We start our review with Zell's appeal of summary judgment in favor of three of the defendants: Patricia Laub, Shannah Morris, and Douglas Bozell. The district court ruled that Zell's claims against them were

[1] Zell also asserted claims for breach of fiduciary duty and breach of contract, both of which arise from, and are therefore subsumed by, her claim for legal malpractice. *Dottore v. Vorys, Sater, Seymour & Pease, LLP*, 2014 WL 72538, 2014-Ohio-25, ¶ 35 (Ohio Ct. App. Jan. 9, 2014). Because the claims rise and fall together, this opinion's discussions related to the malpractice claims apply equally to Zell's other two claims.

barred by Ohio's one-year statute of limitations for legal malpractice claims and dismissed them from the case.

We review the court's ruling *de novo*, construing the facts in the light most favorable to Zell. *Gillis v. Miller*, 845 F.3d 677, 683 (6th Cir. 2017) (citation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In Ohio, a cause of action for legal malpractice must be "commenced within one year after the cause of action accrued." O.R.C. § 2305.11(A).[2] A cause of action accrues upon the occurrence of one of two events, whichever is later: (1) "when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney"; or (2) "when the attorney-client relationship for that particular transaction or undertaking terminates." *Smith v. Conley*, 846 N.E.2d 509, 511-12 (Ohio 2006).

We look first at the cognizable event. At the latest, that event was the Ohio trial court's October 12, 2011 summary judgment ruling dismissing Zell's claim to enforce the note as barred by Ohio's statute of

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[2] Because the court's jurisdiction is based on diversity of citizenship, Ohio's statute of limitations applies. *Blaha v. A.H. Robins and Co.*, 708 F.2d 238, 239 (6th Cir. 1983) (per curiam) (citation omitted).

limitations. At that point, Zell would have "discovered or should have discovered that [s]he ha[d] been injured by" the FBT attorneys' alleged erroneous advice that Missouri's statute of limitations would apply instead of Ohio's. *Smith v. Barclay*, 2012 WL 5378180, 2012-Ohio-5086, ¶ 24 (Ohio Ct. App. Nov. 1, 2012) (citation omitted). And once Zell had notice, her cause of action accrued. *Id.* Zell protests that the trial court's summary judgment opinion did not provide notice of a potential claim because she believed that decision would be reversed on appeal. But Ohio courts have rejected that line of reasoning, concluding that "a client is [not] entitled to exhaust all appellate remedies before the statute of limitations commences," even if there is a chance a decision forming the basis of the client's malpractice action may be subsequently overruled and the malpractice claim negated. *Zimmie v. Calfee, Halter and Griswold*, 538 N.E.2d 398, 402 (Ohio 1989).

Accordingly, looking at the cognizable event, Zell's malpractice action is untimely. It accrued on October 12, 2011, but Zell waited until May 10, 2013—well over a year—before commencing the action.

Nor is her action timely if the accrual date is measured from the date each attorney ceased representation. Normally, when an attorney-client relationship ends is an issue of fact appropriate only for a jury to decide. *See Omni-Food & Fasion, Inc. v. Smith*, 528 N.E.3d 941, 944 (Ohio 1988). But here, the conduct terminating the relationship is so clear and unambiguous that a reasonable juror can reach only one conclusion and summary judgment is proper. *Koerber v. Levey &*

Gruhin, 2004 WL 1344834, 2004-Ohio-3085, ¶ 19 (Ohio Ct. App. June 16, 2004) (citation omitted). The record makes the following clear. First, Zell and Jonathan met with Laub in January 2009 to discuss Zell's million-dollar gift to Jonathan and their options to enforce the unpaid Mindlin note. In February 2009, Laub told the Zells what Bozell emailed her—that Missouri's statute of limitations was ten years and there was still time to enforce the note there. Then, after Mindlin sued Zell in October 2010, Laub referred Zell and Jonathan to Morris, who assisted Jonathan with Zell's answer and counterclaim. With the Zells' blessing, Morris withdrew from the case in May 2011. Zell does not point to any evidence that Laub, Morris, or Bozell communicated with her or Jonathan or otherwise participated in her case beyond the above-identified dates. So even construing Zell's allegations in the light most favorable to her, no juror could find that these attorneys represented Zell anywhere close to or beyond May 10, 2012, a year before she filed this malpractice action.

To get around this result, Zell takes an inventive view of the facts and accuses FBT attorneys of playing a game of "hot potato" with her case. Appellant Br. 42. The way Zell sees it, each attorney misinformed her about the applicable statute of limitations and then intentionally passed her case off to someone else at the firm, hoping Zell wouldn't discover their error in time to sue. Zell even goes so far as to assert that later firm members helped protect their colleagues by filing an appeal simply to drag out the litigation and further delay Zell's ability to sue. She says that to avoid this

injustice and hold these attorneys liable for their wrongs, the court should look at when Dehner—the last FBT attorney on her case—ended his representation and then impute that date to every other FBT attorney because they all worked at the same firm. That would put the accrual date sometime in August 2012, making Zell's action timely.

No reading of the facts supports Zell's hot-potato theory. What the facts do show is an uneventful referral from Laub to Morris once Jonathan asked for help with the declaratory judgment action and a disagreement leading to Morris's removal from the case with the Zells' approval. But even if the facts were on Zell's side, Ohio law is not. In Ohio, "continuing representation of a client by a firm acting through several successive individual attorneys cannot extend the time to sue for alleged malpractice by any one of those individual attorneys." *Fisk v. Rauser & Assoc. Legal Clinic Co., LLC*, 2011 WL 5082232, 2011-Ohio-5465, ¶ 19 (Ohio Ct. App. Oct. 25, 2011). That rule would foreclose Zell's argument even if it had a modicum of merit.

Whether we look to the cognizable event or the end of the attorney-client relationships as the accrual date, Zell's malpractice claims against Laub, Morris, and Bozell were untimely.[3] We therefore affirm the district

[3] Zell also asserts, presumably relying on this same "hot potato" theory, that the district court erred by denying Zell's June 2015 motion for leave to file a second amended complaint to add FBT associate Aaron Bernay as a defendant. Apparently, Bernay performed limited research in 2011 at Morris's request. The district court denied Zell's late request to add him to the action,

court's summary judgment ruling dismissing Zell's claims against them.

B. Rule 52(c) Judgment on Partial Findings

We turn to the rulings made at the end of Zell's bench trial. After the parties rested their cases, the district court granted the remaining defendants' Rule 52(c) motion for judgment on partial findings (and denied Zell's identical motion), concluding that Zell failed to prove her claims. Specifically, the district court found that Zell did not prove breach of duty or causation. Zell argues those findings were made in error.

Under Federal Rule of Civil Procedure 52(c), once a party has been fully heard on an issue at a bench trial, "the court may enter judgment against the party on a claim or defense that . . . can be maintained or defeated only with a favorable finding on that issue." We review a district court's factual findings on a Rule 52 motion for clear error. *Petty v. Metro. Gov't of Nashville & Davidson Cty.*, 687 F.3d 710, 720 (6th Cir. 2012).

Zell does not specifically challenge any of the trial judge's factual findings. Instead, she complains generally that the judge "blamed [Jonathan] for everything that went wrong in the Ohio action" but then—

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concluding that even if Bernay had been named in the original complaint, Zell's claims against him would have been time-barred. This ruling was not an abuse of discretion. *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 853 (6th Cir. 2006) (denial of motion for leave to amend reviewed under abuse-of-discretion standard).

curiously—failed to hold Jonathan liable for malpractice. Appellant Br. 82. Of course, the district judge's failure to hold Jonathan liable would be less confounding to Zell and Jonathan if they considered the obvious: Zell didn't sue Jonathan. Instead, she sued the attorneys that Jonathan hired to review his own work. And Zell again relies on Jonathan to be her representative and mouthpiece in the present litigation, just like she did in the last one—despite Jonathan's repeated pronouncements that he lacks litigation skills and that his mother is, in effect, proceeding pro se. Perhaps liability rests with Jonathan. But that question isn't before the court. The district court found the evidence Zell presented insufficient to prove her case against the attorneys she chose to sue. Although Jonathan's brief is filled with outrage, not one word of it goes to any factual findings made by the district judge for us to review. We therefore affirm the district court's findings and dismissal of Zell's case.

C. Motion for New Trial and Other Evidentiary Objections

Finally, Zell asserts that the district judge should have ordered a new trial based on alleged perjury by the defendants and erroneous evidentiary rulings that she asserts prejudiced her ability to prove her case. We review the denial of a motion for a new trial for abuse of discretion. *Luna v. Bell*, 887 F.3d 290, 294 (6th Cir. 2018) (citation omitted).

1. Alleged Perjury

Zell first contends that she is entitled to a new trial because the defendants lied on the witness stand, making statements about the nature of their working relationship with Jonathan that directly contradicted what Jonathan laid out in various emails to FBT attorneys. But the content of the emails is entirely consistent with trial testimony and the entirety of the evidence supports the district judge's factual findings. In reality, Zell takes issue with the district judge's credibility determinations. But those determinations are "entitled to great deference on appeal." *Isabel v. City of Memphis*, 404 F.3d 404, 411 (6th Cir. 2005). None of the emails to which Zell points casts doubt on the judge's credibility determinations, let alone proves that any attorney lied on the witness stand. Accordingly, we affirm.

2. Evidentiary Rulings

Zell next argues that the district court made several erroneous rulings related to the admission of evidence and witness testimony and disclosure of documents protected by attorney-client privilege. "We review the district court's evidentiary decisions for abuse of discretion, and we will reverse only when we find that such abuse of discretion has caused more than harmless error." *United States v. Johnson*, 440 F.3d 832, 847 (6th Cir. 2006) (citation omitted).

i. Jonathan's Testimony and Admission of Trial Exhibits

First, according to Zell, the district judge arbitrarily restricted the length of Jonathan's testimony and the quantity of exhibits allowed to be admitted. Jonathan testified at his mother's trial, with temporary substitute counsel, James Feibel, conducting the direct examination. Zell says that the trial judge ordered Mr. Feibel to limit questioning to 45 minutes and to introduce various emails into evidence without letting Jonathan explain what each of the emails meant. She says that these restrictions prevented her from fully "counteracting FBT's perjurious testimony." Appellant Br. 36.

As can be said about virtually all of Zell's arguments, this one is based on fabrications about what happened at trial, supported by citations pulled out of context. A fair reading of the record shows that Mr. Feibel examined Jonathan for several hours over the course of two days. Before the close of testimony on day one, Mr. Feibel told the judge that he thought the remaining examination would last 45 minutes or less. Defense counsel also expected cross-examination to last no more than 45 minutes. However, at no point did the trial judge *order* the parties to limit their examination to a specified length of time. Additionally, Mr. Feibel reviewed Zell's exhibits with defense counsel to sift out those that had already been admitted and prevent duplication. Zell does not point this court to any order by the trial judge limiting the number of exhibits she was permitted to admit or any specific exhibit that

she sought to admit but that was excluded. Instead, Zell complains about substitute counsel's strategic decisions at trial. Having no court order before us, we have no basis for finding an abuse of discretion.

ii. Testimony of Yund and Blickensderfer

Zell also appeals the district judge's exclusion of trial testimony by FBT's CEO George Yund and FBT's loss-prevention partner Matthew Blickensderfer. Zell asserts that Yund's testimony was necessary to explain and verify the veracity of statements on FBT's website. The district judge determined that Yund's testimony was irrelevant because the parties had stipulated to the authenticity of the webpage. Zell provides no reason why that decision was made in error. We conclude that it was not.

Zell also objects to the district court's denial of her request to cross-examine Blickensderfer regarding his alleged concealment of discovery materials to obtain favorable rulings on summary judgment and at trial. Zell's forceful allegations against Blickensderfer are, again, unsupported by the record. She points to nothing unusual or suspect about the discovery process and to no evidence that Blickensderfer attempted to thwart it in FBT's favor. The district court did not abuse its discretion in denying Zell's request to cross-examine Blickensderfer.

D. Access to Privileged Emails

Finally, Zell complains that the district court erroneously denied her unfettered access to emails in FBT's possession, including some privileged communications. Apparently, FBT submitted a privilege log identifying certain emails it said were protected by attorney-client privilege. The district court then conducted an in-camera review. It is not entirely clear what these emails consist of and why they were deemed privileged; the best that can be gleaned from the record is that many of them apparently concerned communications between attorneys at FBT regarding the present malpractice litigation. Regardless, while Zell generally decries being denied access to all of FBT's emails, she does not make any specific arguments that the district court *erroneously* concluded that some emails were privileged. Additionally, we are unable to locate the privilege log in the record. Accordingly, we have nothing to review. We can find no error based on Zell's general objection to being denied access to all emails in FBT's possession.

III

What began as a controversy over a $90,000 family loan has undoubtedly cost the Zells far more than that in legal fees. And the cost to family relationships may have been even greater. Perhaps the one benefit to Jonathan is that after working on a trial and appeal for his mother in both state and federal court, he can certainly drop the label "non-practicing attorney with

zero trial experience." His experience in this case, however, has done little to benefit his mother, and it ends with this ruling. We **AFFIRM** the judgment of the district court.

APPENDIX B

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

EILEEN ZELL,	:	
Plaintiff,	:	**Case No. 13-cv-458**
v.	:	**JUDGE ALGENON L. MARBLEY**
KATHERINE M. KLINGELHAFER, et al.,	:	**Magistrate Judge Deavers**
Defendants.	:	

OPINION AND ORDER

(Filed Jan. 8, 2018)

This matter is before the Court on two motions: Plaintiff's Motion for a New Trial, New Findings, and Other Relief (ECF No. 211), and Plaintiff's Motion to Amend the Record (ECF No. 223). For the reasons set forth below, the Motion for a New Trial, New Findings, and Other Relief is **DENIED** and the Motion to Amend the Record is **GRANTED**.

I. BACKGROUND

This case arises out of a $90,000 promissory note between Plaintiff Eileen Zell and her nephew, Michael Mindlin, made in December 2000. (Compl., ECF No. 2 at ¶ 13). While planning her strategy to collect on the note, Plaintiff engaged a law firm, Frost Brown Todd, LLC ("FBT") to advise her. (*Id.* at ¶ 14). Before she

could bring suit, however, Mindlin filed his own affirmative action for declaratory relief in Franklin County, Ohio. Based on advice from FBT attorneys, Plaintiff consented to the jurisdiction of the Ohio courts and participated in Mindlin's case. From the pre-lawsuit planning stage through the conclusion of her nephew's case and subsequent appeals, Plaintiff was represented personally by a succession of FBT attorneys. At first, Plaintiff was represented by Patricia Laub, a partner at FBT, assisted by Shannah Morris and Douglas Bozelle, and overseen by Joseph Dehner. Ms. Laub's personal representation of Plaintiff ended on October 22, 2010, when Ms. Morris assumed primary responsibility. On May 6, 2011, Plaintiff requested that FBT replace Ms. Morris, and Mr. Rupert took over four days later. (*Id.* at ¶¶ 39-40). Mr. Rupert personally represented Plaintiff from May 10, 2011 through March 28, 2012, at which time he moved to Seattle. (*Id.* at ¶ 57).

Katherine Klingelhafer also worked on Plaintiff's case, drafting at least two research memoranda on July 13 and August 8, 2011, addressing the choice of law issue related to Plaintiff's note. (*Id.* at ¶¶ 123, 125-26, 135-38, 140, 146). After Mr. Rupert's departure, Mr. Dehner took over personal representation of Plaintiff, including representing Plaintiff on appeal, and provided his opinion on her seeking review by the Ohio Supreme Court. (*Id.* at ¶¶ 59, 151). Mr. Dehner's last interaction with Plaintiff as her attorney was August 13, 2012, after which he informed her that FBT was withdrawing from her case. (*Id.* at ¶¶ 59-61).

Plaintiff ultimately lost her case against her nephew. Judge Richard Sheward of the Franklin County Court of Common Pleas, found that, because she attempted to recover on her note more than six years after its execution, Plaintiff's claim was not timely under Ohio law, and the court thus entered judgment against her. *Mindlin v. Zell*, No. 10CVH-14965 (Franklin Cty. C.P. Oct. 12, 2011). On appeal, the Court of Appeals for the Tenth Appellate district agreed, and further rejected Plaintiff's alternative arguments on the basis that they were not raised at the trial level, and thus could not be considered on appeal. *Mindlin v. Zell*, No. 11AP-983 (Ohio App. Aug. 7, 2012). The Tenth District twice denied Plaintiff's requests that it reconsider its decision. *Mindlin v. Zell*, No. 11AP-983 (Ohio App. Oct. 25, 2012); *Mindlin v. Zell*, No. 11AP-983 (Ohio App. Dec. 31, 2012). Plaintiff opted not to seek review by the Ohio Supreme Court.

In her Complaint, Plaintiff alleged at least two distinct acts of malpractice by FBT and several of the attorneys at the firm related to their representation of her on the promissory note matter. First, she argued that Defendants erroneously advised her that her note would be subject to Missouri's ten-year statute of limitations, rather than Ohio's six-year period, even if her case were adjudicated in Ohio. (*Id.* at ¶¶ 81-82, 84). Based on these representations, Plaintiff alleged that she rejected an offer to settle the case against her nephew for $63,000. (*Id.* at ¶¶ 101-02, 104, 106-07). She further agreed to submit to the jurisdiction of the Ohio court and to participate in the declaratory action

filed by her nephew, with adverse results. (*Id.* at ¶¶ 74-76, 104, 123). As the appellate court explained, "by choosing Ohio as the forum for pursuing her action, [Plaintiff] was subject to Ohio's statute of limitations even if her claim would be timely in Missouri." *Mindlin v. Zell*, No. 11AP-983, ¶ 15 (Ohio App. Aug. 7, 2012). Next, Plaintiff alleged that Defendants erred when they failed to argue before the trial court any alternative or tolling arguments under Ohio law. (ECF No. 2 at ¶¶ 72, 78); *see Mindlin v. Zell*, No. 11AP-983, ¶¶ 17-18 ("Appellant did not, however, raise any of these [alternative] arguments [as to why the promissory note was timely under Ohio law] in the trial court.

In ruling on Defendant's motion for Summary Judgment, this Court dismissed Mrs. Zell's claims against Ms. Laub, Mr. Bozelle, and Ms. Morris, but permitted her claims against Ms. Klingelhafer, Mr. Rupert, Mr. Dehner, and FBT to proceed. (ECF No. 121).

A bench trial on the remaining claims commenced on April 10, 2017. (ECF No. 185). The proceedings lasted four days. At the conclusion of Plaintiff's case, Defendants moved for judgment on partial findings pursuant to Rule 52(c) of the Federal Rules of Civil Procedure. (Trial Trans., Vol. 5, ECF No. 222 at 1019). Rule 52(c) provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a

> favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

After consideration, this Court orally presented its judgment on partial findings as well as its findings of fact and conclusions of law on April 14, 2017. (ECF No. 222, 1064-1076). It rejected all three claims: the legal malpractice claim (*Id.* at 1072), the breach of fiduciary duty claim (*Id.* at 1074), and the breach of contract claim (*Id.* at 1075).

As for the malpractice claim, the Court first noted that "[t]o establish a cause of action for legal malpractice, a plaintiff must show the existence of an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by the breach." (*Id.* at 1065 (citing *Ratonel v. Roetzel & Andress, L.P.A.*, 2016-Ohio-8013, ¶ 6, 147 Ohio St. 3d 485, 486, 67 N.E.3d 775, 777 (Ohio 2016)). The firm itself could not be directly liable for legal malpractice, but may be vicariously liable when one or more of its principals or associates are liable for legal malpractice. (*Id.* at 1066 (citing *Nat'l. Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 2009-Ohio-3601, ¶ 26, 122 Ohio St. 3d 594, 600, 913 N.E.2d 939, 945 (Ohio 2009)). The Court found that each of the Defendants had an attorney-client relationship with Ms. Zell that gave rise to a duty, but determined that Mrs. Zell had not shown that Mr. Dehner, Ms. Klingelhafer, or Mr. Rupert breached their

respective duties. (*Id.* at 1068-1070). The Court observed that FBT attorneys had, in fact, advised Mrs. Zell that the statute of limitations in Missouri was perhaps more generous than that of Ohio, and that she should consider seeking counsel in Missouri to advise her on the applicable law. (*Id.* at 1071-72). Under those circumstances, no legal malpractice claim could lie.

To establish a breach of fiduciary duty, the Court noted that "a plaintiff must show the existence of a duty arising from a fiduciary relationship . . . , a failure to observe the duty . . . and . . . a resulting injury." (*Id.* at 1072 (citing *Franklin Park Lincoln-Mercury, Inc. v. Ford Motor Co*., 530 F. App'x 542, 545 (6th Cir. 2013)). Mrs. Zell argued that FBT had a fiduciary duty to advise her—after the case was filed in Ohio but before Mrs. Zell was served—to file in Missouri or to evade service of process on the Ohio suit by retreating to Florida. *(Id.* at 1073). But, as with the malpractice claim, the breach of fiduciary duty claim failed because Mrs. Zell was advised of the statute of limitations issue in Ohio and "was told that if she wanted to pursue collection, then they needed to take immediate actions to determine whether the Missouri laws were more favorable from a limitation vantage point." (*Id.*). Mrs. Zell's fiduciary duty claim therefore failed.

Finally, as for the breach of contract claim, the Court noted that because none of the FBT attorney defendants were liable for legal malpractice, there can be no finding of breach of contract by FBT. (*Id.* at 1075).

The case was dismissed with prejudice on April 21, 2017. (ECF No. 200).

Plaintiff now moves for a "new trial," "new findings," "relief from the findings of fact and conclusions of law" presented at the conclusion of the bench trial, and "relief from th[e] Court's Judgment. . . ." (ECF No. 211). Plaintiff also seeks to amend the trial record to correct certain errors on the "Exhibit and Witness List" created during trial. (ECF No. 223).

II. ANALYSIS

Mrs. Zell makes two main arguments for post-trial relief: First, she asserts that witnesses for the defense gave false testimony at trial because they were "seemingly-coached" to perjure themselves, and that the Court based its judgment on that testimony. (ECF No. 211 at 1-2).

Second, she argues—yet again—that there was no agreement to transfer liability for the legal sufficiency of her case from FBT to her son, Jonathan Zell, and that the Court therefore based its determination at trial on a "falsehood." (*Id.* at 61-63). She seeks post-trial relief under Federal Rules of Civil Procedure 52(a)(5), 52(a)(6), 52(b), 59(a)(1)(B), 59(a)(2), 59(e), and 60(b)(3). This opinion addresses each in turn.

A. Rule 52

First, Ms. Zell seeks relief under Rule 52(a)(5), 52(a)(6), and 52(b)[1] of the Federal Rules of Civil Procedure. As a threshold matter, Federal Rules of Civil Procedure 52(a)(5) and 52(a)(6) are inapplicable: Rule 52(a) governs the standard of review *appellate* courts are to apply in reviewing a trial court's decision and does not serve as an independent vehicle for a trial court's reconsideration of its own findings.

Rule 52(b), however, does permit a trial court to "amend its findings—or make additional findings" as well as "amend the judgment." FED. R. CIV. P. 52(b).

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[1] Rule 52 of the Federal Rules of Civil Procedure provides, in relevant part:

> **(a) Findings and Conclusions.**
>
> . . .
>
> **(5)** ***Questioning the Evidential.), Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.
>
> **(6)** ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard for the trial court's opportunity to judge the witnesses' credibility.
>
> **(b) Amended or Additional Findings.** On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

FED.R.CIV.P. 52.

The underlying purpose of Rule 52(b) "is to permit the correction of any manifest errors of law or fact that are discovered, upon reconsideration, by the trial court." *Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990). It is "not intended to allow parties to rehash old arguments already considered and rejected by the trial court." *Id.* (citing *American Train Dispatchers Ass'n v. Norfolk & Western Ry. Co.*, 627 F. Supp. 941, 947 (N.D.Ind.1985)).

Although her briefing is voluminous, at no point in 137 pages of legal memoranda accompanying her post-trial motions does Mrs. Zell demonstrate legal error, newly discovered evidence, change in law, or manifest injustice. Indeed, every one of Mrs. Zell's post-trial arguments were fully considered and subsequently rejected by the Court at trial. Specifically, she argues that because this Court dismissed a Third-Party Complaint against her son, Jonathan Zell (ECF No. 121), that it necessarily follows that FBT and its attorneys *must* be liable for malpractice. (ECF No. 211 at 18). Such an argument depends on a logical fallacy: it assumes both the existence of malpractice and the necessary existence of an entity liable for that malpractice. Here, as the Court found at trial, there was no malpractice because none of the FBT attorney defendants breached their duties to Mrs. Zell (ECF No. 222 at 1068-1070), and in fact FBT attorneys actively advised her to seek counsel in Missouri. *(Id.* at 1071-72).

Next, she argues that the Court failed to consider certain email correspondence between Jonathan Zell

and FBT attorneys—email correspondence that was first excerpted in Mrs. Zell's initial Complaint, and was subsequently addressed in great detail during the pendency of these proceedings. (ECF No. 2, ECF No. 117). This Court did not ignore those emails: it reviewed the emails and after weighing the evidence contained therein, determined at trial that there was no basis for a cause of action for legal malpractice. (*See*, *e.g.*, ECF No. 206 at 9-10).

B. Rule 59

Next, Mrs. Zell argues that she is entitled either to a new trial or an amended judgment under Rules 59(a)(1)(B), 59(a)(2), and 59(e)[2] of the Federal Rules of

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[2] Rule 59 of the Federal Rules of Civil Procedure provides, in relevant part:

> **(a) In General.**
>
> **(1)** ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:
>
> . . .
>
> **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
>
> **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

Civil Procedure. Faced with a Rule 59 motion, a court may choose, "in the interest of judicial economy, to rely on its earlier decision as the definitive resolution of the issues decided therein," or it may "if it deems appropriate, revisit any legal determination *de novo* and alter, amend, or even reverse the prior decision if justice so requires." *Treesh v. Cardaris*, No. 2:10-CV-437, 2010 WL 4809111, at *1 (S.D. Ohio Nov. 17, 2010) (citing *Binkley Co. v. Eastern Tank, Inc.*, 831 F.2d 333, 336 n. 4 (1st Cir.1987); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 n. 5 (6th Cir.1982)). But Rule 59 does not give a party an opportunity to "re-argue a case." *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Indeed, such motions are "seldom granted" because relief "contradicts notions of finality and repose." *Coleman v. United States*, No. 2:05-CR-0043(1), 2017 WL 2266881, at *2 (S.D. Ohio May 23, 2017) (quoting *Thompson v. Kline*, No. 4:16-cv-1926, 2017 WL 1166128, at *2 (N.D. Ohio March 29, 2017)).

Generally, courts will disfavor Rule 59 motions unless the motion calls "attention to an argument or controlling authority that was overlooked or disregarded in the original ruling, presents evidence or argument that could not previously have been submitted, or successfully points out a manifest error of fact or law." *Id.* (quoting *Davie v. Mitchell*, 291 F. Supp. 2d 573, 634

> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 38 days after the entry of the judgment.

FED.R.CIV.P. 59.

(N.D. Ohio 2003)). If, on the other hand, a Rule 59 motion merely quibbles with the Court's decision, the proper recourse is not a motion for reconsideration but instead an appeal to the Sixth Circuit. *McConocha v. Blue Cross & Blue Shield Mut. of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996).

Mrs. Zell presents no controlling authority that was overlooked in the original ruling, presents no new evidence, and has not convinced this Court that its prior judgment contained manifest errors of fact or law. She therefore cannot succeed in a Rule 59 motion.

C. Rule 60(b)(3)

Rule 60(b)(3)[3] "allows a district court to grant relief in cases of 'fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party'" *Info-Hold, Inc. v. Sound Merch., Inc.,* 538 F.3d 448, 455 (6th Cir. 2008) (quoting FED.R.CIV.P. 60(b)(3)). In this context, "[f]raud is the knowing misrepresentation of a material fact, or

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[3] Rule 60(b)(3) of the Federal Rules of Civil Procedure provides, in relevant part:

> **(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. . . .

FED.R.CIV.P. 60.

concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment." *Id.* (citing BLACKS LAW DICTIONARY 685 (8th ed.2004); 37 Am.Jur.2d Fraud and Deceit § 23 (2001) ("The five traditional elements of fraud . . . include: a false representation; in reference to a material fact; made with knowledge of its falsity; with the intent to deceive; and on which an action is taken in justifiable reliance upon the representation."); 12 MOORE'S FEDERAL PRACTICE § 60.43[1][b] (3d ed. 1999) ("Pursuant to [Rule 60(b)(3)], judgments have been set aside on a wide variety of alleged frauds, such as allegations that adverse parties failed to properly respond to discovery requests, thus preventing opposing parties from adequately preparing for trial, to claims that evidence presented at trial itself consisted of perjured testimony or false documents.")).

A motion under Rule 60(b)(3) is "neither a substitute for, nor a supplement to, an appeal." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007) (citing *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir.1989). Indeed, a Rule 60(b) movant must show "extraordinary circumstances justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) *(see also Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009)).

Mrs. Zell does not show the type of "extraordinary circumstances" required to succeed on a Rule 60(b) motion. *Cf. Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Indeed, she does not show fraud at all. Her only proof—such as it is—that witnesses for the Defense provided

this Court with false testimony is her repeated assertion that she would not have hired attorneys at her own expense if she had intended to vest any responsibility for the legal sufficiency of the pleadings and briefs in her son, Jonathan Zell. (ECF No. 211 at 61). This Court has had ample time to consider this argument—indeed, it has been the crux of Mrs. Zell's case since she filed her complaint in May 2013. (ECF No. 2) After a four-day bench trial, in which this Court had the opportunity to hear testimony from several witnesses, this Court concluded that Jonathan Zell assumed strategic responsibility for the case by directing FBT attorneys to limit their role to "correcting obvious errors in his writing," such that they could not be considered responsible for malpractice on the choice of law issue. (ECF No. 222 at 1069-1070). There simply is no credible allegation of fraud that would cause this Court to reopen its considered judgment.

D. Plaintiff's Motion to Correct the Record

Finally, Mrs. Zell filed an unopposed motion to correct clerical errors in the Exhibit and Witness List produced by the Court during the bench trial. (ECF No. 197, 198). (ECF No. 224). The Court **GRANTS** Plaintiff's Motion to Correct the Record and acknowledges that Plaintiff's Trial Exhibit Numbers 23, 150, 35, 121, 48, 42, 65, 118, 49, 279, 280, 135, 64, and 93 were admitted into evidence at the trial.

III. CONCLUSION

Plaintiff's Motion for Post-Trial Relief (ECF No. 211) is **DENIED**. Plaintiff's Motion to Correct the Record (ECF No. 223) is **GRANTED**.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: January 8, 2018

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Eileen L. Zell vs Katherine M. Klingelhafer, et al.	JUDGMENT IN A CIVIL CASE Case No. 2:13-cv-458 **Judge Marbley** **Magistrate Judge Kemp**

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[ ] **Decision by Court.** This action was decided by the Court without a trial or hearing.

> Based on all of the testimony presented at trial, and the findings of fact and conclusions of law stated on the record on Friday, April 14, 2017, IT IS ORDERED AND ADJUDGED that Defendants' Rule 52c Motion for Judgment on Partial Findings is **GRANTED** and

this case is **DISMISSED WITH PREJUDICE**.

Date: **April 21, 2017** **Richard W. Nagel**, Clerk

s/ Scott Miller

By Scott Miller/Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EILEEN L. ZELL, PLAINTIFF, vs. KATHERINE M. KLINGELHAFER, et al., DEFENDANTS.	)	CASE NO. 2:13-CV-458 APRIL 14, 2017 3:00 P.M.

TRANSCRIPT OF EXCERPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE
HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:

Jonathan R. Zell, Attorney-At-Law, LLC
By: JONATHAN R. ZELL, ESQ.
5953 Rock Hill Road
Columbus, Ohio 43213

FOR THE DEFENDANTS:

White, Getgey & Meyer
By: BRIAN D. GOLDWASSER, ESQ.
1 West 4th Street
Cincinnati, Ohio 45202

* * *

[2] FRIDAY AFTERNOON SESSION
APRIL 14, 2017

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THE COURT: As the Court indicated previously, in a bench trial, a motion for judgment at the close of the plaintiff's case is called a motion for judgment on partial findings, and it is governed by Federal Rules of Civil Procedure 52(c), and the parties made arguments pursuant to that. Both parties move for a judgment on partial pleadings pursuant to Rule 52(c).

In determining my ruling, I need not consider the evidence presented in the light most favorable to the plaintiff. And the Court may grant the motion if the Court believes that the plaintiff has failed to make out her case. That's the seemingly universal principle. I'm relying on the case of *Johnson v. Luttrell*, which is an unpublished 1999 opinion by the Sixth Circuit Court of Appeals, Westlaw 645288. That same rule has been articulated by *Geddes v. Northwest Missouri State University*, 49 F.3d 426, Eighth Circuit, 1995; *Roth v. American Hospital Supply Corp*, 965 F.2d, 862, out of the Tenth Circuit.

So I'm going to consider the three issues that were tried in this case to the Court.

[3] The first issue I'm going to take up is the legal malpractice issue against Defendants Dehner, Klingelhafer, Rupert and Frost Brown Todd. To establish a

cause of action for legal malpractice, a plaintiff must show the existence of an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by that breach. That's *Ratonel v. Roetzel & Andress*, 67 N.E.3d, 775, 777, an Ohio Supreme Court ruling from 2016.

Now, as a threshold matter, a law firm does not engage in the practice of law and, therefore, cannot directly commit malpractice or commit legal malpractice. A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice. And that's *National Union Fire Insurance Company of Pittsburgh v. Wuerth*, 913 N.E.2d. 239 – I'm sorry. 913 N.E.2d 939, 945, Ohio Supreme Court 2009.

The first issue I'm going to consider is the issue of the attorney-client relationship giving rise to a duty. I find that Mr. Zell has satisfied this element. Each individual defendant worked on this case in varying capacities.

Then the second issue is whether there was a breach by the respective defendant attorneys, and I'm going to consider each of them independently. First, I'm going to review, to put in context, the claimed breaches. And this comes from the testimony of Mr. Leickly. Did I pronounce that correctly?

[4] MR. GOLDWASSER: Leickly.

THE COURT: Leickly. Mr. Leickly.

First, he opined that the failure to advise that a Court will apply its own state's statute of limitation to Mrs. Zell's note claim both before and after the complaint was filed. That's the first breach he claimed.

Secondly, Mr. Leickly claimed that in 2009, around the time of the Rosensteil research, which was embodied in the January 8th, 2009 e-mail, which is Defendant's Exhibit 2, the failure to advise that Mrs. Zell should have filed in Missouri only, and that she was involved in a race to the courthouse wherein, if the case was filed in Ohio, she would lose.

Third alleged breach set forth by Mr. Leickly was once the complaint was filed, filing an answer and counterclaim instead of advising Mrs. Zell to file a motion to dismiss in Ohio her complaint for improper venue and to try to get the case into Missouri. So that was the third alleged breach as set forth by Mr. Leickly.

And the fourth alleged breach was arguing promissory, rather than equitable, estoppel at summary judgment.

So first, let's consider Mr. Dehner. Per Mr. Dehner's own testimony, his involvement was limited to, A, his status as billing attorney; B, his receipt in carbon copy of the Rosensteil research in 2009; and, C, his advice to Ms. Morris regarding whether to put Mr. Zell's name on a pleading or [5] whether to allow Mr. Zell to serve as trial counsel. That's Plaintiff's Exhibit 262.

Per Mr. Leickly's testimony, the excerpts from the Frost Brown Todd Web site do not change the standard of care for Mr. Dehner or impose additional duties on him even if you believe that he's more than the billing attorney or, as Mr. Zell argued, the team leader. Mr. Leickly, as the expert for Mrs. Zell, had no legal authority – and this Court could find none – suggesting that a billing attorney in a large firm had a duty to run, oversee or strategize a client's entire case if he had entrusted the work to another attorney.

Moreover, the e-mails back and forth between Mr. Zell, as client representative, were primarily with Ms. Morris and Mr. Rupert, not with Mr. Dehner, suggesting that Mr. Dehner was not the primary client contact. Indeed, the testimony of Mr. James Arnold bolsters this conclusion. The Court finds that Mr. Dehner was not involved in the breaches claimed in this case. So that element, and the other elements with respect to legal malpractice, I find – with the exception of him having an attorney-client relationship with Mrs. Zell. Other than that, all of the other elements with respect to Mr. Dehner were not satisfied, and I find that the cause of action does not lie against Mr. Dehner for legal malpractice.

Next, Ms. Klingelhafer. Per her testimony, which the Court found credible, she completed limited research [6] 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 she should have researched statute of limitations when she was asked to research choice of law.

I find, therefore, that with the exception of there being an attorney-client relationship between Ms. Klingelhafer and Mrs. Zell, there is no basis for a cause of action of legal malpractice to lie against Ms. Klingelhafer.

Now with respect to Mr. Rupert. Per his testimony, Mr. Rupert became involved in the case in May 2011, after the case was filed in Ohio, after the counterclaim and answer, but before the summary judgment briefing. He did not write or sign off on the brief. And pursuant to Mr. Zell's own admission, he was primarily asked to edit Mr. Zell's work on the summary judgment briefing.

Now, the issues potentially attributable to Mr. Rupert are, one, failing to advise as to the statute of limitations issue during summary judgment briefing so that Mr. Zell could accept the settlement offer, that is likely the $67,000 offer at the June 24, 2011 court-ordered mediation; and, two, failing to correct Mr. Zell when he argued promissory, rather than [7] equitable, estoppel at summary judgment. However, pursuant to a June 24, 2011 e-mail, Defendant's Exhibit 16, Mr. Zell asked for a change in the role of the attorneys in this case. He, Jonathan Zell, would do all the drafting, and limited Frost Brown Todd to correcting obvious errors in his writing.

Mindlin's motion for summary judgment was filed on July 5th, 2011. That's Exhibit 276. So Mr. Rupert was involved in the whole motion for summary judgment briefing but entirely under Mr. Zell's requested division of labor. By July 19, 2011, the date of the response to Mindlin's motion for summary judgment, Plaintiff's Exhibit 278, Mr. Rupert had met with Eileen Zell and she confirmed that she wanted this change in role. 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 [8] 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.

Let me talk about this element of damages proximately caused by the alleged breach. Although Mrs. Zell lost her case, there's no evidence that the loss was caused by a breach on any part of any of these named

defendants. Pursuant to Mr. Arnold's testimony which I found quite credible, and Mr. Leickly's testimony which I also found credible for the most part, once the case was filed in Ohio, Ohio would apply its own statute of limitations. Therefore, pursuant to the testimony of both experts, the issue was the race to the courthouse. And pursuant to Mr. Leickly's testimony, that issue was not adequately conveyed; pursuant to Mr. Arnold's testimony, it was. But when the Court looks at Defense Exhibit 2, which is the Rosensteil e-mail – well, I'll get to that.

The defendants in this case were not involved in this issue about the race to the courthouse that the experts talked about. Ms. Morris and Mr. Rosensteil were involved in the initial research and the initial advice regarding filing in Missouri. Mr. Bernay and Ms. Morris were involved in some initial choice of law research. The other parties, the other named defendants, were not involved.

[9] But I would be remiss were I not to mention the fact that in that Exhibit 2 memo, which was I believe in January of '10 – am I correct? January of 2009. He advised that under Ohio law, the promissory note is time-barred because more than six years have passed since the due date stated in the note. That's under Ohio law.

Then he goes on to say, "Perhaps the law of Missouri is more generous in this regard, which issue should be explored by an attorney licensed in Missouri as soon as practicable. Even though your mother does

not want any lawsuit to be filed over this loan while her 84-year-old sister is still alive, you may lose the ability to bring this claim in a Missouri court if the Missouri statute of limitations should run."

Then he says, "Following your review, please contact me to discuss whether you want Frost Brown Todd to initiate any collection activity at this time. If not, please contact counsel of your choosing in California and/or Missouri to advise you concerning the laws there. If a decision is made in favor of pursuing these debt obligations, immediate action should be taken to determine whether the laws in California and/or Missouri are more favorable from a statute of limitations standpoint. Any further delay may result in the inability to successfully bring an action against these borrowers in any forum."

I don't know that that could be made any clearer. So I [10] find for the defendants on the statute of limitations – on the legal malpractice claim.

The next issue is breach of fiduciary duty. The elements of a breach of fiduciary duty claim are as follows. To establish a breach of fiduciary duty under Ohio law, a plaintiff must show the existence of a duty arising from a fiduciary relationship; two, a failure to observe the duty; and, three, a resulting injury. That's *Franklin Park Lincoln-Mercury Inc. v. Ford Motor Company*, 530 F.App'x 542, Sixth Circuit, 2013.

In her complaint, Mrs. Zell contends that the basis of the breach of a fiduciary duty claim is that Frost Brown Todd had a conflict of interest. She alleges that

FBT had no office in Missouri, and so it failed to advise Mrs. Zell properly. And they did that – that is, Frost Brown Todd failed to advise her properly – to collect fees.

Now, after the case was filed in Ohio but before Mrs. Zell was served, according to the allegations and the arguments of the plaintiff, Frost Brown Todd should have advised Mrs. Zell to file in Missouri or to evade service of process by retreating to Florida.

First of all, Mr. Arnold's testimony refutes this because to avoid service would be inappropriate. Then they argued that Frost Brown and Todd dissuaded her – the plaintiff argues, rather, that Frost Brown Todd dissuaded her from trying [11] to get the Ohio action moved to Missouri and persuaded her to consent to the jurisdiction of the Ohio courts because the plaintiff claims Frost Brown Todd wanted fees from the representation, all the while knowing the risks of Ohio applying its own statute of limitations.

That theory is belied by the facts. First of all, Exhibit 2 makes clear that they – that an attempt was made – well, that Mrs. Zell was advised of the limitation problem in Ohio. She was urged to contact a licensed attorney in Missouri as soon as practicable. She was told that if she wanted to pursue collection, then they needed to take immediate actions to determine whether the Missouri laws were more favorable from a limitation vantage point. And they urged her that any further delay might result in the inability successfully to bring an action in Missouri.

She was also told that Frost Brown Todd did not have a lawyer in its firm who did that kind of work in Missouri. She was told that we have a lawyer in our firm who is licensed in Missouri but he doesn't practice in this area. The testimony is unrefuted that Mrs. Zell was told that they would be happy to find her a lawyer in Missouri. In fact, in Exhibit 4, in January of 2010, it was noted that – I think to Mr. Zell, that the most efficient way to proceed was to retain Missouri counsel. So that belies the plaintiff's theory that Frost Brown Todd was working assiduously to keep the case in Ohio to [12] collect the fees. She had been told as early as 2009, and again in 2010, that these matters should be taken care of in Ohio. They offered to find her Missouri counsel, and they told her that they didn't have a Missouri lawyer in their firm who could do this particular work.

The named defendants were not involved in the case after the case was filed and before she was served. Those defendants were involved in the case later, as has been previously stated. So the Court finds that the claims for breach of fiduciary duty does not lie against any of the defendants in this case.

Finally, breach of contract. The elements of breach of contract are the existence of a contract between the parties, performance by the plaintiff, breach by the defendants, and damage or loss to the plaintiff. As I mentioned at the outset, any claim of breach of contract – that breach of contract is against the defendant, Frost Brown and Todd only, and that claim can only have merit and only lie against Frost Brown and Todd

through vicarious liability. And since the Court has found that none of the attorneys in this case are liable for legal malpractice, there can be no finding of breach of contract by Frost Brown and Todd.

There is an argument that can be made that under the case of *Dottore v. Vorys, Sater, Seymour & Pease* out of the Eighth District in 2014, a legal malpractice case subsumes within it any of the issues that can arise from the [13] attorney-client relationship. Malpractice by any other name still constitutes malpractice.

And I indicated at the final pretrial that I was going to consider each of these issues separately, and I have.

I want to just say a word about the basis for Mrs. Zell's complaint with respect to breach of contract. They were, first, that Frost Brown and Todd would exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances. This claim fails factually because the legal malpractice claim fails. And she also alleged that Frost Brown Todd would charge reasonable fees for this representation. Well, Mr. Arnold testified – and his testimony was unrefuted and his testimony certainly was credible – that the fees were reasonable. And the fees such as they are, were reasonable and there was no basis for a breach of contract claim.

Therefore, the Court finds specially – and I stated my factual basis and my conclusions of law on the record – that the defendants are entitled to Rule 52(c) judgment on partial findings. This case is, therefore,

dismissed with prejudice. Further briefings will not be necessary.

Are there any other matters that I need to take up at this time from the plaintiff, Mr. Zell?

MR. ZELL: Did your law clerk tell you that we had indicated some exhibits that perhaps were already in the [14] evidence filed? But, if not, we thought we had – since I had testified about them – they were the lower court decisions and the final appellate reply brief.

THE COURT: If I recall correctly, I asked at a point in the proceedings today if the plaintiff rested, and you indicated that you had, and you rested. You had a chance to make a Rule 52(c) argument. So the evidence is in. The Court has ruled, and the record will not be reopened.

Is there anything else?

MR. ZELL: No, Your Honor.

THE COURT: Anything further from the defense?

MR. GOLDWASSER: No, Your Honor.

On behalf of the defendants, we thank you.

THE COURT: Ms. Clark, you may adjourn court.

(Proceedings concluded at 3:33.)

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APPENDIX E

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.*,	**Magistrate Judge Abel**
Defendants.	

OPINION & ORDER

(Filed Dec. 23, 2014)

This matter is before the Court on Third Party Defendant Jonathan Zell's Motion for Summary Judgment, (Doc. 50). Third Party Defendant Jonathan Zell ("Mr. Zell") seeks summary judgment on Defendants' Third Party Complaint, (Doc. 7), alleging that the Defendants are entitled to contribution and/or indemnification from Mr. Zell. For the reasons set forth herein, Third Party Defendant Jonathan Zell's Motion is **GRANTED**.

I. BACKGROUND

A. Factual Background

1. *Plaintiff Eileen Zell's Action Against Defendants*

This case arises out of a $90,000 promissory note between Plaintiff Zell and her nephew, Michael Mindlin,

made in December 2000 (the "underlying action"). (*Compl.*, Doc. 2 at ¶ 13). While planning her strategy to collect on the note, Plaintiff engaged Defendant law firm Frost Brown Todd, LLC ("FBT") to advise her. (*Id.* at ¶ 14). Before she could bring suit, however, Mindlin filed his own affirmative action for declaratory relief in Franklin County, Ohio. Based on advice from FBT attorneys, Plaintiff consented to the jurisdiction of the Ohio courts and participated in Mindlin's case.

From the pre-lawsuit planning stage, through the result of her nephew's case and subsequent appeals, Plaintiff was represented personally by a succession of FBT attorneys. At first, Plaintiff was represented by Defendant Patricia Laub, a partner at FBT, assisted by Defendants Shannah Morris and Douglas Bozelle, and overseen by Defendant Joseph Dehner. Attorney Laub's personal representation of Plaintiff ended on October 22, 2010, when Attorney Morris assumed primary responsibility. On May 6, 2011, Plaintiff requested that FBT replace Attorney Morris, and Defendant Jeffrey Rupert took over, on May 10. (*Id.* at ¶¶ 39-40). Attorney Rupert personally represented Plaintiff from May 10, 2011 through March 28, 2012, at which time he moved to Seattle. (*Id.* at ¶¶ 57). During this time, Defendant Katherine Klingelhafer also worked on Plaintiff's case, drafting at least two research memoranda on July 13 and August 8, 2011, addressing the choice of law issue related to Plaintiff's note. (*Id.* at ¶¶ 123, 125-26, 135-38, 140, 146). After Attorney Rupert's departure, Attorney Dehner took over personal representation of Plaintiff, including representing

Plaintiff on appeal, and provided his opinion on her seeking review by the Ohio Supreme Court. (*Id.* at ¶¶ 59, 151). Attorney Dehner's last interaction with Plaintiff as her attorney was August 13, 2012, after which he informed her that FBT was withdrawing from her case. (*Id.* at ¶¶ 59-61).

Plaintiff ultimately lost her case against her nephew. Judge Sheward, of the Franklin County Court of Common Pleas, found that, because she attempted to recover on her note more than six years after its execution, Plaintiff's claim was not timely under Ohio law, and the court thus entered judgment against her. *Mindlin v. Zell*, No. 10CVH-14965 (Franklin Cnty. C.P. Oct. 12, 2011). On appeal, the Court of Appeals for the Tenth Appellate district agreed, and further rejected Plaintiff's alternative arguments on the basis that they were not raised at the trial level, and thus could not be considered on appeal. *Mindlin v. Zell*, No. 11AP-983 (Ohio App. Aug. 7, 2012). The Tenth District twice denied Plaintiff's requests that it reconsider its decision. *Mindlin v. Zell*, No. 11AP-983 (Ohio App. Oct. 25, 2012); *Mindlin v. Zell*, No. 11AP-983 (Ohio App. Dec. 31, 2012). Plaintiff opted not to seek review by the Ohio Supreme Court.

Plaintiff alleges at least two distinct acts of malpractice[1] by the attorneys at FBT related to their

[1] In her Motion, Plaintiff lists three instances of alleged malpractice by Defendants, by separately enumerating Defendants' alleged failure to preserve the "alternative" arguments on appeal and wrongly arguing "promissory" rather than "equitable" estoppel. (Doc. 19 at 12-13). In her Reply, however, Plaintiff aggregates

representation of her on the promissory note matter. First, she argues that Defendants erroneously advised her that her note would be subject to Missouri's ten-year statute of limitations, rather than Ohio's six-year period, even if her case were adjudicated in Ohio. (*Id.* at ¶¶ 81-82, 84). Based on these representations, Plaintiff alleges that she rejected an offer to settle the case against her nephew for $63,000. (*Id.* at ¶¶ 101-02, 104, 106-07). She further agreed to submit to the jurisdiction of the Ohio court and to participate in the declaratory action filed by her nephew, with disastrous results. (*Id.* at ¶¶ 74-76, 104, 123). As the appellate court explained, "by choosing Ohio as the forum for pursuing her action, [Plaintiff] was subject to Ohio's statute of limitations even if her claim would be timely in Missouri." *Decision, Mindlin v. Zell*, No. 11AP-983, ¶ 15 (Ohio App. Aug. 7, 2012).

Next, Plaintiff alleges that Defendants erred when they failed to argue before the trial court any alternative or tolling arguments under Ohio law. (*Compl.* At ¶¶ 72, 78); *see Decision, Mindlin v. Zell*, No. 11AP-983, ¶¶ 17-18 ("Appellant did not, however, raise any of these [alternative] arguments [as to why the promissory note was timely under Ohio law] in the trial court."). In its first and second reconsideration decisions, the appellate court explained that those arguments that

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these two alleged failures, and cites Defendants' confidence that she still might succeed on appeal, and her consequent rejection of another settlement offer, as the third act of malpractice. (Doc. 48 at 5). In either case, the various acts numbered as the "second" and/or "third" instances of malpractice all relate to Defendants' actions on appeal.

Defendants did raise in the trial court were defective because they were "devoted to the timeliness of [Plaintiff's] action under Missouri law," not Ohio law, and furthermore because even the estoppel argument that Defendants raised in the trial court was ineffective, since the attorneys made reference to "promissory estoppel" rather than "equitable estoppel." *Mem. Decision, Mindlin v. Zell*, No. 11AP-983, ¶¶ 8-9 (Ohio App. Oct. 25, 2012); *Mem. Decision, Mindlin v. Zell*, No. 11AP-983, ¶9 (Ohio App. Dec. 31, 2012). Relatedly, Plaintiff faults Defendants for their overconfidence related to the strength of these "alternative" Ohio-law-based arguments. In an email dated January 4, 2012, before the appellate court had rendered any of its decisions, Attorney Rupert admitted that Missouri law was unlikely to apply to the note, but suggested that she might still prevail on the alternative arguments. (*Email dated Jan. 4, 2012*, Doc. 48-1 at 18). Based on this advice, Plaintiff alleges, she turned down another settlement offer and proceeded with her appeal. (*Compl.* at ¶¶ 79, 148).

2. *Third Party Defendant Mr. Zell's Involvement in the Underlying Action*

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.

B. Procedural Background

Plaintiff commenced this action on May 10, 2013. (*Compl.*, Doc. 2). Pursuant to Fed. R. Civ. P. 4(m), she had 120 days, until September 9, 2013, to serve Defendants. Due to various complications, Plaintiff chose to employ Kirk Wilhite, a professional process server in Columbus, Ohio, to perfect service. (*Pl.'s Mot. for Extension of Time*, Doc. 18 at 2-4; *Aff. of Jonathan R. Zell*, Doc. 18-4 at ¶¶ 13-14, 17-19). Plaintiff alleges that Wilhite was successful in serving process on all Defendants on or before September 9, 2013 except for Defendant Rupert, who was eventually served via certified mail on September 13, 2013. (Doc. 18-4 at ¶¶ 23-26).

Defendants challenge Wilhite's claim that he served them, and take issue with the proofs of service filed by him. Defendants have maintained that failure of service and/or failure of service of process bars the claims against them, and subpoenaed Wilhite to appear and testify as to his effectuation of service. (*See Defs.' Mot. for Order to Show Cause*, Doc. 23). Accordingly, on December 4, 2013, Plaintiff sought extra time to serve process, in order to re-serve each Defendant. (Doc. 18). The Court granted this request on December 26, 2013, giving Plaintiff until March 31, 2014. (Doc. 25). Defendants demanded reconsideration, on the grounds that the Court ruled on the Motion before they had an opportunity to respond (Doc. 26), and on March 10, 2014, after the issue had been fully briefed, the Court denied Defendants' Motion. (Opinion and Order, Doc. 61).

In its Order denying Defendants' Motion, the Court explained that Plaintiff had demonstrated good cause for an extension because she had been reasonably diligent in attempting to perfect service within the allotted period. (Doc. 61 at 5-6). The Court assessed the relevant factors and found no prejudice to Defendants, other than having to defend this action, especially in light of the fact that they had actual notice and were able timely to file their Answer and Counterclaim. (*Id.* at 6). The Court also noted that Plaintiff made "more than . . . a halfhearted attempted at service," considering that she hired a process server, and that nothing suggested that she played any part in the alleged misconduct by Wilhite. (*Id.* at 7).

On December 4, 2013, Plaintiff filed a motion seeking partial summary judgment on Defendants' personal jurisdiction, service of process, and statute of limitations affirmative defenses. (Doc. 19). On January 21, 2014, Defendants opposed Plaintiff's motion, (Doc. 41), and also filed a cross-motion for summary judgment on the same issues, requesting the Court to dismiss Plaintiff's case. (Doc. 40). The Court granted in part and denied in part Plaintiff's motion, and, likewise, granted in part and denied in part Defendants' motion. (*Opinion and Order*, Doc. 89). In its Opinion and Order, the Court dismissed Plaintiff's claims against Defendants Laub, Bozell, and Morris. Plaintiff's claims against Defendants Klingelhafer, Rupert, Dehner, and FGT were allowed to proceed, and summary judgment was granted in Plaintiff's favor on three of Defendants' affirmative defenses – lack of

personal jurisdiction, failure of service, and the statute of limitations.

On September 24, 2013, Defendants filed a joint Answer and Third Party Complaint, (Doc. 7), bringing a third party action against Mr. Zell, Plaintiff's son. Mr. Zell filed a Motion for Summary Judgment, (Doc. 50), moving this Court to dismiss Defendants' third party complaint with prejudice. Defendants responded, (Doc. 60), and Mr. Zell has replied (Doc. 64); therefore, this matter is ripe for review.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides, in relevant part, that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." A fact is deemed material only if it "might affect the outcome of the lawsuit under the governing substantive law." *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The necessary inquiry for this Court is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-52). In evaluating such a

motion, the evidence must be viewed in the light most favorable to the nonmoving party. *United States S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013). The court reviewing a summary judgment motion need not search the record in an effort to establish the lack of genuinely disputed material facts, however. *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404 (6th Cir.1992). Rather, the burden is on the nonmoving party to present affirmative evidence to defeat a properly supported motion, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989), and to designate specific facts that are in dispute. *Anderson*, 477 U.S. at 250; *Guarino*, 980 F.2d at 404-05.

To survive the motion the nonmoving party must present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient to survive the motion; there must be evidence on which the jury could reasonably find for the opposing party. *See Anderson*, 477 U.S. at 251; *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995); *see also Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992) (finding that the suggestion of a mere possibility of a factual dispute is insufficient to defeat a motion for summary judgment) (citing *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)).

III. ANALYSIS

Third-party Defendant Jonathan Zell ("Mr. Zell") seeks summary judgment, requesting that this Court dismiss with prejudice Defendants' third party complaint, (Doc. 7), against him. (Doc. 50 at 1). Defendants' third party complaint alleges that Mr. Zell served as co-counsel on Plaintiff's underlying case and, thus, to the extent Plaintiff suffered damages from Defendants' negligence, she likewise suffered damages because of Mr. Zell's negligence. (Doc. 7 at ¶ 3-5). For that reason, Defendants claim that if they are found liable for negligence they are entitled to contribution from Mr. Zell. (*Id.* at ¶ 6). Defendants also maintain that they are entitled to indemnification from Mr. Zell "based on his active and direct negligence." (*Id.* at ¶ 7).

Mr. Zell argues that "[t]he FBT Defendants not have even alleged any specific acts of negligence" by him and that his status as an attorney in the underlying action, without more, does not prove he contributed to or caused the professional negligence alleged by Plaintiff. (*See* Doc. 50 at 9; Doc. 64 at 8). 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.[2]

[2] 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. (*See* Doc. 64 at 11-13). Moreover, Mr. Zell presents

(Doc. 50 at 8-9; Doc. 64 at 11-13). Further, on Defendants' contribution claim, Mr. Zell argues that Defendants do not allege that he did any poor work, let alone that he contributed to Plaintiff's injury. (Doc. 64 at 8). With respect to Defendants' indemnification claim, Mr. Zell maintains that Defendants fail to present evidence of any indemnification agreement between himself and any individual Defendants or the law firm (FBT). Mr. Zell offers affidavit testimony to support his argument that no such express or implied indemnification agreement exists. (Doc. 50-2 at ¶ 12-14).

Defendants focus their argument on demonstrating that Mr. Zell actively participated in and was intimately involved in Plaintiff's underlying case as counsel. Thus, Defendants conclude, Mr. Zell is "subject to a third party claim for contribution/indemnification." (Doc. 60 at 2, 10). With respect to their claim for contribution, Defendants insist that "FBT has a viable contribution claim against Zell based on his concurrent representation of Plaintiff." (*Id.* at 11). Similarly, Defendants argue that Mr. Zell's participation in the underlying action yields the conclusion that Defendants are entitled to indemnification from Mr. Zell. "If there is liability," Defendants maintain, "it should be placed

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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. (*See* Doc. 64 at 13 (Mr. Zell quoting his own email to Defendants stating, "my mother and I have decided to go along with your initial advice to try the Mindlin action in Ohio!")).

solely on the actions of Zell and not FBT." (*Id.* at 12). For these reasons, Defendants claim genuine issues of material fact exist, making summary judgment on their third party complaint inappropriate. (*Id.* at 12).

A. Contribution

Under Ohio law, a claim for contribution is governed by statute. Ohio Rev. Code § 2307.25; *see also Costin v. Wick*, 1996 WL 27974, at *2 (Ohio Ct. App. Jan. 24, 1996). Ohio Revised Code § 2307.25(A) provides that the right to contribution may exist "if one or more persons are jointly and severally liable in tort for the same injury or loss to person or property." In other words, if two or more persons are concurrently liable or jointly liable in tort for a common injury, a right of contribution exists among them. *See Costin*, 1996 WL 27974 at *3. "Concurrent negligence" has been defined in Ohio law as "the negligence of two or more people concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury." *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 394 (1995); *see also Costin* 1996 WL 27974 at *2 (finding that if both attorneys were negligent, and their negligence combined to plaintiffs' single and indivisible injury, then they were concurrent tortfeasors and Ohio's contribution statute was applicable).

In this case, for their contribution claim to withstand summary judgment, Defendants must show genuine issues of material fact exist as to whether Mr. Zell

was negligent (i.e., engaged in legal malpractice) and that his negligence concurred with Defendants' negligence to produce a single, indivisible injury to Plaintiff. A legal malpractice action arises out of an attorney's breach of the duty to "represent his client in a professional, effective and careful manner." *Costin*, 1996 WL 27974 at *3 (quoting *Loveman v. Hamilton*, 66 Ohio St.2d 183, 184 (1981)). To succeed on a legal malpractice claim, three essential elements must be shown: (1) the existence of an attorney-client relationship such that the attorney owed a duty to the plaintiff; (2) breach of the attorney's duty by not conforming to the standard required by law; and (3) a causal connection between the conduct complained of and resulting damage or loss. *See, e.g., Stancik v. Hersch*, 2012 WL 1567213, at *5 (Ohio Ct. App. May 3, 2012) (citing *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164, 1169 (1997)).

Mr. Zell has discharged his summary judgment burden of "pointing out . . . an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and by putting forth record evidence supporting his position that Defendants do not have viable claims for either contribution or indemnification against him. *See* Fed. R. Civ. P. 56. Defendants, on the other hand, fail to carry their burden to present significant and probative evidence in support of their allegations made in their complaint. *See Anderson*, 477 U.S. at 249-50; *see also Celotex Corp.*, 477 U.S. 317 at 324 (stating that Rule 56(e) "requires the nonmoving party

to go beyond the [unverified] pleadings" and offer admissible evidence supporting its position and "designat[ing] specific facts showing that there is a genuine issue for trial.") (quoting Fed. R. Civ. P. 56.).

Defendants focus their brief almost entirely on whether Mr. Zell was an attorney in the underlying action. Following an extensive discussion of the legal work provided by Mr. Zell and his general role in the underlying action, Defendants then abruptly conclude: "FBT has a viable contribution claim against Zell based on his concurrent representation of Plaintiff" and so "[i]f FBT is liable, so, too, is Zell." (Doc. 60 at 11). Evidence about Mr. Zell's role as co-counsel, however, only relates to the first element of malpractice – whether an attorney-client relationship giving rise to a duty exists.[3] Defendants have not presented to the Court any evidence of a breach of duty by Mr. Zell. Likewise, Defendants make no allegations of, nor present any probative evidence concerning, damages proximately caused by Mr. Zell's conduct in connection with the malpractice alleged by Plaintiff. *See Carolina Cas. Ins. Co. v. Sharp*, 940 F. Supp. 2d 569, 580 (N.D. Ohio 2013) (while the proximate cause determination is ordinarily an issue to be determined by the trier of fact, "where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is

[3] Moreover, Mr. Zell concedes in his Reply that he was one of Plaintiff's attorneys. (Doc. 64 at 2). For that reason, the question of whether an attorney-client relationship existed between Plaintiff and Mr. Zell is an undisputed fact.

nothing for the jury [to decide], and, as a matter of law, judgment must be given.") (quoting *Wesley v. Walraven*, 2013 WL 544053, at *12 (Ohio Ct. App., Feb. 5, 2013).

Defendants' argument is based on the faulty reasoning that concurrent representation of a client necessarily equals third party liability. Defendants' argument misstates Ohio law. To the contrary, as Mr. Zell aptly points out, negligence is not a status offense. Indeed, as indicated in *Costin*, and as Defendants themselves acknowledge, (*see* Doc. 60 at 11), a claim for contribution may stand if a concurrent attorney *causes or contributes* to a single, indivisible injury, not as an automatic consequence of concurrent representation. *See Costin*, 1996 WL 27974 at *2-3. A recitation of Mr. Zell's activities and participation in the underlying matter is not evidence of breach of duty, nor is it evidence of causation connecting those activities and Plaintiff's injury.

Even when viewing the evidence in the light most favorable to the Defendants, Defendants' failure to allege or present affirmative evidence of specific facts demonstrating a dispute over whether Mr. Zell's actions contributed to or caused Plaintiff's injury is fatal to Defendants' claims against Mr. Zell. Accordingly, Defendants have not met their burden of presenting "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore*, 8 F.3d at 339-40; *see also Capital City Energy Grp., Inc. v. Kelley Drye & Warren, LLP*, 975 F. Supp. 2d 842, 851-52 (S.D. Ohio 2013) (finding that to succeed in an action for legal malpractice, all three essential elements of the claim must be satisfied);

Celotex Corp., 477 U.S. 317 at 324 (nonmoving party must put forth probative evidence demonstrating genuine issues of material fact exist). Thus, no genuine issues of material fact exist for the trier of fact. Mr. Zell's motion for summary judgment must be granted.

For these reasons, Mr. Zell's Motion for Summary Judgment on Defendants' contribution claim is **GRANTED**.

B. Indemnity

In Ohio, the rule of indemnity provides that, where a person is chargeable with another person's wrongful acts and pays damages to the injured party as a result thereof, he has a right of indemnity from the person who committed the wrongful act. *Mills v. River Terminal Railway Co.*, 276 F.3d 222, 226 (6th Cir. 2002) (citing *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St. 2d 11, 321 N.E.2d 787, 789 (Ohio 1975)); *Bank One, N.A. v. Echo Acceptance Corp.*, 522 F. Supp. 2d 959, 982 (S.D. Ohio 2007) *aff'd*, 380 F. App'x 513 (6th Cir. 2010).[4] A right of indemnity exists when "the party paying the damages [is] only secondarily liable; whereas the person committing the wrongful act is primarily liable." *Id.*; *see also Satterfield v. St. Elizabeth Health Ctr.*, 159 Ohio App. 3d 616, 620 (Ohio Ct. App. 2005).

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[4] In *Motorists Mutual*, 653 N.E.2d at 238, the Ohio Supreme Court overruled the *Travelers Indem. Co.* decision in part. The principle that an implied indemnity claim exists between parties who are primarily and secondarily liable was not the basis for that disapproval.

Otherwise stated, a claim for indemnification occurs "when one who is primarily liable is required to reimburse another who has discharged a liability for which that other is only secondarily liable." *Bank One, N.A.*, 522 F. Supp. 2d at 982 (citing *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St. 3d 75, 609 N.E. 2d 152, 154 (Ohio 1993)); *see also Mills*, 276 F.3d at 226 ("Indemnity may lie in favor of a party who was not actively negligent but is nonetheless made liable under the law.") (citing *Albers v. Great Cent. Transp. Corp.*, 145 Ohio St. 129, 60 N.E.2d 669, 671 (Ohio 1945) (stating that a case of primary and secondary liability arises where a person "by reason of his relationship to the wrongdoer or by operation of the law," is made liable)). In other words, to acquire a right to indemnification, a co-defendant must be at fault for causing Plaintiff's injuries. *Satterfield*, 159 Ohio App. 3d at 620 ("Without fault, there is no basis for indemnification. This is so because one party must be chargeable for the wrongful act of another as a prerequisite for indemnity.") (internal quotations and citations omitted).

The right to indemnity arises from a contractual relationship, either express or implied. *See Yank v. Howard Hanna Real Estate Servs.*, 2003 WL 21500191 at *3 ("The right to indemnity requires an allegation of some implied or express contract creating a duty by one party to indemnify the other.") (citing *Reynolds v. Physicians Ins. Co. of Ohio*, 68 Ohio St.3d 14, 623 N.E.2d 30 (1993)); *see also Waverly City Dist. Bd. of Edn. v. Trade Architects, Inc.*, 2008 WL 5423269 (Ohio Ct. App. 2008). To allege a claim for express indemnity,

the party making such an allegation must demonstrate proof of an express contractual agreement wherein the parties have agreed to indemnify one another. *See Yank*, 2003 WL 21500191 at *3. An implied contract of indemnity may be found when the tortfeasor committing the wrong is so related to a secondary party as to make the secondary party liable for the wrongs committed solely by the other. *See Motorists Mut. Ins. Co.*, 73 Ohio St.3d at 394 (1995) (quoting *Reynolds*, 68 Ohio St.3d at 16, 623 N.E.2d 30 (1993)); *Yank*, 2003 WL 21500191 at *3 ("[I]ndemnity may be defined as the right, arising out of an implied contract, of a person who has been compelled to pay what another should pay, to obtain complete reimbursement.") (quoting *Allstate Ins. Co. v. U.S. Associates Realty, Inc.*, 11 Ohio App. 3d 242, 464 N.E.2d 169, 173 (Ohio Ct. App. 1983)).

Secondary liability arises when "a relationship exists between parties that permits one to be held liable for the consequences of the other's actions." *Waverly City Dist. Bd. of Edn.*, 2008 WL 5423269 at *8. Relationships which that meet this standard include: wholesaler/retailer, abutting property owner/municipality, independent contractor/employer, and master/servant. *See Reynolds*, 68 Ohio St. 3d at 16; *Yank*, 2003 WL 21500191 at *3. Ohio courts have declined to find an implied contract of indemnity without a sufficient relationship between the party claiming indemnity and the alleged primarily liable party. *See Reynolds*, 68 Ohio St. 3d at 16 (Ohio Supreme Court rejected a claim for indemnity based on the relationship between two

doctors caring for a single patient where the physicians acted independently and had distinct duties).

In this case, Defendants have neither alleged, nor provided evidence of, an express agreement for indemnification with Mr. Zell. Likewise, Defendants do not allege or offer evidence supporting the existence of an implied agreement for indemnification with Mr. Zell. Defendants correctly state the legal requirement that an implied indemnification agreement, and thus vicarious liability, "can be found only when the parties possess a special relationship that gives rise to vicarious liability as a matter of law." (Doc. 60 at 11-12, quoting *Carter v. Bernard*, 2006 WL 3849855, at *4 (Ohio Ct. App. 2006)). And yet Defendants do not allege or offer any evidence of a "special relationship" comparable to those relationships Ohio courts have held create an implied indemnification agreement. Moreover, none of the relationships listed in *Reynolds* that have been found to give rise to implied contracts of indemnity are present here.

Instead, Defendants simply conclude that because Mr. Zell participated as an attorney in the underlying litigation, "[i]f there is liability, it should be placed solely on the actions of Zell and not FBT." (Doc. 60 at 12). Defendants apparently believe – although their argument is not clearly articulated – that Mr. Zell's participation in the underlying action necessarily creates a sufficient relationship between themselves and Mr. Zell such that the parties impliedly agreed that Mr. Zell would be secondarily liable for Defendants' negligent acts. Unfortunately, Defendants fail to provide

any legal support for this proposition. Moreover, this Court is unable to find support in Ohio law for a per se rule that a co-counsel relationship creates an implied indemnification agreement as a matter of law. While the Court does not foreclose the possibility that such a relationship *may* give rise to an implied indemnification agreement in certain circumstances, Defendants do not present adequate factual or legal support for such an argument in this case sufficient to withstand summary judgment.

The Court is unable to find that either an express or implied indemnification agreement exists between Mr. Zell and Defendants. The conclusory allegations pled in Defendants' third-party complaint, and the lack of support for any such agreement in Defendants' Opposition to Mr. Zell's Motion for Summary Judgment are insufficient to discharge Defendants' burden on summary judgment. Thus, the Court finds that Defendants have not demonstrated the presence of any genuine issues of material fact to sustain a claim for indemnification. For this reason, Mr. Zell's Motion for Summary Judgment on Defendants' indemnification claim is **GRANTED**.

IV. CONCLUSION

For the reasons states above, Third-Party Defendant's Motion for Summary Judgment is **GRANTED**. Mr. Zell is hereby dismissed from this action as a third-party defendant.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES
DISTRICT JUDGE

DATED: December 23, 2014

APPENDIX F

No. 17-3534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EILEEN L. ZELL, Plaintiff-Appellant, v. KATHERINE M. KLINGELHAFER; FROST BROWN TODD LLC; JOSEPH J. DEHNER; JEFFREY G. RUPERT; PATRICIA D. LAUB; SHANNAH J. MORRIS; AND DOGLAS BOZELL, Defendants-Appellees.	)	ORDER (Filed Oct. 31, 2018)

BEFORE: SUTTON, McKEAGUE, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

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* Chief Judge Cole recused himself from participation in this ruling.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX G

No. 17-3534

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EILEEN L. ZELL

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

PETITION FOR REHEARING AND REHEARING EN BANC (TO INCLUDE ORAL ARGUMENT) OF PLAINTIFF-APPELLANT EILEEN L. ZELL

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Counsel for Plaintiff-Appellant

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[3] STATEMENT REQUIRED BY FED. R. APP. P. 35

This *Petition for Rehearing and Suggestion for Rehearing En Banc* was originally written as a *Motion for Oral Argument* because, despite the timely request for oral argument Plaintiff-Appellant Eileen Zell ("MRS.

ZELL") had made in her *Opening Brief* (Doc. 40 at 1 and 11), this Court sent the parties a *Notice* dated 8/9/2018 (Doc. 59) stating in pertinent part:

> The Court has determined that oral argument is not required. See I.O.P. 34(a)(4). The case noted above is scheduled for submission to the Court on the briefs of the parties and the record on **Thursday, October 4, 2018**. (Original emphasis.)

However, before MRS. ZELL could file her *Motion for Oral Argument*, a panel of the Court prematurely issued *its Opinion* (Doc. 602) in this case on 9/24/2018 —a full ten days ***before*** the case was "scheduled for submission to the Court."

Not surprisingly, without the benefit of oral argument the panel affirmed the district court's decision in favor of the Defendant-Appellee Frost Brown Todd ("FBT") law firm and against the elderly MRS. ZELL.

Similarly, in connection with its previous denial of MRS. ZELL's *Motion for a New Trial Based on Defendant FBT's Perjury at Trial* (RE [4] 211), the district court had also denied MRS. ZELL's timely request for an oral hearing.

Furthermore, the district court's decision denying MRS. ZELL's *Motion for a New Trial* failed ***even to mention*** any of the overwhelming documentary evidence that directly and unambiguously contradicted FBT's testimony—testimony on which the district court then uncritically based its findings of fact—or any of the testimony of MRS. ZELL's expert witness,

who refuted FBT's testimony by citing to that overwhelming and undisputed documentary evidence. All of the evidence contradicting FBT's testimony was exhaustively referenced in MRS. ZELL's 63-page *Motion for a New Trial* and MRS. ZELL's 76-page *Reply Brief* (RE 217), but was then completely ignored by the district court.

Similarly, in its premature *Opinion*, a panel of this Court did the exact same thing. In affirming the district court's decision, this panel also ignored the overwhelming and undisputed documentary and expert-witness evidence that unquestionably proved FBT's

obvious, blatant, and wholesale perjury

on which the district court had uncritically based its findings of fact.

[5] **I. THE PANEL'S *OPINION* (WRITTEN *BEFORE* THE CASE WAS EVEN SUBMITTED TO THE PANEL) GROSSLY MISCHARACTERIZED THE CASE**

As bad as FBT's perjurious testimony was, the panel of this Court was not satisfied and went on to embellish that perjurious testimony in its premature *Opinion*.

As MRS. ZELL had previously explained to this panel (*see* Doc. 40 at 18-19 and Doc 52 at 5-6), MRS. ZELL's son—the undersigned Jonathan Zell ("MR. ZELL"), a non-practicing lawyer with zero previous trial experience and, at that time, no access to online

legal research—had contacted FBT to represent his mother in the underlying case because the son knew he himself was not qualified to do so. *See* 3/17/2014 *Eileen Zell Affidavit* (RE 50-1, Page ID # 593-596); *3/17/2014 Jonathan Zell Affidavit* (RE 50-2, Page ID # 600-603); Transcript (RE 222, Page ID # 6187-6190); E-mails (RE 50-2, Page ID # 608, 628, 634-643).

However, in an attempt to reduce his mother's attorney's fees—and subject to FBT's oversight and review—MR. ZELL eventually began to voluntarily assist FBT with the writing tasks of assembling the facts and putting FBT's legal research into the first draft of MRS. ZELL's pleadings and briefs. *Id.*

[6] The FBT attorneys and MR. ZELL communicated almost exclusively via e-mail. Their e-mails clearly showed the FBT attorneys did all of the legal research (which turned out to be fatally flawed and mainly involved the statute-of-limitations issue). MR. ZELL then used the FBT attorneys' research to prepare multiple drafts of MRS. ZELL's pleadings for the FBT attorneys' review, correction, and filing in court. *See* E-mails in Mrs. Zell's *Separate Appendix* (Doc 39) Parts V to XIII.

For the three and one-half years prior to trial, none of the above facts had ever been ***questioned***. Moreover, as was documented in MRS. ZELL's *Motion for a New Trial* (RE 211 at 18-30) and her briefs before this Court, the above facts had even been litigated by the parties and ***accepted by the district court*** in its

decision dismissing FBT's *Third-Party Complaint* against MR. ZELL!

As demonstrated below, the district court found FBT represented MRS. ZELL and was responsible for litigating her case, MR. ZELL merely assisted FBT, FBT advised MRS. ZELL (through MR. ZELL) on the key statute-of-limitations issue, FBT advised MRS. ZELL erroneously on this issue and, in so doing, actually overcame MR. ZELL's doubts that FBT's advice was correct:

> [7] 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: . . . selecting FBT, the law firm employing the Defendants in this case, as the firm tasked . . . [with] representing Plaintiff in the litigation related to the underlying action; assisting Plaintiff . . . 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).

* * *

> On the statute of limitations issue, Mr. Zell presents evidence of correspondence between himself and the Defendants in which he questions Defendants' statute of limitations analysis and expresses doubt as to whether Defendants properly considered the issue. Moreover, Mr. Zell presents correspondence indicating that Plaintiff's . . . belief that the Missouri statute of limitations would apply was based on a [8] review of Defendants' recommendation and reasoning, as opposed to any independent research or investigation conducted by Plaintiff or by Mr. Zell.

District court's *Opinion & Order* dated 12/23/2014 (RE 121, Page ID # 2684, 2685, 2689, n.2) (citations omitted).

Then, at the trial held three and one-half years later, FBT falsely claimed—***for the very first time***—it had ***oral*** agreements with MRS. ZELL and her son whereby supposedly (1) the son (a non-practicing lawyer with no access to online legal research) was responsible for doing all the legal research in MRS. ZELL's case, with FBT's four litigators relegated to the role of advising the son; and (2) those four FBT litigators ***never*** researched the key statute-of-limitations issue in the case.

However, in its premature *Opinion*, this panel went even further. To ***help*** the FBT litigators explain what they could have been doing in the case if not representing MRS. ZELL (and why they charged MRS. ZELL over $73,000 on an $82,000 claim), the panel

misrepresented FBT as being more like a continuing-legal-education trainer than a law firm providing legal services, ***falsely*** claiming: "Jonathan [Zell] wanted other attorneys to double-check his work. So, he and [Mrs.] Zell hired lawyers [9] from Frost Brown Todd . . . to be Jonathan's co-counsel." *Id.*

In its premature *Opinion*, the panel also mischaracterized a dispute between FBT attorney Shannah Morris ("MORRIS") and MR. ZELL as having been about which one of them was "lead counsel" (with the panel continuing to suggest it was MR. ZELL). *See* Doc. 60-2 at 3. However, as MRS. ZELL pointed out during the pre-trial proceedings, this dispute was instead about

> Mr. Zell's sincerely-held beliefs that he was not a *bona fide* co-counsel and that Defendant Morris' listing of Mr. Zell on Plaintiffs pleadings had been a mistake that would henceforth be corrected.

(RE 134, Page ID 3054).

MORRIS' and MR. ZELL's contemporaneous e-mail correspondence—which bears this out—was quoted in and attached to MR. ZELL's successful *Motion for Summary Judgment on the Third-Party Complaint* (RE 50, 50-1, 50-2). Here is but one example, which comes from MR. ZELL's e-mail to MORRIS of 11/30/2010:

> I would like to have an arrangement whereby you are the one representing my mother in

> court, yet I am free to suggest strategy to you based on my intimacy with the facts[.]
>
> *and*
>
> [10] [B]y having you do the actual courtroom work, we can all be confident that my mother has fully competent counsel. Furthermore, my overseeing the litigation in the way an outside counsel might should ***theoretically*** help my mother's case.

(RE 50-2, Page ID 641.)

The mischaracterizations of fact ***and argument***[1] in the panel's premature *Opinion* cannot be held against this panel, of course, inasmuch as that *Opinion* was apparently written by an over-enthusiastic law clerk ***before*** the case was even submitted to the panel! But both of those reasons—the gross mischaracterizations in the *Opinion* and the apparent failure to have had this case adjudicated by the panel—***compel*** a rehearing.

II. FROST BROWN TODD'S PERJURIOUS TESTIMONY

As MRS. ZELL explained in her *Opening and Reply Briefs* (Doc. 40 at 84-94 and Doc. 58 at 6, 14-36), the district court based its findings of fact on two Big Lies in the FBT attorneys' testimonies, while the panel of

---

[1] As shown in Section II, the panel ***falsely*** claimed: "Zell does not specifically challenge any of the trial court's factual findings" (Doc. 60-2 at 9).

this Court based its *Opinion* on only the first lie. Yet, since the panel recognized the second lie, it shouldn't have deferred to the district court's finding that the FBT attorneys were credible.

[11] **A. <u>Big Lie # 1</u>**

The first Big Lie came in FBT attorney Jeffrey Rupert's ("RUPERT's") testimony and involved an ***unanswered*** 6/24/2011 e-mail MR. ZELL had sent to RUPERT before the plaintiffs in the underlying case filed their summary-judgment motion on the statute-of-limitations issue on 7/5/2011. With regard to "the run-of-the-mill pleadings that plaintiffs' counsel is churning out," MR. ZELL suggested several ***possible*** ways to "minimize my mother's pre-trial litigation costs—without, however, making my mother wholly dependent on my own inadequate legal research and writing skills." *See* RE 86-19, Page ID # 1629.

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

[12] Since MR. ZELL had received no response to his 6/24/2011 e-mail, he sent a 6/26/2011 e-mail

explaining the signing change was intended to relieve RUPERT of responsibility ***only*** for the professional "tone that would befit a pleading that you would sign," but ***not*** for any "legal[ ] insufficien[cy]" MR. ZELL's first drafts might contain. *See* ¶ 52 of *Amended Complaint* (RE 117, Page ID # 2622-2623). MR. RUPERT's only response on 6/27/2011 was: "I talked with Joe [DEHNER], and I think we may be able to work something out. I'll get back to you shortly on that." E-mail (RE 86-18, Page ID # 1627).

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

RUPERT's testimony, which the district court uncritically adopted in its findings, was demonstrably false for seven reasons:

[13] 1. RUPERT's characterization of the 6/24/2011 e-mail was belied by the e-mail's own words. The e-mail did not say MR. ZELL wanted MRS. ZELL to be dependent on MR. ZELL for all the legal research. On the contrary, it stated MR. ZELL did ***not*** want MRS.

ZELL to be "wholly dependent on my own inadequate legal research and writing skills."

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

3. While arranging a meeting with RUPERT for himself and MRS. ZELL on 7/1/2011, MR. ZELL stated in his 6/2912011 e-mail to RUPERT:

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

(RE 50-2, Page ID # 637) (emphasis added). Does this e-mail sound like it was written by someone who, a few days later on 7/1/2011, would have [14] agreed to an arrangement whereby the legal sufficiency of his mother's pleadings would now become his own ***sole*** responsibility and not that of the law firm his mother was ***continuing*** to employ?

4. While a meeting did take place on 7/1/2011, there was never any discussion, let alone any agreement, on even the key ***signing*** component of MR. ZELL's proposal. Proof is that, on 7/5/2011, MR. ZELL sent RUPERT an e-mail asking: "(a) Who—you or me—should sign [the next pleading] . . . and (b) who should be listed as 'of counsel' on it?" RUPERT then replied back: "I think you should sign it and list me as 'of counsel' in the signature block." *See* Trial Exhibit P-127 (Appendix V).

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

6. In almost four years of pretrial litigation—including litigation on the *Third-Party Complaint* specifically concerning MR. ZELL's potential liability—FBT never even once mentioned this supposed agreement.

[15] 7. MR. ZELL's testimony was that he was to do a large part of the writing, but the FBT's attorneys were ***always*** responsible for doing the legal research, for MRS. ZELL's pleadings and briefs. (Transcript, RE 222, Page ID # 6189, line 16 to # 6190, line 11; RE 221, Page ID # 6137, line 11 to 6138, line 22.) More importantly, the e-mails cited in section "VIII.B" of Mrs. Zell's *Opening Brief* support MR. ZELL's testimony by showing the FBT attorneys always provided MR. ZELL

with the legal research he used—***even after*** the 7/1/2011 meeting.

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

ZELL (8/8/2011)

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

RUPERT 8/9/2011

"I am having someone research the two points you identified" (Appendix VII, p. 175)

[16] **RUPERT (8/10/2011)**

"I will have an associate research these [additional] issues." (Appendix VIII, p. 186)

RUPERT (8/11/2011)

"Below is the results of the research." (Appendix IX, p. 191)

B. Big Lie # 2

The second Big Lie was when the FBT attorneys testified that—throughout the pendency of the trial-court proceedings—MR. ZELL had ***never*** asked any FBT attorney to research the statute-of-limitations

issue for MRS. ZELL's Note nor had any FBT attorney ***ever*** indicated to MR. ZELL that Missouri's statute of limitations would apply.

The district court then uncritically accepted the FBT attorneys' perjurious testimonies and incorporated them wholesale into the court's findings of fact. Yet, as shown by the examples in MRS. ZELL's *Reply Brief* (Doc. 58 at 6), the district court's findings of fact were directly contradicted by all the evidence in the Record:

> [17] ***Specifically, the district court held that, during the entire trial-court proceedings*:**
>
> "[T]here's no evidence that she [Ms. Klingelhafer] * * * researched statute of limitations[.]"
>
> "Mr. Zell asked and authorized Mr. Rupert to research only *Standard Agencies,* not procedural choice of law [i.e., the statute of limitations]."

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

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

> on statute of limitations" and "Conference with J. Rupert re research on statute of limitations"?

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

[18] **III. FBT'S OBVIOUS PERJURIES WOULD HAVE BEEN EXPOSED AT ORAL ARGUMENT**

By deciding this case without oral argument, this Court has protected FBT's obvious perjuries from being exposed. As the undersigned stated in MRS. ZELL's *Reply Brief* (Doc. 58 at 21):

> This is precisely why FBT and their experienced malpractice counsel are opposing my request for oral argument. *See* Appellees' Brief, Doc. 43 at 1. With the Truth against them, they fear giving this Court an opportunity to ask them the three questions I stated on pages 6-7 of my mother's Opening Brief that "FBT *cannot* answer."
>
> As expected, FBT did not even attempt to answer any of those three questions in its responsive brief. Yet, on those three questions this entire appeal hinges. So I implore this Court to ask FBT's counsel those questions at the oral argument. If he can give an adequate

> answer to any *one* of those questions, my mother will instantly drop this appeal.

[19] As stated in MRS. ZELL's *Opening Brief* (Doc. 40 at 6-7 and 94-95), the three questions "FBT *cannot* answer" were:

> 1. How could Appellees Morris, Rupert, and Klingelhafer and FBT attorney Aaron Bernay testify truthfully that, throughout the entire trial-court proceedings in the Ohio action, they did not think they were supposed to research the procedural choice-of-law issue of the statute of limitations applicable to MRS. ZELL's Note (and therefore did not do it) or that MR. ZELL had not asked them to do so when they had each received MR. ZELL's e-mails asking for research ***specifically*** on the applicable statute of limitations (which was essentially the only issue in the case) and some of their own research memos even discussed the "statute of limitations"?
>
> 2. Why did neither Appellee Rupert nor Appellee Dehner have any notes to themselves, meeting notes, notes to the file, e-mails, or any written agreement with the Zells regarding what Appellee Rupert testified to was an agreement under which Mrs. Zell's son Jonathan Zell (a non-practicing attorney with zero trial experience and no access to online legal research) rather than FBT [20] (whose attorneys Mrs. Zell was paying every

month)—was to be responsible for the legal sufficiency of Mrs. Zell's pleadings and briefs in the Ohio litigation?

3. Why in almost four years of litigation—including litigation specifically concerning Jonathan Zell's potential liability—did FBT never even once mention this supposed agreement before?

The *sine qua non* of MRS. ZELL's present *Petition* is that—when either the panel or the full Court en banc rehears this case—the parties ***must*** be granted oral argument. This is because to deny oral argument is to

hide the facts of this case,

which seem to have been ***purposefully*** covered up in both the district court's decision and the premature *Opinion* of a panel of this Court.

[21] **IV. THE DENIAL OF ORAL ARGUMENT HAS CREATED THE APPEARANCE OF A COVER-UP, AN APPEARANCE THAT CAN ONLY BE DISPELLED BY PROVIDING ORAL ARGUMENT *NOW***

Accordingly, the question of "exceptional importance" that Fed. R. App. P. 35(b) states must be present for a rehearing is simply this:

Can an opinion of the Sixth Circuit (and of the district court before it) be left to stand when, instead of attempts to find out the facts,

> they were concerted efforts to cover up the facts?

In her *Opening* and *Reply Briefs*, MRS. ZELL provided a number of controlling legal precedents on which this panel could have reversed the district court's decision and remanded the case for a new trial. Nonetheless, the panel chose to ignore those precedents and, in some cases, the entire legal issues involved. Although MRS. ZELL will not attempt to reargue these legal issues here, they will nevertheless remain if, on rehearing, this Court would prefer to base its new *Opinion* on the errors of law in the district court's decision rather than on the district court's having adopted as its findings of fact FBT's obvious perjury at trial.

In this *Petition*, the undersigned is arguing only that the panel gave the ***appearance*** of having corruptly "fixed" this case by denying [22] MRS. ZELL's request for oral argument given that, like the district court's decision, the panel's *Opinion* was directly based on FBT's obvious, blatant, and wholesale perjury at trial—which would have been ***clearly*** exposed for all to see if the panel had granted MRS. ZELL's request for oral argument.

However, if MRS. ZELL's petition for rehearing is denied, what was once alleged to be only the appearance of impropriety will then be alleged to be the fact of impropriety. The undersigned will not only make this allegation the central focus of MRS. ZELL's *cert.* petition before the U.S. Supreme Court. But the

undersigned will also spend ***the rest of his life*** protesting that the law itself is a complete fraud since the courts routinely disregard it to favor their friends.

As a result, the undersigned ***will*** eventually obtain the desired oral hearing through disbarment proceedings before the Ohio Supreme Court that the undersigned will ***demand*** be instituted against himself for his future allegations against this Court in particular and the courts in general.

In addition, both MRS. ZELL and the undersigned intend to file additional lawsuits against FBT based on (1) FBT's wholesale perjury [23] during the trial and (2) FBT's use of that perjury to ***frame*** the undersigned for FBT's own malpractice. In these lawsuits—which will provide still other opportunities for a hearing—the question of why this Court covered up FBT's blatant, wholesale, and obvious perjury will be the ***300-pound elephant in the room***.

Finally, the undersigned is hereby announcing a $100,000 Challenge to anyone who can convince three full-time law professors from Ivy-League schools that FBT did ***not*** commit perjury. (The rules for the Challenge are posted at http://occupythefranklincountycourts.com.)

CONCLUSION

MRS. ZELL respectfully requests this panel or preferably the full Court en banc rehear this case, give

the parties an ***oral argument***, and then remand the case for a new trial.

Respectfully submitted,

/s/ Jonathan R. Zell

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[24] [Certificate Of Compliance Omitted]

[25] [Certificate Of Service Omitted]

APPENDIX H

No. 17-3534

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EILEEN L. ZELL

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

PLAINTIFF-APPELLANT'S REPLY IN SUPPORT OF MOTION TO STRIKE TWO OF THE THREE DOCUMENTS IN THE DEFENDANTS-APPELLEES' [FIRST] CORRECTED SEPARATE APPENDIX

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INTRODUCTION

In her pending *Motion to Strike Two of the Three Documents Contained in the Defendants-Appellees'* [First] *Corrected Separate Appendix* (Doc. 48), Plaintiff-Appellant Eileen L. Zell ("Mrs. Zell") pointed out that:

1. In cherry-picking certain of the documents that were already in the district court's electronic record and then highlighting those documents by placing them in a separate appendix, the Defendants-Appellees violated both the Local Rules of this Court and the clearly-correct interpretation of those Rules by this Court's Clerk of Court; and

2. In reliance on the Clerk of Court's previous and clearly-correct interpretation of this Court's Local Rules, Mrs. Zell was prevented from doing the same thing with her own appendix that the Defendants-Appellees impermissibly did with theirs.

ARGUMENT

I. This Court's Local Rules Prohibit What the Defendants-Appellees Did in their [First] Corrected Separate Appendix

Specifically, when the undersigned counsel for Mrs. Zell was preparing Mrs. Zell's separate appendix, he asked the Clerk's Office whether he was permitted to include in the appendix documents that were ***both*** previously part of the district court's electronic record ***and*** were exhibits admitted at trial. The Clerk's Office

then told the undersigned that this Court's Local Rules prohibited that action and, furthermore, if the undersigned did include in Mrs. Zell's appendix any documents that were already in the district court's electronic record, that appendix would be subject to being struck by the Clerk's Office.

The Clerk of Court's Office was doubtless correct in its interpretation of the Local Rules. According to 6 Cir. R. 30(b)(2): "In an appeal from the district court, the appendix, when required, must include . . . those items . . . that are not part of the district court's electronic record[.]"

In addition, page 3 of the *Appendix Checklist* found on this Court's website explains that 6 Cir. R. 10(b) means that only trial exhibits that "were not electronically filed" may be included in an appendix:

- Trial exhibits that are electronically filed are accessible to the court of appeals.
- If trial exhibits were not electronically filed, but were admitted in the trial, a party may submit an appendix. . . . *See* 6 Cir. R. 10(b).

Although the Defendants-Appellees have replaced their original *Separate Appendix* (Doc. 44) with a *Corrected Separate Appendix* (Doc. 47), the latter version still contains the same out-of-rule documents that were already part of the district court's electronic record. The only change that was made in the Defendants-Appellees' *Corrected Separate Appendix* was the addition of a "Certification of Record" in which the

Defendants-Appellees simply asserted: "The trial exhibits are not viewable through the court's electronic record" (Doc. 47 at 16).

However, as pointed out in Mrs. Zell's pending motion:

> The Defendants-Appellees' above-quoted assertion is sheer sophistry. For, while the trial exhibits *per se* were not made a part of the district court's electronic record, two of the three trial exhibits contained in the Defendants-Appellees' *Corrected Separate Appendix* were already a part of the district court's electronic record by virtue of their having been attached to some of Plaintiff-Appellant Eileen L. Zell's—but *not* the Defendants-Appellees'—previously-filed pleadings in the instant case.

And, as provided in this Court's Local Rules, trial exhibits that are already a part of the district court's electronic record for ***any*** reason may not be duplicated in a party's appendix. Otherwise, this Court would be swamped with voluminous appendices containing duplicative documents already contained in the electronic record, thereby defeating not merely the letter, but also the spirit of Local Rules 30(b)(2) and 10(b).

In their *Memorandum in Opposition to the Motion to Strike* (Doc. 51 at 3), the Defendants-Appellees seem to be arguing that it is easier for the parties to reference documents by trial-exhibit number rather than by citing the "various record entry numbers from the thousands of pages" in the district court's docket. If so, then that is an argument for ***changing*** this Court's

Local Rules in the future. It is ***not*** a valid argument for allowing one party to violate the Local Rules, when the other party was obliged to follow them.

II. The Purpose of the Defendants-Appellees' Non-Conforming Appendix is to Mislead this Court

As previously explained in Mrs. Zell's *Motion to Strike* in particular and in Mrs. Zell's Opening Brief in general, the Defendants-Appellees have pinned virtually their ***entire*** defense in this case on a lie that was never before mentioned in the previous ***three and one-half year long*** pretrial proceedings—including the parties' prior litigation of the Defendants-Appellees' *Third-Party Complaint* (RE 7, Page ID 110-111) involving this very issue—and was instead manufactured for the very first time by one of the Defendants-Appellees (Jeffrey Rupert) at trial.

Mrs. Zell's son—Jonathan Zell (a non-practicing lawyer with zero previous trial experience and, at that time, no access to online legal research)—had contacted the Defendants-Appellees to represent his mother in the underlying case because the son knew that he himself was not qualified to do so. However, in an attempt to reduce his mother's attorney's fees, the son voluntarily assisted the Defendants-Appellees in the writing (as opposed to the legal-research) tasks during the pretrial proceedings in Mrs. Zell's underlying case (eventually signing the pleadings himself and listing the Defendants-Appellees as "of counsel").

The Defendants-Appellees and Mrs. Zell's son communicated almost exclusively via e-mail. Their e-mails clearly showed that Defendants-Appellees Shannah Morris, her associate Aaron Bernay, Jeffrey Rupert, and his associate Katherine Klingelhafer did all of the legal research (which turned out to be fatally flawed) in Mrs. Zell's underlying case, while Mrs. Zell's son then used the Defendants-Appellees' research to prepare multiple drafts of Mrs. Zell's pleadings for the Defendants-Appellees' review, correction, and filing in court.

After Mrs. Zell lost the underlying case on summary judgment due to the Defendants-Appellees' flawed legal research on the statute-of-limitations issue, Mrs. Zell sued the Defendants-Appellees for legal malpractice. The Defendants-Appellees then filed a *Third-Party Complaint* for contribution and indemnification against Mrs. Zell's son (and the son, in turn, filed a counterclaim against the Defendants-Appellees). The district court dismissed the *Third-Party Complaint* against the client's son on summary judgment, finding that the Defendants-Appellees—rather than Mrs. Zell's son—had performed the questionable legal research at issue:

> On the statute of limitations issue, Mr. Zell presents evidence of correspondence between himself and the Defendants in which he questions Defendants' statute of limitations analysis and expresses doubt as to whether Defendants properly considered the issue. Moreover, Mr. Zell presents correspondence

> indicating that Plaintiff's . . . belief that the Missouri statute of limitations would apply was based on a review of Defendants' recommendation and reasoning, as opposed to any independent research or investigation conducted by Plaintiff or by Mr. Zell.

District Court's *Opinion & Order* dated December 23, 2014 (RE 121, Page ID # 2689, n.2) (citations omitted).

Furthermore, on the eve of trial, the district court held in its *Plenary Order* dated April 3, 2017:

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

RE 192, Page ID # 4312.

Then, at the bench trial (held three and one-half years into the case), Appellee Rupert falsely claimed—***for the very first time***—that he had oral agreements with Mrs. Zell and her son whereby (1) Mrs. Zell's son (a non-practicing attorney with zero prior trial experience and, at that time, no access to online legal research) was supposedly responsible for doing all of the legal research on Mrs. Zell's underlying case and (2) Appellee Rupert (a partner in the litigation department of Defendant-Appellee Frost Brown Todd LLC,

an "Am Law 200" law firm) was supposedly relegated to the role of merely advising the son.

Without altering its previous rulings exonerating Mrs. Zell's son, the district court uncritically accepted Appellee Rupert's testimony hook, line, and sinker even though, as previously stated, the e-mail evidence showed that the Defendants-Appellees (including Rupert) had done all of the legal research and that Mrs. Zell's son had merely incorporated that research into the drafts of the pleadings that he then submitted to the Defendants-Appellees (including Rupert) for their review, correction, and filing in court. The district court found that the oral agreements that Appellee Rupert claimed to have had with Mrs. Zell and her son—whereby Mrs. Zell's son would supposedly be responsible for all the legal research in the underlying case—had, in effect, immunized the Defendants-Appellees from ***all possible*** malpractice liability.

Just as incredibly, the district court also accepted all of the Defendants-Appellees' individual testimonies that—***during the entire trial-court proceedings*** in the underlying case—none of them had ever researched the statute-of-limitations issue (which was the sole basis on which the court in the underlying case had denied Mrs. Zell's claim) even though this was directly contrary to the voluminous e-mail evidence on which the district court had based its previous findings and decision dismissing the Defendants-Appellees' *Third-Party Complaint* against Mrs. Zell's son. To repeat what the district court previously found in dismissing the *Third-Party Complaint*:

> 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 Plaintiffs . . . 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.

District Court's *Opinion & Order* dated December 23, 2014 (RE 121, Page ID # 2689, n.2) (citations omitted).

Moreover:

- Not only was the supposed oral agreements between Appellee Rupert on the one hand and Mrs. Zell and her son on the other hand not in writing, but the Defendants-Appellees also had no written fee agreement with Mrs. Zell and no written co-counsel agreement with Mrs. Zell's son.
- Appellee Rupert could produce no written notes, e-mails, memoranda, or any other written documentation whatsoever of the claimed oral agreements.
- Appellee Rupert could produce no witness from his law firm (or anywhere else) who could testify to having heard about or approved this arrangement between Appellee

Rupert on the one hand and Mrs. Zell and her son on the other hand.

- Although the Defendants-Appellees claimed to be only advising Mrs. Zell's son on how to handle Mrs. Zell's underlying litigation, the Defendants-Appellees billed Mrs. Zell over $73,000 on Mrs. Zell's (unsuccessful) $82,000 claim in the underlying litigation.

- And, of course, the Defendants-Appellees never mentioned these supposed oral agreements in ***three and one-half years*** of pretrial proceedings in the instant case, including the parties' prior litigation of the Defendants-Appellees' *Third-Party Complaint* specifically involving the role that Mrs. Zell's son had played in the underlying case.

Then what—besides Appellee Rupert's bald assertion, which was ***obviously*** fabricated—supported Appellee Rupert's lie (or, more precisely, his perjury) and, by extension, the district court's finding adopting this perjury? It was a single e-mail sent to Appellee Rupert by Mrs. Zell's son on June 24, 2011. *See* "Email from Jonathan Zell to Jeffrey Rupert dated June 24, 2011" (Defendants-Appellees' *Corrected Separate Appendix*, Doc. 47 at 13-15).

However, this June 24, 2011 e-mail was not only taken out of context and misconstrued by Appellee Rupert (and by the district court). But part of the June 24, 2011 e-mail itself directly contradicts Appellee Rupert's lie that Mrs. Zell's son supposedly agreed to be

responsible for doing all of the legal research on Mrs. Zell's underlying case:

> 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***.

Email from Jonathan Zell to Jeffrey Rupert dated June 24, 2011, RE 8619, Page ID # 1629 (emphasis added). *See* Defendants-Appellees' *Corrected Separate Appendix* (Doc. 47 at 14).

But this is more of an argument ***for allowing*** the Defendants-Appellees to include the June 24, 2011 e-mail in a separate appendix than for excluding it. The arguments for excluding the June 24, 2011 e-mail are, first, that neither Appellee Rupert nor anyone else ever responded to Jonathan Zell's June 24, 2011 e-mail.

Second, and more importantly, the June 24, 2011 e-mail was superseded by a subsequent e-mail dated June 26, 2011 from Jonathan Zell to Appellee Rupert, and the June 26, 2011 e-mail even more clearly contradicts the false interpretation of the earlier June 24, 2011 e-mail and the related lie—on which virtually the Defendants-Appellees' ***entire*** defense in this case is based—that Mrs. Zell's son was agreeing to accept full responsibility for the legal sufficiency of his mother's pleadings:

> As I have stated in a recent e-mail [this is a reference to the June 24, 2011 e-mail], I realize that as long as you have to sign your name on my mother's pleadings, you will want those pleadings to be the best you can make. Also, you will want those pleadings to give the kind of professional impression that you want to leave on the Court—as opposed to the much-more aggressive and confrontational stance that my pleadings take. Because the more changes you make in my drafts, the larger your charges will be, in some of my recent e-mails I have suggested some ways in which you might minimize those charges.
>
> Thus, in revising my draft memorandum, please consider what you can do to minimize your charges. For example, if you feel that you have to substantially rewrite my draft—***not because it is legally insufficient, but because it does not have the tone that would befit a pleading that you could sign***—please consider allowing me to sign the pleading by myself.

Email from Jonathan Zell to Jeffrey Rupert dated June 26, 2011 (RE 117, Page ID # 2622-2623) (emphasis added).

Thus, allowing the Defendants-Appellees to highlight the June 24, 2011 e-mail by including it in their appendix—***without*** including the June 26, 2011 e-mail —is misleading and, moreover, was specifically ***designed*** to mislead this Court.

A similar explanation—but one too complicated to discuss ***herein***—also applies to the inclusion of the second out-of-rule document in the Defendants-Appellees' nonconforming [First] *Corrected Separate Appendix*: the "Email from Jeffrey Rosenstiel to Jonathan Zell dated January 8, 2009." *See* Defendants-Appellees' *Corrected Separate Appendix* (Doc. 47 at 3-10).

The undersigned apologizes if he appears to be petty in moving to strike the Defendants-Appellees' out-of-rule documents from their appendix. However, given the transparent (and joint) attempt to frame the undersigned for the clear malpractice of the Defendants-Appellees and to mislead this Court, the undersigned feels that he must try to expose those attempts both great and small.

CONCLUSION

For all of the reasons stated above, Plaintiff-Appellant Eileen L. Zell respectfully requests that this Court strike the two *out-of-rule* documents contained in the Defendants-Appellees' [First] *Corrected Separate Appendix*, but then allow the Defendants-Appellees to file a corrected appellate brief containing the proper citations to the district court's electronic record for

those two documents in addition to filing a second Corrected Separate Appendix.

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