Circuit Court for Baltimore County
Case No. C-03-CV-21-001340

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 206

September Term, 2022

TYRONE EAMES

v.

WAL-MART STORES EAST, LP

Kehoe,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: January 31, 2023

*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.

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This appeal arises out of a decision by the Circuit Court for Baltimore County to grant summary judgment in favor of Wal-Mart Stores East, LP ("Wal-Mart"), appellee, and against Tyrone Eames, appellant. On April 29, 2021, Eames filed a complaint against Wal-Mart asserting claims for negligence and seeking damages for injuries he allegedly suffered as a result of a slip and fall at a Wal-Mart store on Perry Hills Court in Baltimore County. Discovery was conducted and, thereafter, Wal-Mart filed a motion for summary judgment. After a hearing on March 30, 2022, the circuit court granted the motion and entered judgment in favor of Wal-Mart. This timely appeal followed.

ISSUES PRESENTED

Eames presents the following two issues for our consideration:

I. Whether the circuit court committed reversible error by granting Wal-Mart's motion for summary judgment; and,

II. Whether the circuit court committed reversible error by determining that the statements of a cashier to Eames did not constitute admissible hearsay.

For the reasons set forth below, we shall reverse the grant of summary judgment and remand the case to the circuit court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In his complaint, Eames alleged that on or about April 10, 2021, he and his wife were in the Wal-Mart store at a check-out counter "near the middle of the cluster of check out aisles," when a cashier, whom he identified as "Jay,"[1] asked him about a container of

[1] In Supplemental Answers to Interrogatories, Wal-Mart identified "Jay" as Reyja "Jay" Wheeler.

cups. As Eames turned to his wife to ask her the same question, he slipped and fell "on his head and back on a slippery and wet substance near the end of the check out counter." Eames asserted that Jay assisted him and informed him that during the course of his shift, "several other customers had reported the slippery spot to him" and several other nearby cashiers. According to Jay, Wal-Mart's custodial staff had been notified of the need to clean up the area but no one had responded despite several calls. The incident was reported to management and a manager came over to Eames and advised him "that the entire incident was 'on videotape' and 'saved.'"

Eames claimed he sustained "severe personal injury" as a result of his fall. He asserted that at all times Jay was an employee, agent, and/or servant of Wal-Mart and was "acting within and during the course of his agency and/or employment." In addition, Eames claimed that he was a business invitee properly on Wal-Mart's premises and that Wal-Mart had a duty to keep its premises "in a reasonably safe condition for use by its customers and invitees, including him, and to exercise "reasonable care to discover, correct or warn customers and invitees . . . of any danger, hazards or defective conditions existing upon" the premises.

In his deposition, Eames provided more details about the incident. He explained that his wife was using a personal "ride-around" cart and he was pushing a shopping cart. When they finished their food shopping, they went to a cashier "directly across from the bathroom." Eames's wife entered the check-out line first and placed her items on the counter. According to Eames's wife, they each paid for their own items separately. She then rode her ride-around cart to the bathroom. Eames's wife testified that she rode the

cart into the bathroom, but Eames testified that she parked the cart outside the bathroom, exited the cart, and entered the bathroom. After Eames's wife left to use the bathroom, the cashier, Jay, told Eames that his wife had already paid for some plastic drinking cups. As Eames went to put those cups into his wife's parked ride-around cart, he slipped, fell, and hit his head. Prior to the fall, Eames did not see anything on the floor, but after he fell he noticed that his shoes were wet with an odorless "clear liquid." Jay approached Eames and told him that "he called for a custodian to come a half hour ago and didn't nobody show up." Eames's wife did not witness the incident because she was in the bathroom. In her deposition, she stated that she did not see any substance on the floor either before or after Eames fell.

After discovery was conducted, Wal-Mart filed a motion for summary judgment. It asserted that there was "no objective evidence" beyond Eames's "specious and self-serving testimony, that there was any liquid on the floor." Further, even assuming *arguendo* that there was liquid on the floor, there was no evidence that Wal-Mart "had either actual or constructive notice" of it. Wal-Mart maintained that Eames's "self-serving testimony" was insufficient to create a genuine dispute of material fact and that the lack of objective evidence to support his claim warranted entry of summary judgment. Alternatively, Wal-Mart argued that it could not be held liable for Eames's injuries because it did not have actual or constructive notice of the existence of any dangerous or defective condition. It asserted that Eames failed to present any corroborating facts to establish that there was something on the floor and there was no evidence to show how long the alleged dangerous

condition existed or that it existed long enough for Wal-Mart to discover it. Lastly, Wal-Mart argued that Eames was contributorily negligent.

In support of its motion, Wal-Mart provided an affidavit from Deborah Carroll, who was working as a cashier at the store and witnessed Eames fall. She testified that she did not observe any liquid on the floor either before or after Eames fell and no customer notified her that there was any liquid on the floor. Wal-Mart also provided an affidavit from Dennison Scipio, who was working as "the Front End Coach" at the time of the incident. He did not witness Eames fall, but observed Eames on the floor after he fell. Scipio testified that he did not observe any liquid on the floor "either in the area where [Eames] fell or anywhere else in the near vicinity." Scipio also took photographs of the area where Eames fell. He denied seeing any liquid on the floor or being notified by any customer that there was liquid on the floor.

A hearing on Wal-Mart's motion for summary judgment was held on March 30, 2022. The judge questioned counsel for Eames about how the plaintiff would establish that Wal-Mart knew or should have known that there was something on the floor. Counsel responded that Jay, Wal-Mart's employee, told Eames that something was on the floor and that he had called for a custodian a half hour before the incident. The following colloquy occurred:

> THE COURT: But I think we need Jay. I don't see how that gets in front of a jury. I don't – I am missing that link. I understand that your client is basically saying – your client is creating, right? You're relying – I am not saying creating. You are relying on your client saying Jay said. How is that coming in?

> [COUNSEL FOR EAMES]: Well, Jay is definitely an employee there.
>
> THE COURT: I don't think every employee speaks for the company.
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> [COUNSEL FOR EAMES]: As to things that they are aware of, I think so.
>
> THE COURT: You think you are going to be able to just say to a jury, this guy Jay who was wearing a Wal-mart uniform and seemed to be the check-out guy said there has been water on the floor?
>
> [COUNSEL FOR EAMES]: It seems to me that constitute[s] the admission of a party opponent.
>
> THE COURT: I feel like you need to establish that Jay is a higher-up in the company. Like, every person who works for Wal-mart or any company – I mean, this is my understanding of the law. And perhaps I am misunderstanding it. But every person who works for a company doesn't speak for the company. For it to be an admission against interest, it has to be somebody a bit higher up than a cashier.

Counsel for Eames disagreed and argued that Jay was one of several cashiers in the area, that he was in a position to know about liquid on the floor, and that he had responsibility for reporting it to the custodians. Moreover, Jay told Eames that he did report the liquid on the floor about a half hour before the incident. According to counsel, that evidence established constructive knowledge. The judge responded that she did not see how that evidence could come in through Eames.

Counsel for Wal-Mart argued that Eames could not prove his case with his own "self-serving uncorroborated allegation" about what a cashier told him. He maintained that the statement of a cashier could not constitute a statement of a party opponent because the

cashier was not someone upon whom Wal-Mart had "bestowed a certain amount of authority" to speak for the corporation.

The court granted summary judgment in favor of Wal-Mart, stating:

> Every person who wears a Wal-mart name tag does not speak for the company. So I feel still focused on the same issue, which is if there was a way for you to get into evidence Jay's alleged comments, you would have a question that a jury would have to decide.
>
> But I don't see how you get that in. And I looked, and that was one of the things I was doing when I asked you to give me a minute to look at the file.
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> The scheduling Order was issued on June 1st of 2021. You said you received Answers to Interrogatories in July, but you said you weren't told about Mr. Wheeler until September 8th. There was still 3 months before the discovery deadline of December 19 of 2021.
>
> So I am going to grant the motion for summary judgment based on the fact that there is absolutely no evidence to support any argument that Wal-mart had constructive or actual knowledge of anything on the floor and had any opportunity to correct any such thing before Mr. Eames took his spill.

DISCUSSION

Eames contends that the circuit court erred in granting summary judgment in favor of Wal-Mart because Jay's statements were admissible as an exception to the rule against hearsay[2] under Maryland Rule 5-803(a)(3) and (4), which provide:

[2] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Rule 5-802 prohibits the admission of hearsay "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes[.]"

> 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:
> >
> > * * *
> >
> > (3) A statement by a person authorized by the party to make a statement concerning the subject; [or]
> >
> > (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;
> >
> > * * *

Eames argues that the circuit court erred in finding "without any factual support one way or the other," that Jay's statement "was either not authorized and/or not made by someone 'higher up' in [Wal-Mart's] hierarchy" and, therefore, was not admissible under Rule 5-803(a)(3). In addition, Eames maintains that Jay's statements were admissible under Rule 5-803(a)(4) because Jay's statements were made contemporaneous with the incident, were directly within his personal knowledge, and "contain[ed] the appearance of authorization." Moreover, Wal-Mart never asserted a lack of authorization or pointed to a policy that cashiers lack authority "to speak to its customers about anything in general or this particular topic, specifically." According to Eames, the circuit court erred in finding that Jay lacked authority to make the statements attributed to him and, because Jay's statements to Eames constituted an admission, the circuit court erred in granting summary judgment. We agree.

A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact" and "the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). We review the grant of a motion for summary judgment *de novo*. *Asmussen v. CSX Transp., Inc.*, 247 Md. App. 529, 558 (2020); *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). When there is no genuine dispute of fact, "we review the trial court's ruling on the law, considering the same material from the record and deciding the same legal issues as the circuit court." *Messing v. Bank of America, N.A.*, 373 Md. 672, 684 (2003) (citing *Green v. H&R Block, Inc.*, 355 Md. 488, 502 (1999)). When reviewing the trial court's grant of summary judgment, "we ordinarily are limited to considering the grounds relied upon by the circuit court[.]" *Asmussen*, 247 Md. App. at 558-59. We conduct our review without deference to the trial court and determine independently, based on the record before the trial court, "whether the moving party was entitled to judgment as a matter of law." *Tyler v. City of College Park*, 415 Md. 475, 498-99 (2010).

The decision to grant summary judgment in this case was based on the circuit court's determination that evidence about Jay's statements constituted inadmissible hearsay. In *Gordon v. State*, 431 Md. 527 (2013), the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[3] set forth a distinctive standard of review for evidentiary

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute,

rulings regarding the admissibility of hearsay. The Court considered whether the trial court erred in admitting hearsay evidence pursuant to the exception provided by Rule 5-803(a)(2), but we infer that the framework for appellate analysis is the same for cases such as the one before us, which involve the exceptions found in Rule 5-803(a)(3) and (4).

In *Gordon*, the Court 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. The Court 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* [*v. State*, 390 Md. 1, 8], 887 A.2d at 606 [2005)]. 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.
>
> * * *

ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

> 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).

Gordon, 431 Md. at 536-37.

In the case at hand, the circuit court erred in finding that Jay's statements were not authorized because he was not "higher up" in Wal-Mart's hierarchy. In a supplemental answer to Interrogatory No. 4, Wal-Mart identified Jay as Regja "Jay" Wheeler, a cashier who was working the aisle where Eames checked out and who witnessed the incident. Thus, Wal-Mart acknowledged that Jay was one of its agents.

In *B&K Rentals and Sales Co., Inc. v. Universal Leaf Tobacco Co.*, the Supreme Court of Maryland adopted the principle embodied in Federal Rule of Evidence 801(d)(2)(D) and held that "[s]tatements 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*." *B&K Rentals*, 324 Md. 147, 157-58 (1991). The Court noted that a new rule of evidence had been proposed to provide that "a statement made by a party's agent or employee concerning a matter within the scope of agency or employment" would be admissible against a party opponent. Indeed, Maryland Rule 5-803(a)(4) was later adopted.

Here, Eames provided evidence that Jay, the Wal-Mart cashier waiting on him, made statements contemporaneous with Eames's slip and fall about matters that were within his personal knowledge. Jay's statements concerned activities that occurred in the store during the course of, and within the scope of, his employment. Jay's statements to Eames were admissible under Rule 5-803(a)(4) as statements by Wal-Mart's "agent or employee made during the employment relationship concerning a matter within the scope of the agency or employment." Because Jay's statements were admissible under Rule 5-803(a)(4), the court erred in finding that there was no evidence to support the argument that Wal-Mart had constructive or actual knowledge that there was liquid on the floor or that it had an opportunity to correct "any such thing" before Eames fell. We, therefore, hold that the trial court erred in granting summary judgment, and remand the case to the circuit court for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.