Leonid Khodor	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
Whiteford, Taylor & Preston	*	BALTIMORE CITY
Defendant	*	Case No.: 24-C-04-006528

* * * * * * *

MEMORANDUM OPINION

On August 27, 2004, Leonid Khodor ("Khodor")filed a Complaint in this Court ("the Malpractice Action") against Whiteford, Taylor & Preston, LLP ("Whiteford") alleging that Whiteford committed legal malpractice which led to the dismissal of Khodor's suit against his former employer (the "Federal Litigation"). The alleged malpractice is based on the actions of Phillip Barnes, Esq. ("Mr. Barnes") of Whiteford, who was Khodor's attorney in the Federal Litigation.

On January 28, 2005, Whiteford filed a Motion to Dismiss, or in the alternative, for Summary Judgment in which it argues that the doctrine of collateral estoppel bars the Malpractice Action because during a motion for reconsideration in the Federal Litigation, Khodor fully and fairly litigated the issue of responsibility for the discovery failures that lead to the dismissal of that action. Whiteford argues that the findings in the Federal Litigation that Khodor was personally responsible for certain discovery failures compels the conclusion that Khodor was contributorily negligent and that the Malpractice Action is therefore precluded as a matter of law.

Khodor argues that collateral estoppel does not apply for several reasons. First, he argues that there was not a final judgment on the merits because the Federal Litigation ended with a consent judgment, and because the sanction of dismissal was a result of failure to comply with a discovery consent order. Second, any wrongdoing on the part of Khodor that

contributed to the discovery failure occurred after Whiteford committed malpractice by entering into a consent order that required Khodor to respond to discovery in two days on pain of dismissal. Third, the issues to be decided in the Malpractice Action are not essential to the issues decided in the Federal Litigation where the issue was whether Khodor had complied with the consent order. Fourth, the factual determinations that are crucial to a claim of contributory negligence were never considered in the Federal Litigation. Fifth, the issues in the Malpractice Action were not fully and fairly litigated in the Federal Litigation because: (1) the findings relied upon by Whiteford were made in the context of a decision denying Khodor's motion for reconsideration after a summary proceeding without the benefit of discovery; (2) the hearing on the motion for reconsideration included evidence that would have been inadmissible at a trial or in support of a motion for summary judgment; and (3) there was a higher burden on Khodor to convince the court to grant the motion for reconsideration than he has to convince the factfinder that there was malpractice.

A hearing was held on Whiteford's motion on March 14, 2005. After argument, the Court requested that counsel file supplemental memoranda addressing whether the issues in this action were fully and fairly litigated in the Federal Litigation. Counsel were also directed to provide this Court with copies of the material considered by the federal court in ruling on the motion for reconsideration. For the reasons discussed below, the Court will issue an order denying the motion to dismiss or in the alternative for summary judgment.

UNCONTESTED FACTS

Khodor originally filed suit in state court in Ohio against his former employer, LHD Vending, Inc. ("LHD"). LHD removed the case to Ohio federal court, it was subsequently transferred to federal court in Maryland (the "Federal Litigation") and Khodor retained Whiteford to represent him. After its motion to dismiss was denied, LHD filed an Answer,

a Counterclaim, and written discovery requests. Almost two and a half months after Khodor's response to discovery was due, LHD filed a Motion to Compel Responses alleging that there had been a total failure of discovery. That motion was filed on November 13, 2001. On November 28, 2001, the parties entered into a Consent Order[1] and in exchange, LHD withdrew its Motion to Compel. The Consent Order required Khodor to provide complete responses, without objections, except on the basis of attorney-client privilege or work product protection by no later than November 30, 2001. The Consent Order further provided that the Clerk would dismiss Khodor's complaint if he failed to "file a certificate . . .certifying that full responses and answers complying with the governing rules were served, . . ., in accordance with [the Consent] Order. . . ."

On February 26, 2002, LHD filed a Motion to Dismiss alleging that Khodor failed to file the required certificate and failed to provide complete responses and answers to the discovery requests because "the majority of Plaintiff's discovery responses [were] incomplete, evasive, non-responsive, and/or incomprehensible." Additionally LHD alleged that Khodor had produced documents but failed to identify in any manner which documents corresponded to which Request for Production and/or Interrogatory. As to documents produced in electronic format, LHD alleged it was unable to open them and that despite a request, Khodor failed to provide a hard copy or information on how to open them. LHD also identified alleged deficiencies in six specific interrogatories and three specific requests for documents. Finally, LHD alleged that Khodor executed the Interrogatories with a claim that he did not have personal knowledge of the facts contained in the answers. LHD alleged that efforts to get complete responses had proven unsuccessful and requested the court to

[1]Khodor alleges that this Consent Order was entered into without his knowledge or consent.

dismiss the action for failure to comply with the Consent Order.[2] LHD pointed out in its Reply that Khodor had taken no action after the filing of the motions to supplement his discovery responses.[3]

On April 17, 2002, LHD filed a Second Motion to Compel Responses to Written Discovery due to Khodor's Total Lack of Response to discovery requests filed on February 26, 2002. LHD alleged that before filing the second motion they contacted Khodor's counsel by letter but never received a response to the letter or to discovery. In his status report to the Court, Khodor's counsel alleged that he never received LHD's Interrogatories or the letter dated April 5th.

A hearing on the motions was held on May 8, 2002. Khodor was not present and had been told by Mr. Barnes that he need not be present. During argument there were several representations made by Mr. Barnes concerning Khodor's failure to produce documents that suggest that the failure to be more responsive to the discovery request was because of Khodor's obstinacy. Judge Blake questioned why no affidavit had been presented in support of some of the allegations and why no protective order had been sought. It is clear from Judge Blake's oral opinion granting the motion to dismiss that she placed great emphasis on the fact that the discovery failure followed the Consent Order:

> *I look first to the fact that there is a consent order in the file, which I issued* . . . with the agreement of the plaintiff with consideration in that the motion for request for attorney's fees was being dropped. And that in that order, there is an agreement to provide without objection other than work product or attorney/client privilege, all the responsive answers to

[2]On March 5, 2002, LHD filed a Motion for Sanctions and Motion to Extend Time for Defendants' Discovery Responses making the same allegations.

[3]The federal court record reflects that Whiteford filed an Opposition on Khodor's behalf to the Motions but a copy of that response was not attached to the pleadings in connection with the motion before this Court.

> interrogatories and request for production of documents . . . .
>
> ****
>
> *So these are just egregious examples in my mind that follow a very clear warning on November 30, 2001 of the consequences of Mr. Khodor's failing to comply with his discovery obligations.*

While she pointed out that Barnes had not filed a request for a protective order to not produce documents in Khodor's possession, Judge Blake based substantially all the blame for the failure of discovery on Khodor.

> [*I]t's clear that there are a number of crucial inadequacies and failures to respond for which it appears Mr. Khodor is substantially and personally responsible.* *** It is, as it should be candidly, conceded by counsel and clear from the record in this case, that Mr. Khodor has the responsive documents. They have not been produced. *It's been because of his own reasons he has not felt that he should have to do that. But that's unacceptable.* There are methods of raising that issue appropriately. There could have been a protective order requested. Certainly, it is not appropriate to simply ignore his responsibilities, which is obviously what he has done.
>
> I think the same is true with the response to the document request that fails to specifically identify what documents are responsive to what requests and I think it is also true in regard to the electronic files. That apparently there's been very little attempt to open them or produce them in some readable fashion or and apparently a refusal to return this information without requiring that the defendants pay the shipping costs for which I see no reason or excuse. It was admittedly their property and Mr. Khodor took it and it is not appropriate for him to expect the defendants to pay to get their own property back. So that also relates to this discovery failure.
>
> Recently, the answers to the second interrogatory request, the one that requests specific factual information regarding witnesses who are alleged to have knowledge, the answer to that which again appears to be attributable most directly to Mr. Khodor personally, those answers are totally inadequate.

Although not discussed in her oral opinion, during argument on the motion Judge Blake

pointed out that Barnes had not filed an affidavit to support Khodor's claim concerning opening the electronic documents:

> The Court: ***, *have you given me an affidavit* from Mr. Khodor to the effect that he cannot open them?
>
> Mr. Barnes: No, Your Honor. But I'm happy to do so.
>
> The Court: *It would have been helpful* and I would think in response to this discovery issue if that's going to be the position of Mr. Khodor.
>
> ****
>
> The Court: ****it's troubling that there is no affidavit*. . . .

Judge Blake entered an order consistent with her oral opinion on May 20, 2002, granting LHD's Motion to Dismiss Khodor's complaint and the Motion for Sanctions and Motion to Extend Time for Defendants' Discovery Responses; granting judgment in favor of LHD and against Khodor on the breach of contract and conversion counts in the counterclaim; ordering Khodor to return to LHD all property in his possession, custody or control which belonged to LHD, and to produce to LHD all documents responsive to their discovery requests relating to the counterclaim. The order also provided that if there were any additional discovery requests relating to LHD's counterclaim to which Khodor had not responded, LHD was ordered to specifically identify those responses within 10 days of the order and Khodor was ordered to fully respond to them 10 days after the requests were identified. Finally, LHD was given an opportunity to file affidavits in support of its request for attorney fees.

On May 21, 2002, Khodor returned LHD's property including a computer. However, the hard drive on LHD's computer indicated that on May 14, 2002, six days after the hearing, it had been reformatted and that select design files had been reinstalled on the same day but the program used to create and open the reinstalled files was not installed on the computer.

Thus LHD could not open any of the design files. In addition, Khodor did not provide plans, designs or documents related to the disputed patent as ordered by the Court. On May 24, 2002, LHD faxed to Khodor's counsel Defendant's Identification of Discovery requests Relating to Counterclaims to which Khodor failed to respond. On May 29, 2002, Whiteford withdrew its representation of Khodor.

On June 3, 2002, Andrew White and Barry Pollack entered their appearance as counsel on Khodor's behalf. LHD filed a Second Motion for Sanctions on June 14, 2002 relating to Khodor's alleged failure to respond to the May 24th request. On July 5, 2002 Khodor's new counsel filed a Motion for Reconsideration arguing that the insufficient discovery responses which led to the dismissal sanction were due to Whiteford's actions or inaction.[4] A hearing on the Motion for Reconsideration was held on December 20, 2002. In the Order denying the Motion, Judge Blake stated that even if Whiteford was partially responsible for the discovery failures, Khodor was personally responsible for certain discovery failures.

> Even if [Whiteford] were partially responsible for the discovery delay in October and November and the inadequacy of some responses, [the Court] remain[s] persuaded from the record [] that Mr. Khodor is personally responsible for the refusal to produce requested patent documents when directed to do so, the initial and continuing failure to return LHD's computer, and the failure to produce, in a readable fashion, all the designs contained on the computer. Further, subsequent to the May 8, 2002 hearing, Mr. Khodor is personally responsible for the decision to reformat the hard drive on LHD's computer before returning it to LHD, thus determining for himself without the

[4]Khodor's new counsel filed an Opposition to the Motion for Sanctions, stating "on June 3, 2002, rather than attempt to file substantive responses, Mr. Khodor's new counsel filed its motion to reconsider the Court's May 20th Order and asked the Court for a stay of that Order until July 5, 2002." On December 31, 2002 Judge Blake deferred ruling on the Second Motion for Sanctions and denied it on March 14, 2003.

> opportunity of inspection by counsel what, if anything, constituted "personal" information that may have been appropriate to delete.

On December 31, 2002, Judge Blake signed an Order referring the Federal Litigation to Magistrate Judge Beth P. Gesner for a settlement conference and on August 22, 2003 the parties filed a Joint Motion for Consent Order. Judge Blake signed the Consent Order thereby closing the Federal Litigation. On August 27, 2004, Khodor filed this Malpractice Action alleging that Whiteford committed legal malpractice in the course of its representation of Khodor, which ultimately led to the dismissal of the Federal Litigation.

DISCUSSION

Standard of Review

In reviewing the grant of a motion to dismiss pursuant to Maryland Rule 2-322(b), the Court must assume "the truth of all well pleaded facts and all inferences that can reasonably be drawn from them." *Bennett Heating & Air Conditioning, Inc. v. Nations Bank*, 103 Md. App. 749 (1995), *rev'd in part on other grounds*, 342 Md. 169 (1996); 2-322(b)(2). However, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501." Md. Rule 2-322(c). Because the facts considered in this Memorandum Opinion include facts outside the Complaint, the motion is treated as a motion for summary judgment.

Pursuant to Maryland Rule 2-501 a motion for summary judgment may be granted where "there is no genuine dispute as to any material fact and that the [moving] party is entitled to judgment as a matter of law." *See also Russo v. Ascher*, 76 Md. App. 465, 473 (1988); *Syme v. Marks Rentals, Inc.*, 70 Md. App. 235, 237-38 (1987); *Ganter v. Kapiloff*, 69 Md. App. 97, 104 (1986). Summary judgement acts as a gate-keeping mechanism

whereby only those actions that present a triable issue of fact proceed. Thus, if there is no issue of fact to be tried, judgment must be entered accordingly. *See Coffey v. Derby Steel Co.*, 291 Md. 241, 247 (1974).

In deciding a motion for summary judgment, the Court should assume the truth of all credible evidence on the issue, and all fairly deducible inferences therefrom, in the light most favorable to the party against whom the motion is made. *Nissan Motor Co. Ltd. v. Nave*, 129 Md. App. 90, 116-17 (1999) (citations omitted), *cert. denied*, 357 Md. 482 (2000). "[I]f there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration." *Washington Metro. Area Transit Auth. v. Reading*, 109 Md. App. 89, 99 (1996) (citation omitted); *Orwick v. Moldawer*, 150 Md. App. 528, 531-32 (2003).

Applicable Law

Under the doctrine of collateral estoppel, "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Murray Int'l Freight Corp. v. Graham*, 315 Md. 543, 547 (1989) (*quoting* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)). This has been stated as a four part test:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?
>
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Colandrea v. Wilde Lake Community Ass'n, Inc., 361 Md. 371, 391 (2000). Another way of stating the fourth part of the test is that "the issue actually litigated was essential to the judgment in the prior action." *Deitz v. Palaigos*, 120 Md. App. 380, 395 (1998)(*citing Murray Int'l Freight Corp.*, 315 Md. at 547). All four parts of the test must be satisfied for the doctrine of collateral estoppel to apply.

The issue of whether a party had a "fair opportunity to be heard" has sometimes been stated as a variation of the requirement that the issue have been "essential to the judgment" in the first action and sometimes as a separate requirement. How ever it is stated, it is a crucial factor. "The foundation of the rule of nonmutual collateral estoppel is that the party to be bound must have had a full and fair opportunity to litigate the issues in question." *Welsh v. Gerber Prods., Inc.*, 315 Md. 510, 518 (1989). In determining if a party had a fair opportunity to be heard, a court must examine the burden of proof in both proceedings as well as the relationships between the parties.

> Section 29 of the RESTATEMENT (SECOND) OF JUDGMENTS, which sets forth limitations on the doctrine of issue preclusion, makes clear that, in determining whether a party is precluded by judgment from re-litigating an issue, consideration must be given, among other things, to whether the forum in the second action affords the party against whom preclusion is asserted "opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined" and whether the first determination "may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding."

Grey v. Allstate Ins. Co., 363 Md. 445, 467 (2001). In *Grey* the question before the Court was whether a finding to pay restitution after a guilty finding in a criminal case could form the basis of a garnishment of the defendant's automobile insurance. The answer was "no."

The Court found that the judgment for restitution did not become a "judgment for compensatory damages arising out of a motor vehicle accident," and pointed out that many issues (such as contributory negligence) involved in a civil case are not litigated in a criminal restitution finding.

The exceptions discussed in *Grey* are stated slightly different in § 28 of the RESTATEMENT. "Although an issue [was] actually litigated and determined by a valid and final judgment, and the determination [was] essential to the judgment. . ." collateral estoppel does not bar relitigation where

> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or . . . ; or
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action;

RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

Application of Law to the Facts

Khodor argues that only the third part is satisfied, i.e., he agrees that he was a party to the Federal Litigation and that he is a party to the Malpractice Action. Without resolving all of the issues presented by the parties, this Court will deny the motion to dismiss because Khodor did not have a "fair opportunity to be heard on the issue" of Whiteford's alleged malpractice in the Federal Litigation.

It is important to keep in mind that the decision to dismiss Khodor's case and impose sanctions against him was made at the May 8, 2002 hearing when Whiteford still represented Khodor. Thus, Whiteford does not, and could not, argue that any findings made at that hearing have any collateral estoppel effect on Khodor's ability to file this claim. Instead the

findings on which Whiteford rely are those made at a motion for reconsideration of the decision to dismiss Khodor's case, and the Court's decision to impose sanctions on him.

A determination made on a motion for reconsideration is problematic both because the burden of proof on the proponent of the motion is extremely high—abuse of discretion– and because the procedures available to present the issues to be decided are severely limited. Procedures in the second action that were not available in the first action that may lead to different results include "such procedures as discovery devices and plenary as distinct from summary hearing." RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. d.

First, the burden of proof for the proponent on a motion for reconsideration is extremely high. A motion for reconsideration "is a request for extraordinary relief that may be granted only upon a showing of exceptional circumstances." *Sanders v. Clemco Indus.*, 862 F.2d 161, 169 n. 14 (8th Cir. 1998) (citation omitted). The decision to grant or deny a motion for reconsideration is committed to the court's discretion, *Renfro v. City of Emporia*, 732 F.Supp. 1116, 1117 -1118 (D. Kan.1990), and is reviewed by an appellate court on the basis of an abuse of discretion. *Id*. Therefore the district court had an extremely broad range in which to operate that was immune from reversal and thus difficult for Khodor to challenge.

> When a district court is vested with discretion as to a certain matter, it is not required by law to make a *particular* decision. Rather, the district court is empowered to make a decision--of *its* choosing--that falls within a range of permissible decisions. A district court "abuses" or "exceeds" the discretion accorded to it when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision . . . cannot be located within the range of permissible decisions.

Zervos v. Verizon New York, Inc. 252 F.3d 163, 168-9 (2d Cir. 2001) (footnotes omitted); *see also Eastway Constr. Corp. v. City of N.Y.*, 821 F.2d 121, 123 (2d Cir. 1987) ("The

concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; at the same time, a decision outside those limits exceeds or, as it is infelicitously said, 'abuses' allowable discretion."); United States Circuit Judge Joseph T. Sneed, *Trial Court Discretion: Its Exercise by Trial Courts and its Review by Appellate Courts,* Address to the Judges of the Second Circuit (Apr. 19, 1982) ("To have *discretion* is to have *choice.* To have choice is to be able to choose one course of action over one or more others with *immunity* from reversal by a higher court because of the course selected. The range of choice is determined by the number of permissible courses of action that exist.") (emphasis in original).

Khodor was not present at the May 8, 2002 hearing where the original decision was made to dismiss the case. During that hearing Whiteford placed the blame for most of the discovery failure on Khodor:

> Mr. Barnes: ***So we have e-mails with. . . . that *I'm told by my client*, this is exactly what we used...
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> ****
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> Mr. Barnes: ****And again they are in a format *he advises me* was used by LHD when he worked for them. So—
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> ****
>
> Mr. Barnes: And basically, *his explanation*, . . ., as best as I can understand it is this.....
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> *****
>
> Mr. Barnes: Well, he's articulated that to me he feels he's produced to them all the ....And his position was, well, [He then goes on to say his client is a Ukranian and in a personal fight with the Plaintiff and then explains, from his client's perspective why he has not produced documents] *** And I have communicated to my client that it is – in trying to make him understand how our system works . . . it is obviously my job to communicate that to him and I've done my best to do so. . . .

Thus when the crucial finding was made, Khodor did not have an opportunity to tell his side

of the story.[5] Thereafter, at the motion for reconsideration, he was required to convince the court that what had already been decided was wrong, i.e., that the court had made a mistake. That was a significantly higher burden than the burden he faces in the Malpractice Action where he need only convince the factfinder that it is more likely so than not so. Maryland Pattern Jury Instructions, MPJI-Cv 1:7 (4th ed. 2002). Thus "[t]o apply issue preclusion . . .would be to hold, in effect, that [Khodor] . . . would also have lost [in the Federal Litigation] had . . . [the burden of proof been more likely so than not so]." RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. f. That is a finding of fact to be made by the factfinder.

Second, the motion for reconsideration was in all respects a summary proceeding and in the Malpractice Action there are procedures such as discovery and full examination of witnesses that could be "significantly influential in determination of the issue." *Id.* at § 29 cmt d. Whiteford argues that Khodor could have presented witnesses during the motion for reconsideration hearing had his counsel chosen to do so. However, it is not clear whether the federal court would have permitted witnesses. Judge Blake indicated she "would *consider* a request for testimony on particular issues." Consideration is not a promise that it will be permitted. Furthermore there were other procedural obstacles to the presentation of the facts during the motion for reconsideration that are not present in the Malpractice Action. Khodor's counsel was concerned that having Mr. Barnes testify would raise attorney client privilege issues that could harm him even if the motion for reconsideration was granted.

> ...having Mr. Barnes called as a witness will significantly escalate this litigation and create the need for a mini-trial that

[5]Of course from Khodor's perspective, many of Mr. Barnes's actions including his argument at the May 8th hearing were part of the alleged malpractice.

> will raise *complex privilege* and other practical issues for the Court and all counsel. As it sits now, counsel have agreed that the information and documents before the Court may properly be considered in spite of the attorney-client privilege. Beyond that, there is no agreement about the complex privilege issues and Mr. Khodor will actively protect unwaived privilege if Mr. Barnes is called to testify.

This concern was legitimate because once the privilege was waived, Khodor, if he won the motion, would be disadvantaged solely because of his attorney's malpractice. In contrast, the issue of waiver is now gone since the privilege is waived by the very nature of these proceedings.

Third, the hearing was intended to take only two hours and while counsel may have been successful in obtaining additional time for the hearing, if witnesses were called, Khodor's counsel wanted a full hearing as opposed to a summary one. In fact Khodor's counsel made clear that discovery before witnesses were called would be crucial.

> ...if the Court allows Mr. Barnes to be called as a witness, we would request that the current schedule for the hearing be amended. We will need the option of calling Mr. Khodor as a witness upon the completion of Mr. Barnes' testimony, and arguments of the many pending motions and direct and cross-examination of witnesses will likely last *well beyond the currently allotted two-hour period*. In addition, a postponement may be in order as assigned counsel will need to subpoena additional documentation and records from Whiteford[] regarding Mr. Barnes' complete billing record for all of his clients as well as all phone records during the time period in question. *Such materials would be crucial in the cross-examination of Mr. Barnes* because his direct testimony would likely lead to assertions by Mr. Barnes of how much of his time he devoted to Mr. Khodor's case.

These concerns were all justified and it would not be fair to bind Khodor to factual findings made in the narrow confines of the motion for reconsideration.

Fourth, Judge Blake could, and probably did, rely upon hearsay evidence that would not have been admissible on a motion for summary judgment or at trial. In their pleadings

and at the hearing in opposition to the motion for reconsideration, LHD's counsel made several references to information he received from Barnes concerning statements made by Khodor to Barnes. Thus in the pleadings LHD's counsel argued:

> [W]hile Barnes has declined generally to discuss Khodor's allegations against him, he informed undersigned counsel . . . that 1) he specifically advised Khodor against deleting or destroying any information on LHD's computer and that to do so could be considered destruction of evidence, 2) he discussed the Consent Order with Khodor, who would not listen to him, 3) Khodor accused Barnes of "working for the other side" when Barnes tried to explain discovery Khodor's obligations and resisted, 4) Khodor drafted his own answers to interrogatories, which in many cases, Barnes did not change out of concern for misconstruing what Khodor meant, 5) Khodor refused to return LHD's computer and property until after the Sanctions Order, 6) Khodor never told Barnes that he had disabled the design files so that LHD could not open them, or that he later reformatted the hard drive on LHD's computer before he returned it. According to Barnes, Khodor refused to show Barnes his patent application until after May 7, 2002, when the USPTO approval notice was issued.

This hearsay evidence would not have been admissible at a trial or in support of a motion for summary judgment.

Thus, while it is apparent that Judge Blake made what are clearly factual findings that, if applied in this case, end the matter, it is also apparent that the findings in the Federal Litigation were made on a record that was more than complete for purposes of a motion for reconsideration, but that would be wholly inadequate for a motion for summary judgment or at trial. Therefore, this Court concludes that based on the rather limited evidentiary context of the motion for reconsideration and the type of evidence relied upon by the Court, Khodor never had a full and fair opportunity to litigate the issues surrounding his legal malpractice claim and that the Malpractice Action will afford Khodor "'opportunities in the presentation and determination of the issue [of Whiteford's legal malpractice] that were not available [on the motion for reconsideration in the Federal Litigation] and could likely result in the issue

being differently decided.'" *Grey*, 363 Md. at 467 (citation omitted).

Finally, a different result is not required because Judge Blake considered Khodor's decision to reformat the hard drive of LHD's computer in denying the motion for reconsideration, and there is no evidence that Whiteford played any role in that decision. Khodor's allegation of malpractice concerns actions that occurred before the hard drive was reformatted. Judge Blake's decision to dismiss Khodor's case was made at the hearing on May 8, 2002 although the order was not signed until May 20, 2002. Khodor reformatted the hard drive a few days after the hearing. While it is clear that Judge Blake considered the reformatting in denying the motion for reconsideration, there is no evidence that her decision to dismiss was based on what Khodor did after the May 8th hearing. Nor is there evidence that Judge Blake was aware of the reformatting when she signed the order on May 20th. Therefore, the fact that Khodor reformatted the hard drive on May 14th is not evidence that his actions contributed to the court's decision on May 8th to dismiss his claims. *See Royal Ins. Co. v. Miles & Stockbridge*, 133 F. Supp. 2d 747, 755 (D. Md. 2001) ("[A]ssuming the facts and all inferences therefrom in the light most favorable to [defendant law firm], the defense of contributory negligence is not available because any negligence on the part of [the plaintiff] occurred well after [the law firm's] negligence.").

CONCLUSION

For all the reasons stated above, this Court will issue an order denying the motion to dismiss or in the alternative for summary judgment.

Dated: June 13, 2005

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Judge Evelyn Omega Cannon

Khodor Summary Judgment Opinion.Final.wpd