Circuit Court for Prince George's County
Case No.: CAL 13-33195

**UNREPORTED**

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0325

September Term, 2015

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ERICA R. WRIGHT

v.

BURLINGTON COAT FACTORY OF MARYLAND, LLC

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Meredith,
*Krauser, Peter B.,
Thieme, Raymond G., Jr.
(Senior Judge, specially assigned),

JJ.

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Opinion by Meredith, J.

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Filed: March 14, 2018

*Peter B. Krauser, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Erica R. Wright, appellant, filed this premises liability action against Burlington Coat Factory of Maryland, LLC ("Burlington"), appellee, in the Circuit Court for Prince George's County, alleging that she slipped and fell, and suffered personal injury, in one of Burlington's stores. After the circuit court granted summary judgment in favor of Burlington, Mrs. Wright filed a motion for reconsideration. The circuit court denied Mrs. Wright's motion for reconsideration, and this appeal followed.

## QUESTIONS PRESENTED

Mrs. Wright presents two questions for our review:

> I. Did the trial court err when it excluded hearsay statements that fall within the bounds of several reliable hearsay exceptions?
>
> II. Did the trial court err when it found that the post-fall observations made by [Mrs. Wright] and her husband, including all reasonable inferences, in the light most favorable to [Mrs. Wright], were not sufficient to establish that [Burlington] had actual or constructive notice of the dangerous condition?

Because we perceive no reversible error, we will affirm.

## BACKGROUND

On May 28, 2012, Mrs. Wright was injured when she tripped and fell at the Burlington Coat Factory store in Greenbelt, Maryland. On November 13, 2013, she filed a complaint against Burlington in the Circuit Court for Prince George's County, alleging that she had sustained injuries that were caused by Burlington's negligence. Mrs. Wright alleged that her flip-flop sandal became caught on an unsecured strip of rubber (the "transition strip" or "border strip") which separated a carpeted section of the store from an uncarpeted aisle between departments.

In her complaint, Mrs. Wright alleged that the transition strip "was damaged and detached from the ground, creating a dangerous condition for store patrons," and that Burlington "had either actual or constructive knowledge of the damaged transition strip in its store." During discovery, Mrs. Wright said that, after she was helped off the floor by another customer, she heard an unidentified Burlington employee responding to the location of her fall say: "They knew about this. I'm not getting fired for this." Her husband also heard the unidentified person make that statement. Mrs. Wright asserts that this statement provides proof that Burlington was on notice of the unsafe condition, which is a necessary element of her claim.

After the parties had engaged in discovery, Burlington filed a motion *in limine*, seeking a ruling excluding "evidence of hearsay pertaining to statements purportedly made by an unidentified individual alleged to be Defendant's employee." Burlington also moved for summary judgment on the ground that, if the court accepted the arguments set forth in its motion *in limine*, there was no genuine dispute as to any material fact relative to Burlington's lack of notice, and therefore, Burlington was entitled to judgment as a matter of law. Burlington argued that, without the unidentified person's statement, Mrs. Wright was unable to produce admissible evidence from which a jury could reasonably find that Burlington had either actual or constructive knowledge of the unsecured transition strip that was alleged to have caused Mrs. Wright's fall.

In opposing Burlington's motion for summary judgment, Mrs. Wright identified the statement of the unidentified Burlington employee as admissible evidence giving rise

to a genuine factual dispute as to whether Burlington knew or should have known that the transition strip was loose. Additionally, Mrs. Wright asserted that summary judgment should not be granted because the trial judge had not yet ruled on her November 19, 2014, motion to compel discovery. (The discovery deadline in the scheduling order was October 3, 2014.)

In Mrs. Wright's memorandum in opposition to Burlington's motion for summary judgment, she directed the court's attention to the following deposition excerpts:

> 4. During her deposition, Plaintiff provided testimony that Defendant's employee had knowledge of the damaged transition strip prior to her fall. *See* Exhibit 3, Plaintiff's Deposition Transcript. She testified:
>
> Q: Okay. And what was wrong with the transition strip?
> A: It — well, from — from what I could see — from what I was told by the store employees, that it was — it wasn't secure.
> Q: What is your understanding of what was wrong with the transition strip?
> A: that it wasn't secure.
> Q: Okay. And how long had it not been secured for?
> A: I wouldn't know that. Only the store employee of the store would know that.
> Q: So it's possible that that transition strip could have become loose within minutes before you were walking through that area?
> A: I would disagree with that based on what the store employee — when the s[to]re employee came over to me, what he stated.
> Q: Okay. What did the store employee say to you?
> A: When the — the patron helped me off the floor, she went to get someone to come and assist. And she went and got a gentleman who walked over there. And he just started blurting out. "They knew about this. I'm not getting fired for this."
>
> Page 159-160

> Q: So now he pointed it out to you and said, "They knew about this"?
> A: He — basically, when he was walking towards me — I'm not sure what the patron told him, but as he was walking over to the area, he said, "I'm not getting fired for this. They knew about this. They should have fixed this a long time ago."
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5. Similarly, Plaintiff's husband had his deposition taken and provided testimony that Defendant's employee had knowledge of the damaged transition strip prior to her fall. See Exhibit 4, Wilbur Lavan Wright Deposition Transcript. He testified:

> Q: Did he say anything else?
> A: He said — once he showed me that this strip, he said: I told them about the strip. I'm not getting in trouble for this. Those were his words.
>
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6. Plaintiff's husband testified consistent with Plaintiff that the transition strip was broken to the point where it could be lifted from the floor following the fall. See Exhibit 4, Wilbur Lavan Wright Deposition Transcript. He testified:

> Q: And you said that the male employee told you that she tripped over the strip, lifted the strip, and showed the strip to you?
> A: Exactly.
>
> Page 31

7. In contrast, Kwesi Badu, a store manager for Defendant who was on duty on the day of the fall, provided testimony on deposition that the transition strip in question was not broken when he arrived at the scene of the fall. See Exhibit 5, Kwesi Badu Deposition Transcript. He testified:

> Q: Did you observe the trim she was referring to, the border trim?
> A: Actually, I went there but I didn't see that the trim was, you know, kind of removed or something like that. I saw that the trim there, but I don't know how she tripped.

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8. Kwesi Badu provided testimony that Defendant has a duty to warn customers of any known dangers within the store which might result in a slip, a trip, or a fall. See Exhibit 5, Kwesi Badu Deposition Transcript. He testified that:

> Q: Okay. Do you have any responsibility to warn customers of any known dangers within the store which may result in a slip, a trip or a fall?
> A: If it's something that, you know, they have to know, I mean, we don't actually go around talking to customers like that. But if something happens or there's, you know, a spill or something we secure the place or we tell that that, you know, there's something, you know, wrong.
> Q: How do you secure the place?
> A: We use cones, we use caution signs.
> Q: Anything else?
> A: Yes. And you know, if it happens that, you know, something, I'm waiting for somebody to take care of, I stand there and make sure its taken care of and (unintelligible.) I mean, whatever is done.
> Q: So would you agree that it is either your responsibility or the responsibility of the employee at the store to warn customers of any known dangers — within the store which might result in a slip, a trip, or a fall?
> A: That is what has to be done.
> Q: Okay. If a transition strip was broken on store premises and an employee noticed it what would you expect that employee to do?
> A: You call me to the scene. I got to the scene and we protect the place. We secure the place.

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In response to Mrs. Wright's claim that the above-quoted deposition excerpts were sufficient to establish Burlington's notice of a defective transition strip, Burlington replied that the statement attributed to an unidentified employee was inadmissible hearsay, and that, as a result, Mrs. Wright failed to produce evidence from which a jury

could reasonably infer “that the Defendant had knowledge[]-either actual or constructive[]- of the allegedly damaged transitions (sic) strip.” Consequently, Burlington argued that it was entitled to summary judgment.

At the outset of the hearing on Burlington’s motions, the circuit court asked counsel for Mrs. Wright to address the admissibility of the proffered hearsay statement of the unidentified individual. The court stated:

> THE COURT: . . . I’ve read both motions and opposition and the reply. It seems to me that the motion for summary judgment comes down to the statement or the alleged statement of the unidentified employee with regard to notice. Is that right?
>
> [COUNSEL FOR BURLINGTON]: Yes, Your Honor.
>
> THE COURT: So I’ll hear from the Plaintiff. Why, why, at trial should I [—] and what authority do I have to [—] allow the statement of the unidentified employee to come into evidence?
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> [COUNSEL FOR MRS. WRIGHT]: We’re contending that this is an admission of a party opponent, Your Honor. And therefore it’s an exception to the hearsay rule.[1] And I would, in addition to the response that we filed,

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[1] Maryland Rule 8-503(a)(4) provides that a statement that is an admission of a party opponent’s agent or employee is admissible as an exception to the rule against hearsay, and states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) **Statement by Party-Opponent.** A statement that is offered against a party and is:
>
> * * *

continued…

I would point you to a case, B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co., which is at 324 Md. 147, . . . .

THE COURT: Go ahead. I'm familiar with the case.

[COUNSEL FOR MRS. WRIGHT]: . . . It says statements by agents concerning a matter within the scope of the agent's employment and made during the existence of the agency relationship should be admissible without the necessity of proving that the agent had authority to speak or that the statements were part of the *res gestae*.

* * *

In this case, Ms. Wright fell in the Burlington Coat Factory Store in Greenbelt, Maryland. After she fell, she claims an employee came up and started blurting out "they knew about this. I'm not getting fired for this." She fell over a, what she contends was a loose transition strip or a border between a tiled floor and carpet, a rubber border. She claims that that border was loose.

**And to prove our case we have to prove that Burlington had either constructive or actual notice of this defective condition or dangerous condition. And so this statement is crucial to our case** because it proves that this particular employee knew about it and that they –

THE COURT: Who's the particular employee?

[COUNSEL FOR MRS. WRIGHT]: She describes him, one second, Your Honor. She didn't get his name at the scene. But she just recognized him as a male employee with dread locks.

THE COURT: How? How did she make that determination?

[COUNSEL FOR MRS. WRIGHT]: How did she make the determination?

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continued…

> (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment[.]

> THE COURT: That he's an employee. Did he say I'm Joe Smith. I'm the assistant manager. I work at the register. Did he have on a Burlington Factory shirt? **What, how did she make that, how do you make that determination that this person was an employee?**
>
> * * *
>
> [COUNSEL FOR MRS. WRIGHT]: . . . **I assume the phrase "I'm [not] going to get fired for this," one would imply that that is sufficient to establish that he was an employee of Burlington –**
>
> THE COURT: Right**. But you're using the statement to prove the identification which the statement doesn't come in if you can't lay the proper foundation for the identification**. You're bootstrapping the whole argument with the statement itself and I'm asking you, in order to let it come in, one[,] **you have to first establish he was an employee**. And then it comes in whether or then it [sic] determines whether the statement comes in. But the statement has to be reliable, credible, and trustworthy as well . . . .
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> * * *
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> THE COURT: The question is not can an employee make a vicarious admission. The question is[:] can you first establish the statement came from an employee. **Can you even establish that this person exists because the Court has to determine, again, reliability, trustworthiness.** And if I'm not even sure that this person exists, if you can't even establish that this person exists[,] then the statement doesn't come in.

(Emphasis added.)

At the conclusion of the hearing on Burlington's motions, the circuit court first granted Burlington's motion *in limine* to exclude the alleged employee's statement, explaining that "the only evidence or argument that this person was an employee was the statement itself," and "the Court finds that an unidentified person by nature is not reliable or credible or trustworthy. And the fact that the Plaintiff cannot corroborate this person's employment status in not the slightest. . . ." Having made that ruling, the court then ruled

that summary judgment would be entered in favor of Burlington because, without the hearsay statement from the unidentified person, Mrs. Wright would be unable to prove Burlington had notice of the loose transition strip. Mrs. Wright filed a motion for reconsideration, which the court denied. Mrs. Wright timely noted an appeal.

## DISCUSSION

Mrs. Wright raises two separate questions that could be paraphrased: (1) Did the motion court err in granting Burlington's motion *in limine* to preclude Mrs. Wright from offering, as evidence at trial, the statements allegedly made by an unidentified person believed by Mrs. Wright to be a Burlington employee? (2) Did the motion court err in granting Burlington's motion for summary judgment on the basis that there was insufficient evidence that Burlington had actual or constructive notice of the alleged defect in the floor that caused Mrs. Wright to fall? The sequence in which these two questions are considered is potentially outcome-determinative. Different standards of appellate review apply to the two questions, and a ruling upon the motion *in limine* potentially eliminates some of the proffered "facts as would be admissible in evidence," *see* Maryland Rule 2-501(c), that are to be considered in a light most favorable to the non-moving party when the court rules upon a motion for summary judgment. Here, the motion court ruled upon the motion *in limine* first, and granted that motion before ruling upon the motion for summary judgment. In Mrs. Wright's brief, she similarly addresses the motion *in limine* before addressing the motion for summary judgment. We, too, shall address the questions in that sequence.

## I. Motion in limine.

### A. Standard of review of ruling to exclude hearsay.

In *Gordon v. State*, 431 Md. 527, 532 *et seq.* (2013), the Court of Appeals described the distinctive standard for appellate review of evidentiary rulings regarding the admissibility of hearsay (including exceptions to the general rule prohibiting hearsay evidence). The *Gordon* Court was considering whether the trial judge had erred in admitting hearsay evidence pursuant to the exception provided by Rule 5-803(a)(2), whereas, in Mrs. Wright's case, the pertinent exception is found in Rule 5-803(a)(4), but we infer that the framework for appellate analysis should be the same for both exceptions to the hearsay rule.

Writing for the Court of Appeals in *Gordon*, Judge Sally D. Adkins observed that "Maryland's older cases almost always treated the admissibility of hearsay evidence as an issue left to 'the discretion of the trial judge' and spoke of reviewing hearsay rulings for abuse of discretion." *Id.* at 535 (quoting *Jacobs v. State*, 45 Md. App. 634, 653 (1980); footnote and additional citations omitted). But, "under the [Maryland] rules of evidence [adopted December 15, 1993, effective July 1, 1994], hearsay rulings are not discretionary. *See* Md. Rule 5–802. ('Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.')." *Id.*

As Judge Irma Raker recognized in *Bernadyn v. State*, 390 Md. 1, 7-8 (2005):

> Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, *must* be excluded as evidence at trial, unless it

> falls within an exception to the hearsay rule excluding such evidence or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.

*Accord Gordon*, 431 Md. at 535-36.

In *Gordon*, however, the Court of Appeals clarified that the standard of appellate review is more nuanced and multi-dimensional than simply choosing between either deferential or *de novo* review, and varies depending upon which aspect of the admissibility ruling is at issue on appeal. Judge Adkins explained:

> A hearsay ruling may involve several layers of analysis. Proponents of the evidence challenged on hearsay grounds usually argue (1) that the evidence at issue is not hearsay, and even if it is, (2) that it is nevertheless admissible. The first inquiry is legal in nature. *See Bernadyn*, 390 Md. at 8, 887 A.2d at 606. But the second issue **may require the trial court to make both factual and legal findings**. For instance, in determining whether evidence is admissible under the excited utterance exception to the hearsay rule, codified in Rule 5–803(b)(2), the trial court looks into "the declarant's subjective state of mind" to determine whether "under all the circumstances, [he is] still excited or upset to that degree." 6A *Lynn McLain, Maryland Practice: Maryland Evidence State & Federal* § 803(2):1(c) (2d ed. 2001). It considers such factors, as, for example, how much time has passed since the event, whether the statement was spontaneous or prompted, and the nature of the statement, such as whether it was self-serving. *Id*. **Such factual determinations require deference from appellate courts.**
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> * * *
>
> Under this two-dimensional approach, **the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review**. Accordingly, the trial court's legal conclusions are reviewed de novo, *see Bernadyn*, 390 Md. at 7–8, 887 A.2d at 606, but **the trial court's factual findings will not be**

> **disturbed absent clear error**, *see State v. Suddith*, 379 Md. 425, 430–31, 842 A.2d 716, 719 (2004) (and citations contained therein).

*Id.* at 536-37, 538 (emphasis added).

Applying that standard of review in *Gordon*, the Court concluded that "[t]he question of whether Gordon manifested an adoption or belief in the truth of the date of birth listed on the license was *a preliminary question of fact to be resolved by the trial court before deciding whether to admit the statement into evidence*." 431 Md. at 545-46 (emphasis added). *Cf.* Rule 5-803(a) Committee note, stating: "*Where there is a disputed issue as to* scope of employment, representative capacity, authorization to make a statement, the existence of a conspiracy, or *any other foundational requirement, the court must make a finding on that issue before the statement may be admitted*." (Emphasis added.) The *Gordon* Court reviewed the trial judge's finding relative to the requisite "preliminary factual determination" for "clear error," and, finding none, held that the trial court in that case did not err in admitting the challenged hearsay as an adoptive admission pursuant the exception in Rule 5-803(a)(2). 431 Md. at 550. *Accord Hailes v. State,* 442 Md. 488, 499 (2015) ("In reviewing a trial court's ruling on whether evidence falls under an exception to the rule against hearsay, an appellate court reviews for clear error the trial court's findings of fact, and reviews without deference the trial court's application of the law to its findings of fact."); *Baker v. State*, 223 Md. App. 750, 760 (2015) ("Whether hearsay evidence is admissible under an exception to the hearsay rule . . . may involve both legal and factual findings. In that situation, we review the court's legal conclusions

*de novo*, but we scrutinize its factual conclusions only for clear error." (Citations to *Gordon* omitted.)).

In Mrs. Wright's case, the motion judge, ruling upon an evidentiary question raised in a pre-trial motion *in limine*, was being asked to decide whether the hearsay statement allegedly made by an unidentified person should be admitted pursuant to Rule 5-803(a)(4) as a statement made by the opposing party's agent or employee. Whether the unidentified declarant was Burlington's agent or employee was a preliminary factual determination that the motion judge was required to make based upon the deposition testimony that was submitted by the parties. After hearing argument from both parties, the judge was not persuaded that there was sufficient proof of the unidentified declarant's employment status for the hearsay statement to be admitted pursuant to Rule 5-803(a)(4). We review that preliminary factual determination for clear error.

When we review a court's factual finding for clear error, we defer to the court's finding and will not overturn the court's finding unless it was clearly erroneous. As Judge Charles E. Moylan, Jr., has explained, the "clearly erroneous" standard presents a particularly high hurdle for a party trying to convince an appellate court that the finder of fact committed clear error by not being persuaded of something. In *Byers v. State*, 184 Md. App. 499, 531 (2009), Judge Moylan wrote for this Court that "it is nearly impossible for a verdict to be ... legally in error when it is based not on a fact finder's being persuaded of something but only on the fact finder's being unpersuaded." (Citing *Starke v. Starke*, 134 Md. App. 663, 680–81 (2000)).

In the present case, Mrs. Wright faces the daunting task of convincing us that the motion judge was clearly erroneous in finding that she had not met her burden of proving that a statement she and her husband heard an unidentified declarant utter was in fact a statement made by an employee or agent of Burlington. Burlington prevailed on the issue of whether Mrs. Wright had met the burden of establishing a factual foundation for admission of the hearsay statement, and therefore, "we view the circuit court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to" Burlington. *Cf. Hailes, supra*, 442 Md. at 499 n.5 (when reviewing a court's ruling upon a motion to suppress evidence, "the appellate court views the trial court's findings of fact, the evidence, and the inferences that may be drawn therefrom in the light most favorable to the party that prevailed on the issue insofar as the appellate court considers the issue").

**B. The court's ruling to exclude hearsay statement of unidentified person.**

The parties do not dispute that, at the time of the accident, Mrs. Wright was Burlington's invitee. In *Maans v. Giant of Maryland, L.L.C.*, 161 Md. App. 620 (2005), we explained that there is an assumption that the proprietor of a retail establishment "'will exercise reasonable care to ascertain the condition of the premises[.]'" *Id.* at 627 (quoting *Rawls v. Hochschild, Kohn & Co.*, 207 Md. 113, 117 (1955)). In light of this assumption, we stated: "'The duties of a business invitor [] include the obligation to warn invitees of known hidden dangers, a duty to inspect, and a duty to take reasonable

precautions against foreseeable dangers.'" *Id.* (quoting *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 388 (1997)).

In *Maans*, *supra*, 161 Md. App. at 629, we also quoted from *Rehn v. Westfield Am.*, 153 Md. App. 586, 593 (2003), in which Judge Sally Adkins discussed the obligation of a plaintiff in a premises liability case to prove that the proprietor had notice of the dangerous condition:

> **The evidence must show not only that a dangerous condition existed, but also that the proprietor "had actual or constructive knowledge of it, and that that knowledge was gained in sufficient time to give the owner the opportunity to remove it or to warn the invitee.**" *Keene v. Arlan's Dep't Store of Baltimore, Inc.*, 35 Md. App. 250, 256, 370 A.2d 124 (1977). Whether there has been sufficient time for a business proprietor to discover, cure, or clean up a dangerous condition depends on the circumstances surrounding the fall. *See Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 264 (2003), stating: "'What will amount to sufficient time depends upon the circumstances of the particular case, and involves consideration of the nature of the danger, the number of persons likely to be affected by it, the diligence required to discover it or prevent it, opportunities and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequences of the conditions.'" *Id.* (quoting *Moore v. Am. Stores Co.*, 169 Md. 541, 551, 182 A. 436 (1936)).

(Emphasis added.) [2]

[2] In *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 263 (2003), the Court of Appeals adopted Restatement (Second) of Torts § 343 (1965), which provides the following standard for premises liability:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land **if, but only if, he**

continued…

It appears that the main point of dispute with respect to Mrs. Wright's ability to offer evidence of a *prima facie* case against Burlington was whether she could prove that Burlington had notice that the transition strip was loose before her fall. After it became clear during discovery that Mrs. Wright was relying upon the statement she attributed to an unknown person for her proof of Burlington's notice, Burlington moved *in limine* to exclude that evidence as inadmissible hearsay.

In response to Burlington's motion *in limine* asking the court to rule that the proffered statement allegedly made by an unidentified person should be excluded as hearsay, Mrs. Wright argued that the statement would be admissible at trial as a statement by an agent or employee of a party-opponent pursuant to Maryland Rule 5-803(a)(4). As noted above, the Committee note accompanying Rule 5-803(a) provides this caveat about the foundation for admitting such statements:

> **Where there is a disputed issue as to** scope of **employment**, **representative capacity**, authorization to make a statement, the existence of a conspiracy, **or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted.**

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continued…

> (a) **knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees**, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

(Emphasis added.)

(Emphasis added.)

The admissibility of the statement proffered by Mrs. Wright to prove that Burlington was on notice that the transition strip was loose depended on a preliminary factual determination that the declarant was a Burlington employee. But, at the hearing on Burlington's motion *in limine*, when the motion judge asked counsel for Mrs. Wright to point to evidence in the record that would establish that the declarant was an employee of Burlington, counsel could point to little other than the statement itself which referred to "not getting fired," from which the court was urged to infer that the declarant was likely an employee. But the motion judge declined to consider the statement itself in determining whether the hearsay exception in Rule 5-803(a)(4) applies. The motion judge said to Mrs. Wright's counsel: "You're bootstrapping the whole argument with the statement itself and . . . in order to let [the statement] come in, . . . you have to first establish that he was an employee."

This ruling was consistent with the Maryland approach described by Professor Lynn McLain in 6A LYNN MCLAIN, MARYLAND EVIDENCE § 801(4):(5) (3d ed. 2013). Professor McLain explains:

> Under the [modern] approach adopted in *B & K Rentals* [*& Sales Co. v. Universal Leaf Tobacco Co.*, 324 Md. 147, 157 (1991),] and later codified in Md. Rule 5-803(a)(4), the hearsay rule does not exclude an agent's or employee's statement offered against the principal, **as long as** only the following requirements are met:
>
> (1) the statement concerned a *matter* within the scope of the agent's employment (there need be no "speaking authority");

> (2) the statement was made during the existence of the agency or employment relationship; and
>
> (3) **there is independent evidence of the agency.**
>
> * * *
>
> **The Maryland case law has not permitted consideration of the statement itself in determining whether the foundational facts have been sufficiently shown.**

McLain, *supra*, § 801(4):5 (bold emphasis added).[3]

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[3] Professor McLain explains in her treatise that the comparable federal rule — unlike the Maryland rule — expressly provides for consideration of the content of the hearsay statement as one factor in determining whether the foundational requirements of the exception have been satisfied. She notes that the parallel provision in the Federal Rules of Evidence, Fed. R. Evid. § 801(d)(2)(D), provides:

> (d) Statements that are not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> * * *
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed;
>
> * * *
>
> **The statement must be considered but does not by itself establish . . . the existence or scope of the relationship under (D).**

(Emphasis added.)

Professor McLain notes that the language in Fed. R. Evid. § 801(d)(2)(D) providing that the statement "must be considered" was added to the rule in 1997 "to

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As noted above, the Committee note to Maryland Rule 5-803(a) requires the trial court to make a finding resolving any factual dispute about any foundational requirement **"before the statement may be admitted**." (Emphasis added.) Because, in the present case, there was a dispute as to the alleged employee's status as an agent or employee of Burlington, the trial court was required to make a finding on that foundational issue prior to determining whether the statement fits within the hearsay exception. When called upon to make that finding, the motion judge found that there was insufficient evidence that the declarant was an employee, and, therefore, granted Burlington's motion *in limine* to exclude the hearsay statement. As explained above, we review that finding for clear error. *See, e.g., Hailes, supra,* 442 Md. at 499. And we conclude that the motion judge did not make a clearly erroneous ruling in determining that there was insufficient evidence for him to find that the proffered statement had been made by an agent or employee of Burlington.

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continued…
codify the [Supreme Court's] holding in *Bourjaily* [*v. United States*, 483 U.S. 171, 178 (1987)]." MCLAIN, *supra*, § 801(4):5. In *Bourjaily*, the Supreme Court held that a court may consider the statement itself "in deciding . . . the preliminary fact [] of a conspiracy involving the declarant and the defendant.[]" *Id.* This added language applies "not only as to statements by alleged coconspirators[, as in *Bourjaily*] (Rule 801(d)(2)(E)), but also as to statements by alleged agents or employees (Rule 801(d)(2)(D)) . . . ." *Id.*

Because Maryland Rule 5-803(a)(4) does not contain similar language, and therefore does not *require* a court to consider the substance of the statement in analyzing the adequacy of the foundational facts, we hold that the motion judge did not err in declining to consider the content of the alleged hearsay statement when determining whether the statement would be admissible as an exception to the hearsay rule under Rule 5-803(a)(4).

As the following passages from the transcript of Mrs. Wright's deposition show, her description of the unidentified employee was vague, and her testimony regarding the alleged indications of employment were contradicted by her own testimony:

> Q. [BY COUNSEL FOR BURLINGTON]: Can you tell me what happened on that day?
>
> A. [BY MRS. WRIGHT]: So I was walking back — leaving the [lingerie] department to meet my husband, try to go meet him in the men's department, because it's on separate sides of the store.
>
> And as I was walking out of that department, the transition strip or the strip on the floor got caught in my flip-flop, and I went flying in the air.
>
> There were a few patrons that saw what had happened, and one lady came over to me to help me up off the floor.
>
> * * *
>
> Q. What is your understanding of what was wrong with the transition strip?
>
> A. That it wasn't secure.
>
> Q. Okay. And **how long had it not been secured for?**
>
> A. **I wouldn't know that.** Only the store employee or the store would know that?
>
> Q. So it's possible that the transition strip could have become loose within minutes before you were walking through that area?
>
> A. I would disagree with that based on what the store employee — when the store employee came over to me, what he stated.
>
> Q. Okay. What did the store employee say to you?
>
> A. When the — **the patron helped me off the floor, she went to get someone to come assist. And she went and got a gentleman who**

**walked over there. And he just started blurting out, "They knew about this. I'm not getting fired for this."**

Q. **What was he wearing?**

A. **A Burlington smock** —

Q. **Do you know the color** —

A. — **or shirt**. I don't really recall that.

Q. **Do you recall the color?**

A. **I don't recall that.**

Q. **Was he wearing a name tag?**

A. It's possible. I'm pretty sure. **I'm not sure** — I was in pain and agony. I — I wasn't checking him out to see what he had on or get his name or anything like that. I was focused on myself at the time.

Q. Where were you when he came over and said that "They knew about this. I'm not going to get fired for it"?

A. I was sitting in the shoe department, which was across from the lingerie department.

* * *

Q. So it's your testimony that this individual, who you believe was employed at Burlington, walking down the aisle, just pointing, saying, "They knew about this. I'm not going to get fired for it"? He was just making those random comments as he's walking down?

A. Well, he saw that I had — I assume that the patron told him that I fell there. And he saw the strip still in the middle of the floor, and he saw me there injured.

Q. I understand. But I just want to understand your testimony.

A. That's fine.

Q. This gentleman, who you believe was an employee — who was he employed with?

A. Burlington Coat Factory.

Q. Okay. — who you believe was employed with Burlington Coat Factory was walking down the aisle just ranting, in your words, "They knew about this. I'm not going to get fired. They should have fixed it a long time ago," was just making those comments to no one in particular?

A. He may have been speaking to me, I'm not sure, but he was making the comment.

Q. Did anyone else overhear those statements other than you?

A. When my husband came over there — they had called him over the intercom. My husband — he made the same comment to my husband.

Q. The same three comments to your husband?

A. Yes. And he even showed my husband the strip.

Q. What were the comments made to your husband?

A. "I'm not getting fired for this. They knew about this."

Q. Anything else?

A. The assistant manager was also there.

Q. He overheard that conversation?

A. The assistant manager was there. We kind of skipped a part.

Q. We're going to come back to that. Let's just focus on the conversations — what did he look like?

A. He was medium complexion, African American with dreads, dreadlocks.

Q. How tall was he?

A. I'm not sure.

Q. Was he tall? [S]hort? [N]ormal height?

A. Normal height.

Q. What was his weight? Was he a skinny guy? [O]verweight guy?

A. Again, I'm focusing on myself. I don't know really know. I guess he's a medium build. Maybe skinny. I'm not sure exactly his buil[d]. I wasn't focusing on him.

* * *

Q. Do you know, sitting here today, what type of build that the – that employee had?

A. I do not.

Q. How old was he?

A. I have no idea.

Q. So the second time that he made the comments, "I'm not getting fired. They knew about this," that was in the presence of who? Did you overhear the conversation?

A. Yes. I was still sitting there in the shoe department.

Q. Who else heard that conversation?

A. My husband —

Q. Anyone else?

A. — and also the assistant store manager.

Q. What's his name?

A. I don't know her name. It was a woman.

Q. Okay. You don't know her name?

A. I don't.

Q. What did she look like?

A. Medium complexion.

Q. What was her race?

A. African American.

Q. Okay.

A. She was – I'm not sure of her build. She looked kind of small, so I'm not sure if she was a 10 or an 8. I'm not quite sure exactly of her size.

Q. Okay. What color — how long was her hair?

A. She had it pulled back, so I — I really couldn't make that assumption.

Q. And you don't know her name?

A. I do not.

Q. What was she wearing?

A. She had a jacket on. I guess store manager. I don't recall her outfit.

Q. And you don't recall the outfit of the other gentleman who had the dreads — dreadlocks?

A. I know he had on a smock, a Burlington smock.

Q. When you say "smock" — I'm just trying to understand. When you say "Burlington smock," meaning it had Burlington Coat Factory written on the smock, or was it like an apron? **Can you describe to me what a smock is that you're** —

A. It's — it's — it looks like a vest, something like a vest.

Q. So like a V-neck shape with buttons?

A. No. It was — it was a vest. It wasn't a V-neck. It was — well, it was just kind of low. I'm — I'm not sure if — exactly. **I can't really describe Burlington's uniforms.**

But the young lady that helped me, she went and got a worker from Burlington. It's some type of smock. It's like low here, maybe have pockets on the side and something that comes right here (indicating.) I really — that's probably the best I can describe it to you. I don't know — I know it was red.

Q. It was red? Was either the assistant — the female that you said was the assistant store manager or the individual with dreadlocks, were they — either one of them wearing a hat?

A. No.

Q. Were they wearing glasses?

A. No.

Q. How did you know the female was the assistant store manager?

A. Because the gentleman with the dreadlocks went and got the manger to — the assistant manager to come over there to speak with me. And the assistant manager asked me if I was here alone. And I stated, no, my husband was in the store. She asked me for his name so she could page him overhead. And my husband came to the area. And as he was walking up, he saw me sitting in the shoe department with the assistant manager. And the gentleman, he asked my — my husband asked what happened, and the gentleman started stating that the strip got caught in my foot, it was loose. And, again, he rephrased that store employees knew about it.

(Emphasis added.)

Mrs. Wright's husband also was unable to provide a description of the unidentified declarant that was adequate to compel the motion judge to conclude that the person was a

Burlington employee. At Mr. Wright's deposition, in response to a question — "Do you remember what [the alleged employee] was wearing?" — Mr. Wright responded: "**I guess their uniforms**. I don't remember the actual — the exact color, but yeah, I know it was [a] typical uniform." (Emphasis added.)

After hearing argument from counsel, the circuit court granted Burlington's motion *in limine*, which, in turn, also resulted in the court granting Burlington's motion for summary judgment. The motion judge explained:

> Even taking the evidence most favorable to the Plaintiff, in this case it comes down to the unidentified [—] allegations of an unidentified employee. It's been stated throughout this hearing that an employee, other than a black male, dread locks with medium complexion, there is no other information to corroborate the fact that this person was an employee or the fact that this person existed.
>
> There was no, there's no testimony about any insignia from Burlington Coat Factory whether it's a, they all wore all the same color shirts. They wore a shirt that said Burlington on it. There was a name tag. There was a hat. They saw this person earlier working as a cashier, etcetera. Apparently the testimony from the operations manager couldn't even say whether anybody, they have an employee that fits that description let alone was working that day.
>
> **The only evidence or argument that this person was an employee was the statement itself. That is that ["]I told them about this and I'm not going to get fired.["] The statement in order to come in under hearsay, even statements that come in under hearsay have to meet the requirements of reliability, trustworthiness, and credib[ility].** As well, as in this case the defense in [sic] precluded in effect from investigating this statement, investigating this person, cross-examining this person, deposing this person, putting them under oath, etcetera, about who supposedly this person told, etcetera, which is the crux of the case.
>
> And without that, **the Court finds that an unidentified person by nature is not reliable or credible or trustworthy**. And the fact that the **Plaintiff cannot corroborate this person's employment status in not**

> **[sic] the slightest**, the Court will, I guess I one, am granting the motion in limine to preclude the statement from coming in.
>
> * * *
>
> The motion *in limine* is granted with respect to only the statement of the unidentified employee.

(Emphasis added.)

The trial judge's finding that there was insufficient evidence of the agency or employment of the declarant to satisfy the foundational requirement for the statement to be admitted under Rule 5-803(a)(4) was not clearly erroneous.

## II. Motion for Summary Judgment.

Because the trial court properly excluded the hearsay statement under Rule 5-802, we also hold that the trial court properly granted Burlington's motion for summary judgment. We perceive no other genuine dispute of material facts. Without the alleged employee's hearsay statements, the record is devoid of evidence which would indicate that Burlington had notice of a defective transition strip. The Court explained:

> And as a result of [concluding that the alleged employee's statement is not admissible as an exception to the hearsay rule], I'm going to grant the motion for summary judgment.
>
> Without that statement there is no material fact in dispute that would be admissible at trial. So . . . the Court rules that the statement is, again, not admissible as any hearsay exception and without that . . . there's no proof of notice. So in return then I'll also grant the motion for summary judgment.
>
> * * *
>
> And, again, without [evidence that Burlington had notice of the defective condition], the motion for summary judgment is granted 'cause [sic]

> without that statement [of the unidentified person] coming in, there no longer is a material fact in dispute.

To successfully oppose a motion for summary judgment, "the non-moving party must provide **detailed and precise facts that are admissible in evidence**." *Appiah v. Hall*, 416 Md. 533, 546 (2010) (emphasis added). In granting the motion *in limine*, the motion judge ruled that the statement from the unidentified person alleged to be an employee was not admissible in evidence. And Mrs. Wright did not provide the motion court with other detailed and precise facts that are admissible in evidence that would be sufficient to establish a rational finding of notice on the part of Burlington. We agree with the motion court's conclusion that Burlington is entitled to judgment as a matter of law. *See Maans, supra*, 161 Md. App. at 629.

After the court entered summary judgment in favor of Burlington, Mrs. Wright filed a motion for reconsideration, citing Maryland Rules 2-534 and 2-535. Motions under both of those rules are addressed to the discretion of the circuit court. In Mrs. Wright's opening brief, there is no separate argument to support a claim that the court abused its discretion in denying the motion for reconsideration. Accordingly, we decline to address that issue further.

Mrs. Wright does argue in her opening brief that the statement should have been admitted as an excited utterance. That argument, however, was not articulated in the opposition to the motions or at the hearing on the motions, and is not preserved for our review.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**