Circuit Court for Baltimore County
Case No. C-03-CV-19-004575

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1444

September Term, 2022

ELTON M. BLAND

v.

EMCOR FACILITIES SERVICES INC., ET AL.

Graeff,
Reed,
Taylor, Robert K., Jr.
(Circuit Court Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 20, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

Elton Bland, appellant, sued appellees, EMCOR Facilities Services, Inc. ("EFS"), and LMC Properties Inc. ("LMC"),[1] for negligence after sustaining injuries from a slip and fall on ice at his workplace. A jury trial ensued in the Circuit Court for Baltimore County. At the close of all the evidence, EFS and LMC moved for judgment on two grounds: (1) they did not owe a duty to Mr. Bland; and (2) Mr. Bland assumed the risk of his injuries. The court found as a matter of law that Mr. Bland assumed the risk of injury, and it entered judgment in favor of both appellees.

On appeal, Mr. Bland presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in finding that Mr. Bland voluntarily assumed the risk of his injuries as a matter of law?

2. Did the circuit court err in precluding Mr. Bland from testifying about statements made to him in a meeting when those statements were intended to be offered for their effect on Mr. Bland's state of mind?

3. Did the circuit court err by excluding a witness as a discovery sanction when the identity of that witness was not requested in discovery?

For the reasons set forth below, we shall affirm, in part, and reverse, in part, the judgment of the circuit court.

[1] "LMC" is short for Lockheed Martin Corporation.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, Mr. Bland was employed at Middle River Aircraft Systems, Inc., ("MRAS"). MRAS is an aircraft production plant located in Baltimore County ("the Complex") and owned by LMC. MRAS has leased its premises from LMC since 1997. MRAS contracts with EFS for maintenance, including snow and ice removal on its premises. LMC contracts with EFS to provide maintenance, facility management, and other services, including snow and ice removal, for other areas. Employee parking is located outside of the Complex, and employees must walk past a guard shack that is manned by a security guard, and through a turnstile that requires employees to scan their badges to access the Complex.

On December 17, 2016, Mr. Bland reported for a shift at MRAS. When he arrived at 5:55 a.m., the weather conditions were icy, and the walkways inside the Complex had not been cleared of snow and ice. Mr. Bland walked from the employee parking lot, through the entrance to the MRAS premises, and proceeded toward the MRAS facility. As he approached the facility, he slipped and fell on a patch of ice, sustaining injuries.

On June 6, 2019, Mr. Bland filed a complaint, alleging that LMC and EFS were negligent. He asserted that LMC, the owner of the Complex, and EFS, "the entity responsible for the maintenance and snow removal of the MRAS premises," breached their duty to Mr. Bland to ensure "that the Complex was free from avoidable hazards such as ice and snow."

LMC and EFS answered the complaint, alleging, among other affirmative defenses, that Mr. Bland assumed the risk of his injuries. On October 14, 2020, they filed a joint motion for summary judgment, asserting that Mr. Bland assumed the risk as a matter of law because he "freely admits that: (l) his path into his place of employment was covered with ice; (2) he perceived the presence of ice on his path; (3) he knew if he walked over the ice he could slip and fall; and (4) he nevertheless voluntarily walked over the ice." The motion alleged that Mr. Bland

> made the voluntary decision to go to work to seek overtime pay. When he arrived at his place of employment, [he] expressly admits that he saw the ice in his path, knew the ice was slippery, knew that he could fall if he walked over the ice, and knew that he could be injured if he slipped and fell on the ice. Despite these known dangers, and despite that [he] did not need to go into work, [he] nevertheless freely and voluntarily elected to walk over the ice.

The court denied the motion on December 9, 2020.

I.

Trial

The case was bifurcated, and a two-day trial on the issue of liability began on September 15, 2022. Mr. Bland testified that, in December 2016, MRAS needed to meet quotas for completing the production of aircraft parts by the end of the year. On Friday, December 16, 2016, MRAS held a meeting for all employees. At the meeting, a supervisor asked Mr. Bland if he could work overtime the following day, Saturday, December 17, and Mr. Bland agreed to work. When asked his understanding about what would happen if he did not show up for his shift, he stated: "You'd get an occurrence and you'd be denied

overtime in the future." During direct examination, Mr. Bland's counsel asked Mr. Bland to expand on what it meant to receive an "occurrence":

> [COUNSEL FOR MR. BLAND]: So, I want to go to each of those steps in turn if we can. So, what is an occurrence? Like what does that mean?
>
> MR. BLAND: Occurrence counts towards you in, and it can lead up to three days off and termination.
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> [COUNSEL FOR MR. BLAND]: Is that a method that your employer had of tracking not just, not showing up for a shift but other sort of workplace violations or was it specific to missing a shift? In other words, what else could be an occurrence, I guess is the - -
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> MR. BLAND: Oh, an occurrence could be messing up on production part, it could be not doing as you're told, coming in late, missing time during your regular work hours, arguing with somebody.
>
> [COUNSEL FOR MR. BLAND]: Understood. Was an occurrence minor, a minor thing, a major thing? How significant was getting one of these occurrences for you at your particular job site?
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> MR. BLAND: It, it was, it was a major thing.
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> [COUNSEL FOR MR. BLAND]: And, why is that? What is it about an occurrence that made it something to be avoided?
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> MR. BLAND: Because it counts towards, towards your overtime, counts towards your, towards your, if you put in for, if you want to move, change departments or you want to put in for a promotion, it counts towards you in that way. It counts towards you, towards getting your raises - -
>
> [COUNSEL FOR MR. BLAND]: Understood.
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> MR. BLAND: - - and production.
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> [COUNSEL FOR MR. BLAND]: You mentioned that it would have some sort of impact on your ability to work overtime. Would you explain that a little bit more to the jury?

> MR. BLAND: So, I mean, if you're asked to work and you don't show, then it knocks you down on the overtime chart or - -
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> [COUNSEL FOR MR. BLAND]: So, for the purpose of - -
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> MR. BLAND: - - or you're denied the next time.
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> [COUNSEL FOR MR. BLAND]: So, for, just to make sure that the jury understands what you're saying. What is the overtime chart?
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> MR. BLAND: He has, he has all the people that are in the department, and it shows their overtime, how much overtime they have for that, for that month and that quarter.
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> [COUNSEL FOR MR. BLAND]: And so, when you say that in getting one of these occurrences would knock you down on the chart, would that make it harder to get additional overtime in the future? Is that how, is what you're describing?
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> MR. BLAND: Well, they, they would hold the occurrence against you and say hey, you didn't show up this time so we're going to skip you. We're not going to give it to you because them hours that you, even though you agreed, so you incurred them hours, but you didn't show so you didn't get paid and now you got an occurrence.

Mr. Bland testified that he worked overtime approximately "three out of four weekends a month," and the overtime pay could account for up to one third of his paycheck. Mr. Bland was aware that a winter storm was approaching when he agreed to work. He thought that it would be safe for him to come in to work.

The next morning, December 17, the storm began between 2:00 and 3:00 a.m. Mr. Bland woke up at approximately 5:00 a.m., and he got ready for his shift. He stated that, if you're coming in for overtime, you can come in whatever time you want. He also stated, however, that his typical work hours were 6:00 a.m. to 2:30 p.m., and that was when he agreed to work on December 17. At his deposition, portions of which counsel read into

evidence, Mr. Bland said that, when he left his house, it was precipitating, and he saw "lots of black ice" and sleet. At trial, he testified that there was ice on the walkway leading from his house to his car, so he spread ice melt. His car was covered in ice, which he had to clear before leaving for work. In an answer to interrogatories, which was read to the jury, Mr. Bland stated that the "conditions were hazardous and dangerous" when he left his house for work that morning. In his answers to two other interrogatories read to the jury, he stated that it took him longer to get his workplace because he was "pretty much driving in ice."[2]

When Mr. Bland arrived at work, it was dark outside. He parked on the upper employee parking lot and saw that both the upper and lower parking lots were getting full as other employees arrived. It "was a little icy" in the parking lot, and it was unclear whether there had been any snow or ice removal. The perimeter of MRAS's premises was enclosed by a fence, with a guard shack manned by a security guard and a turnstile for MRAS employees to access the premises. Mr. Bland parked as close as possible to the guard shack. He swiped his employee badge at the turnstile. Mr. Bland then saw "two salt trucks with plows," which were going toward the front of the building to start salting. It was approximately 5:55–6:00 a.m. Mr. Bland realized that the walkway had not been treated, and ice was "pretty much . . . everywhere," leading "all the way to" where he fell.

[2] On direct examination, by contrast, Mr. Bland testified that the road conditions on his route to work were clear, and the roadways had been salted.

Although there appeared to be ice along his route, he was not concerned for his safety because

> it didn't feel like it was heavy. . . . I didn't feel it was hazardous and . . . pretty much everybody else had already parked there so I felt it was, everybody else was parking and was there at work as they were supposed to early, earlier before I got there.

Mr. Bland then walked his normal route, following a set of railroad tracks towards the direction of the MRAS facility. Mr. Bland walked approximately a quarter of a mile next to, but not on, the railroad tracks. He was wearing work boots and was "trying to walk in the safest way [he] could." The ground along the railroad tracks was mostly flat, but as he neared the MRAS facility, it began to slope uphill, and the conditions became "more treacherous, more slippery." Mr. Bland then attempted to cross the railroad tracks and "step up on higher ground because [he] was starting to walk in thick, thick ice." As his foot touched the tracks, however, he slipped and fell onto the tracks on his left side, causing him to sustain injuries.

Mr. Bland acknowledged that he volunteered to work that day. He testified, however, that once he agreed to work a shift, if he failed to report for the shift, he would get "an occurrence and [] be denied overtime in the future." Mr. Bland explained that an "occurrence" was a penalty that could affect an employee's ability to work overtime, change departments, get a promotion, or earn a raise. He testified that he would not have agreed to take the shift on December 17 if he "had known it was going to be icy." He acknowledged on cross-examination, however, that he could have pulled over during his drive to work and told his boss that it was not safe to drive, and he would arrive at work at

a later time. He also agreed that, once he realized the ground was icy in the parking lot, he could have returned to his car and notified his boss that he would wait until the ice had been cleared. Mr. Bland stated, however, that "the whole upper parking lot was full . . . I thought it was clear inside the gate. I didn't have but a couple more footsteps to go."[3]

Cezarina Scales, the MRAS facility operations analyst and property manager, testified with respect to property maintenance for the property MRAS leased. Specifically, in 2012, LMC and MRAS incorporated a "Lease Amendment No. 5" into their agreement, which provided that MRAS was responsible for snow and ice removal on the premises, including on roads and walkways "inside the fence . . . where Mr. Bland fell," "[s]ome of the parking lots that Mr. Bland mentioned," and the portion of the railroad inside the fence. MRAS's contract with EFS "called for the snow and ice treatment to be done [at] 6:00 a.m. on weekdays and 7:00 a.m. on weekends," but MRAS could request any start time of their choice.

Brent Focht, an EFS regional account manager for the East Coast at the time of Mr. Bland's fall, testified that, in 2016, EFS "provided facility service maintenance for [LMC's] buildings, as well as services outside the perimeter of the fence. And everything inside the perimeter . . . was the MRAS portion." MRAS had contracted with EFS, since 2012, "to treat or remove snow inside the perimeter of the fence," on roadways and sidewalks, as well as several identified lots.

[3] Mr. Bland then stated that it was his "understanding [that] it was going to be cleared." The court sustained EFS's objection, but there was no motion to strike the statement.

LMC and MRAS each had a contract with EFS for snow and ice removal. MRAS's contract with EFS, admitted into evidence, provided terms for "Snow Removal (Inside the perimeter fence)," in relevant part, as follows:

> [I]t is the intent of the snow removal and ice treatment specifications that the assigned properties will be kept in a passable, safe manner at all times. These standards represent the services required to effectively address the snow removal operation and treatment of slippery surfaces on the premises.
>
> * * *
>
> On non-business days (i.e., weekends and holidays) all parking, walkways, entrances and exit ways, emergency egress and roof walkways, are to have snow removed and sand and salt mix products applied by 7:00 am to ensure hazardous conditions do not exist. All areas are to be addressed and maintained in a safe passage condition throughout inclement weather periods to ensure safe passage by pedestrians and vehicles.

When EFS performed its services, it maintained and treated the area "throughout the duration of the storm," beginning with a first treatment at the time specified in the contract. MRAS's contract with EFS provided that, on weekends, EFS would begin snow and ice removal at 7:00 a.m. Mr. Focht acknowledged, however, that the contract provided for "[s]alting of driveways, walkways and parking lots to be at the service provider's discretion or at his directive by owner based on changing weather conditions." MRAS could request for EFS to provide services outside of the contracted times. Mr. Focht stated that, typically, the manager at EFS would contact MRAS if there was a storm forecasted earlier than the contracted hours. He explained that,

> if we knew a storm was coming the following day, there would be a meeting at the end of that business day. So, in this case, it would have been Friday at the close of business between the MRAS management team and our team and sometimes the LMC manager to look at the hour-by-hour forecast.

> And then . . . if it showed it was going to snow maybe at 5:00 a.m., they would have the opportunity to allow us to come in early or adjust the schedule. But it had to be approved.

Mr. Focht stated that MRAS did not always request that EFS arrive early for treatment during a winter storm. He believed, but could not be sure, that there was no meeting between MRAS and EFS to discuss EFS providing snow and ice removal services before 7:00 a.m. on December 17, 2016. He stated that there was likely no meeting because: (1) the EFS employees' timecards showed that they arrived at 6:00 a.m. on December 17, as they normally would if no one requested that the area be treated before 7:00 a.m.; and (2) his manager did not notify him, as was standard protocol, about a time adjustment for services that day.

II.

EFS and LMC Motions for Judgment

At the close of Mr. Bland's case, EFS and LMC each moved for judgment as a matter of law on the negligence claim. EFS argued that it did not owe a duty to Mr. Bland at the time of his fall because EFS's contract with MRAS did not require EFS to treat or clear snow before 7:00 a.m. on weekends, and Mr. Bland fell at 5:55 a.m. LMC asserted that it was not liable for Mr. Bland's injuries because "property owners are not liable for injuries caused by dangerous conditions on leased premises," and here, "LMC was not in possession and control of the property where Mr. Bland fell." MRAS was responsible for snow and ice removal under the terms of its lease.

EFS and LMC also moved for judgment as a matter of law on the ground that Mr. Bland assumed the risk of his injuries. EFS argued that "[t]here's no question that Mr. Bland knew and appreciate[d] the dangers," and "an ordinary person . . . a person of normal intelligence, would understand the conditions presented him with . . . a situation where he could be injured." With respect to the voluntariness of Mr. Bland's actions, EFS relied on *ADM P'ship v. Martin*, 348 Md. 84 (1997), for the proposition that Mr. Bland's "subject[ive] belief that he might sustain some kind of employment consequence is simply not enough to undo the voluntariness requirement. He needs something more. He needs extrinsic evidence." LMC adopted EFS's arguments on the defense of assumption of the risk, adding that Mr. Bland was not required to begin work at 6:00 a.m., and he "would not have suffered adverse consequences" if he alerted his employer that he could not come in to work.

Counsel for Mr. Bland did not argue in response to EFS's and LMC's duties owed for purposes of his negligence claim.[4] Regarding assumption of the risk, he stated that he was focusing primarily on the voluntariness requirement. He argued that the circumstances left Mr. Bland "no reasonable alternative course of conduct in order to either avert harm to himself or another" because a failure to report for his shift "would have meant a twenty-five to thirty percent pay cut." Further, "the production shuts down if there's nobody there

[4] Counsel did say that he wanted the opportunity to address that argument if the motion was renewed at the end of the case.

working that coverage shift to fix the tools, to replace the tools that are broken," and "when that happens, there are people hounding him to get back to work and get it fixed."

The court denied EFS and LMC's motions. It stated that the parties would be able to renew arguments on the motions at the conclusion of the defense case.

At the end of the case, the court stated that EFS and LMC could incorporate their prior arguments for motion for judgment and supplement with anything additional. EFS repeated, and LMC adopted, the argument that Mr. Bland voluntarily assumed the risk because *ADM P'Ship* required more evidence than Mr. Bland's subjective belief about consequences that would have resulted from failing to report for his shift. Both EFS and LMC reiterated their argument that they did not have a duty to Mr. Bland. Counsel for LMC stated that the evidence did not support a finding that LMC had control over the property, either generally or specifically, "with respect to snow and ice removal inside the fence."

The court then asked counsel for Mr. Bland to address LMC's liability in light of its argument that it did not have control over the property. Mr. Bland contended that LMC was liable as a landlord for an "injury to a business invitee" because LMC retained the ability to exercise control of the property to prevent a dangerous condition. He argued that "[t]he jury should be allowed to decide whether LMC could have exercised a degree of control over snow and ice over the location where Mr. Bland fell."

In addition to arguments made at the bench, LMC and EFS each filed with the court a written motion for judgment, containing substantially the same arguments, i.e., that the

defendants did not owe a duty to Mr. Bland, and Mr. Bland assumed the risk of injury. EFS's motion for judgment added that *Schroyer v. McNeal*, 323 Md. 275, 283 (1991), should control the court's ruling because, as in *Schroyer*, Mr. Bland "admits that he knew and appreciated that he could slip, fall, and be injured if he walked over that ice. But for his own purposes, he voluntarily elected to walk over the ice."

Mr. Bland requested that the court also consider his prior memorandum in opposition to the defendants' pretrial motion for summary judgment, in which he argued that EFS and LMC "fundamentally misunderstand the element of voluntariness," because "[w]hen [Mr. Bland] got up to go to work on the day of the occurrence, it was not voluntary anymore." Rather, he "was compelled" to work because "[h]e had already told his supervisors that he would be at work that day . . . his employer was relying on him to be there." Further, his supervisors had "made overt statements that they had spoken with the Defendants and that the property would be 'deiced'" and "safe to traverse."

After a recess, the court granted appellees' motions for judgment, stating:

> I do find that the evidence in this case is undisputed, and even drawing all permissible inferences in favor of the Plaintiff, that, as a matter of law, [Mr. Bland] assumed the risk when he undertook to walk from his automobile into the place of business along a route, as he testified to, through the ice, in the dark.
>
> Based upon his testimony from the witness stand, his interrogatory answers that were read into evidence, his deposition testimony, taking all of that into account and having read both *Schroyer v. McNeil* and *ADM Partnership v. Martin*, there's no question in my mind that he had absolute total knowledge of the risk of walking on the ice, the danger that posed.
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> He, he testified [to]. . . his attempts to select his route based on how heavy the ice was. He appreciated the risk of walking on ice certainly can

result in you slipping falling and getting injured when you slip and fall. And he voluntarily undertook that, knowing it, and he had the accident he had and was injured as a result.

[Mr. Bland] strenuously argued that I should have allowed into evidence testimony . . . that pursuant to a meeting held the day before, he was informed the area would have been treated for ice accumulation.

So that my ruling is entirely clear, had I admitted that into evidence, my ruling at this point would be the same. That notwithstanding the fact that he may have been told the day before that the walkways would be treated prior to his arrival, that once he gets there, parks and gets out of his car and is encountering ice, the ice he encountered as he testified began when he left his home.

When he's walking on the ice, picking his way along his route, he is doing so with a full knowledge that ice is slippery. If he slips he can fall and if he falls, he can be injured. He understood that and he went ahead and undertook his walk in any event.

[Mr. Bland] also urges upon me that he didn't entirely voluntarily undertake this walk because he believed there would be a sanction imposed by his employer for his having agreed to work overtime and then not showing up on time for the overtime shift. There would be a sanction imposed against him as a result of that.

There's no testimony in this case that he ever made any attempt to communicate to his employer [whether there] would there be a sanction if he came in late, could he come in late. Even when he got to the parking lot, can I sit here until it gets light or [until] they treat the walkways. There's . . . none of that. So, he certainly voluntarily chose to take the path he took at the time he took, undertaking it understanding what could happen.

So, based on the holdings in *Schroyer v. McNeal* and *ADM Partnership v. Martin*, I find as a matter of law he assumed the risk and I'm granting the Motions to Dismiss for that reason. Judgment is entered in favor of the Defendants and against the Plaintiff for costs.

This appeal followed.

DISCUSSION

I.

Entry of Judgment in Appellees' Favor

Mr. Bland contends that the court erred by entering judgment in favor of appellees based on the defense of assumption of the risk. He argues that the evidence supported a finding that he did not voluntarily assume the risk, asserting that "[t]here was competent evidence presented about specific consequences Mr. Bland would have suffered" by failing to show up for his shift, including getting an "occurrence," which would limit his ability to work future overtime shifts. He asserts, therefore, that the jury could have "credited [his] testimony concerning these specific adverse consequences" and "could reasonably have concluded that [his] decision to walk to his building on the day of his injury was not voluntary."

EFS contends that the court properly granted judgment in favor of appellees, for two reasons. First, it argues that the evidence clearly established that Mr. Bland assumed the risk of his injuries. It argues that there is no dispute that Mr. Bland saw ice, and he walked across it, despite knowing and appreciating "the risk that he might slip and fall on the ice outside his place of employment." Although Mr. Bland testified that his decision to walk on the ice was not voluntary because he would suffer adverse consequences if he did not go to work, EFS contends that Mr. Bland's subjective belief regarding employment consequences was not sufficient to establish a lack of voluntariness. In the absence of other evidence of such consequences, EFS asserts that the court properly granted judgment in its

favor based on the defense of assumption of the risk. Second, EFS contends that, although the court did not address its argument in this regard, it properly granted judgment in its favor because it did not owe Mr. Bland any duty under its contract.

LMC also contends that the court properly entered judgment in its favor. It asserts that the evidence established that appellant assumed the risk of his injuries. It also argues that the court's decision entering judgment in its favor should be affirmed because LMC did not have possession and control of the premises where Mr. Bland fell, and therefore, it had no duty to protect him from the icy conditions.

We review the circuit court's decision on a motion for judgment *de novo*. *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 241 Md. App. 94, 114 (2019), *aff'd*, 469 Md. 704 (2020). The necessary determination is whether there was sufficient evidence to create a jury question, i.e., "'whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence.'" *Six Flags Am., L.P. v. Gonzalez-Perdomo*, 248 Md. App. 569, 581 (2020) (quoting *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012)); *Saponari v. CSX Transp., Inc.*, 126 Md. App. 25, 37 (1999). If there is 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.'" *Six Flags AM., L.P.*, 248 Md. at 581 (quoting *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 683 (2007)). *Accord Prince George's County v. Morales*, 230 Md. App. 699, 711 (2016).

In a negligence claim, the plaintiff must prove: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 316 (2019) (quoting *Joseph v. Bozzuto Mgmt., Co.*, 173 Md. App. 305, 314 (2007)). As appellees note, however, assumption of the risk is an affirmative defense that is a complete bar to recovery. *Am. Powerlifting Ass'n v. Cotillo*, 401 Md. 658, 668 (2007); *Prudential Sec. Inc. v. E-Net, Inc.*, 140 Md. App. 194, 226 (2001).

A.

Assumption of the Risk

In Maryland, to establish the defense of assumption of the risk, the defendant must show that: (1) the plaintiff had knowledge of the risk of the danger; (2) the plaintiff appreciated that risk; and (3) the plaintiff voluntarily confronted the risk of danger. *Thomas v. Panco Mgmt. of Maryland, LLC*, 423 Md. 387, 395 (2011). *Accord ADM P'ship*, 348 Md. at 90–91. "The assumption of the risk doctrine 'is grounded on the theory that a plaintiff who voluntarily consents, either expressly or impliedly, to exposure to a known risk cannot later sue for damages incurred from exposure to that risk.'" *Warsham v. James Muscatello, Inc.,* 189 Md. App. 620, 639 (2009) (quoting *Crews v. Hollenbach*, 358 Md. App. 627, 640 (2000)).

With respect to the first two elements, whether the plaintiff had knowledge and appreciation of the risk, that "is ordinarily a question for the jury, 'unless the undisputed

evidence and all permissible inferences therefrom clearly establish that the risk of danger was fully known to and understood by the plaintiff.'" *Thomas*, 423 Md. at 395 (quoting *Schroyer*, 323 Md. at 283). If "it is clear that a person of normal intelligence in the position of the plaintiff must have understood the danger, the issue is for the court" to decide as a matter of law. *Schroyer*, 323 Md. at 283–84. Certain risks, such as "the danger of slipping on ice," are risks that "anyone of adult age must be taken to appreciate." *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 118 (2011) (quoting W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 68, at 487 (5th ed. 1984)).

Here, there is no dispute as to the first two elements of assumption of the risk. Mr. Bland had knowledge of the icy conditions at the MRAS facility on December 17, 2019, and he testified that he understood that it was possible to slip and fall on the ice.

The requirement at issue in this case is the third one, i.e., whether Mr. Bland voluntarily assumed the risk. He contends that, viewing the facts in the light most favorable to him, a jury could find that he did not voluntarily assume the risk because, if he failed to report for his shift, he would have incurred adverse consequences from his employer. *See Warsham v. Muscatello, Inc.*, 189 Md. App. 620, 640 (2009) (jury typically determines "whether a plaintiff knew of the danger, appreciated the risk, and acted voluntarily"), *cert. denied*, 919 Md. 332 (2010).

To determine "whether a plaintiff has voluntarily exposed him or herself to the risk of a known danger, 'there must be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct.'" *ADM P'Ship*, 348 Md. at 92 (quoting *Prosser*

and Keeton on The Law of Torts § 68 at 490). For "a plaintiff to assume voluntarily a risk of danger, there must exist 'the willingness of the plaintiff to take an informed chance.'" *Id.* (quoting *Schroyer*, 323 Md. at 283). "[T]here can be no restriction on the plaintiff's freedom of choice either by the existing circumstances or by coercion emanating from the defendant." *Id.* In other words, "the risk is not assumed where the conduct of the defendant has left [the plaintiff with] no reasonable alternative." *Warsham*, 189 Md. App. at 641 (quoting *ADM P'Ship*, 348 Md. at 92–93).

Appellees rely on *ADM P'Ship* for their contention that Mr. Bland voluntarily assumed the risk. In that case, Ms. Martin fell on an icy walkway while making a delivery to a building owned by the defendants. *ADM P'Ship*, 348 Md. at 88. Ms. Martin testified that she saw ice and snow around the building and on the walkways, but because there were other vehicles in the parking lot, footprints in the snow and ice, and people working inside the building, she believed that "there was a safe means of ingress and egress" to the building. *Id.* at 88–89. She argued that she did not voluntarily assume the risk of injury because she believed that, if the blueprints were not delivered, both she and her employer would experience adverse economic consequences. *Id*. She acknowledged, however, that no one told her that she would lose her job if she failed to make the delivery, and she could have told her employer that it was too dangerous to do so. *Id.* at 99.

In holding that Ms. Martin voluntarily assumed the risk as a matter of law, the Supreme Court endorsed the following principles of the Restatement (Second) of Torts, § 496E, which provides:

> (1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.
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> (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to
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> (a) avert harm to himself or another, or
>
> (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

Id. at 93.[5]

The Court held that the evidence in that case did not support a finding that Ms. Martin had no choice but to walk on the ice, noting that she testified that she could have called her employer and said it was too dangerous to deliver the documents. *Id.* at 99. With respect to the adverse job consequences, the Court stated:

> other than Martin's subjective belief that she could have been terminated, and thus that she acted from economic necessity, there is no evidence from which a reasonable jury could have so concluded. Neither Martin's employer nor the defendant ever demanded that she traverse the ice and snow covered walkway against her will.

Id.

[5] As this Court subsequently explained:

> Where the defendant puts him to a choice of evils, there is a species of duress, which destroys the idea of freedom of election. (Citing PROSSER AND KEETON § 68 at 490–91). However, when the plaintiff is compelled "by his own necessities to accept a danger, the situation is not to be charged against the defendant."

Warsham, 189 Md. App. at 641 (quoting *ADM P'ship.*, 348 Md. at 93).

The Court noted that determining whether Ms. Martin acted voluntarily required proof of her state of mind, which typically is "supplied by direct evidence, *i.e.,* testimony by the person whose state of mind is at issue, or by circumstantial evidence, *i.e.,* testimony concerning facts and circumstances from which the state of mind may be inferred." *Id.* at 100. It explained that, although the testimony of the person whose state of mind is at issue "ordinarily is sufficient, without more," to generate a jury question, where "the proof of the state of mind itself depends upon the proof of another fact, the witness's testimony alone will not suffice. There must, in addition, be some evidence of that critical fact." *Id.* at 101.

In that case, the Court stated that there was "not a shred of evidence from which Martin's concern for her job if the delivery were not made [could] be inferred." *Id.* at 101. The Court held "that an employee's purely subjective belief that the refusal to assume a risk would result in negative consequences, without more, does not create a factual dispute, necessitating a determination by the trier of fact." *Id.* at 95, n. 3. *Accord Burke v. Williams*, 244 Md. 154, 158 (1966) (Appellant voluntarily assumed the risk of injury, despite belief that he would be fired if he did not walk on slippery walkway, because there was "no evidence that . . . anyone . . . ever demanded that the appellant use the walkway against his will. Nor is there any evidence that his job would have been in jeopardy.").

Here, Mr. Bland testified to his subjective belief that he would suffer adverse job consequences if he did not report to work for his overtime shift at 6:00 a.m. Specifically, he said that he would "get an occurrence" and "be denied overtime in the future." And,

as in *ADM P'Ship*, there was no evidence that Mr. Bland's employer demanded that he cross the ice against his will. Mr. Bland acknowledged that he could have told his boss that it was not safe to come to work, or he could have asked to come in later, but he did not do so.

Unlike in *ADM P'Ship*, however, there was more than Mr. Bland's subjective belief; there was evidence adduced from which Mr. Bland's concern about adverse job consequences if he did not go to work could be inferred. Mr. Bland testified that his employer gave employees an "occurrence" for various violations, including missing a shift. He explained that getting an occurrence was a "major thing," which could count towards overtime work, promotions, raises, and termination.[6] Thus, in this case, there was "more" than Mr. Bland's subjective belief that he would experience adverse job consequences if he did not show up at his shift; there was evidence providing a factual basis from which his concern for his job if he did not report for his shift could be inferred.

The evidence was sufficient to create a jury question on the issue of voluntariness. The circuit court erred in entering judgment in favor of appellees on the ground that Mr. Bland assumed the risk of injury as a matter of law.

[6] Mr. Bland testified that overtime pay could account for up to one third of his paycheck.

B.

Duty

As indicated, appellees argue that the circuit court's decision granting judgment in their favor should be affirmed as a matter of law for the alternate ground that they did not have a duty to protect Mr. Bland from the ice. As they acknowledge, however, the court did not address this argument in its ruling, and we conclude that it is appropriate in this case to remand to the circuit court to make a finding in this regard.[7]

II.

Hearsay

Mr. Bland contends that the circuit court erred in refusing to allow him to testify about statements made by a supervisor for MRAS, the day before the fall, that the supervisor would request EFS to come in early to treat the walkways for ice. Mr. Bland asserts that the statements were not hearsay because they were offered to show the effect on his state of mind. Even if they were hearsay, he argues that the statements were admissible under the exception to the hearsay rule for his state of mind to prove future acts under Maryland Rule 5-803(b)(3).

Appellees contend that the court properly excluded these statements. They assert that the statements were hearsay that did not fall within any exception to the general rule that hearsay is inadmissible.

[7] We could not find in the record that Mr. Bland responded to EFS's duty argument until the rebuttal portion of his oral argument in this Court. The issue should be fleshed out in the circuit court.

A.

Standard of Review

We ordinarily review the circuit court's rulings on the admissibility of evidence for an abuse of discretion. *Colkley v. State*, 251 Md. App. 243, *cert. denied*, 476 Md. 268 (2021). With respect to hearsay, however, our review

> 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*.

Gordon v. State, 431 Md. 527, 535–36 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). The "ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal." *Id.* at 538.

B.

Proceedings Below

During direct examination, Mr. Bland's counsel attempted to question him about the discussions held during the company-wide MRAS meeting on December 16, when he was asked to work the next day, and the following exchange occurred:

> [COUNSEL FOR MR. BLAND]: Mr. Bland, when you agreed to work overtime, did you know that there was a storm coming that weekend?
>
> MR. BLAND: Yes.
>
> [COUNSEL FOR MR. BLAND]: Did you, at the time you agreed to come in, have any concerns about your ability to get to your building safely –
>
> MR. BLAND: No.

[COUNSEL FOR MR. BLAND]: -- in light of that storm?

MR. BLAND: Nope.

[COUNSEL FOR MR. BLAND]: Why was that not a concern you had?

MR. BLAND: Because of the prior discussions that were held on Friday –

[COUNSEL FOR APPELLEES]: Objection.

THE COURT: Sustained. Strike it.

MR. BLAND: The –

THE COURT: Don't, the jury is, is to disregard it. Next question.

[COUNSEL FOR MR. BLAND]: Your Honor, may we approach?

THE COURT: No, ask your next question.

[COUNSEL FOR MR. BLAND]: All right. Mr. Bland, I want to be very careful in how I ask this question because, again, it's not proper for you to tell us that any, anything that someone else told you. But since the jury has to understand what your mental state was –

[COUNSEL FOR APPELLEES]: Objection.

THE COURT: Needs to be, counsel, it needs to be a question. You need to ask him a question.

[COUNSEL FOR MR. BLAND]: I'm, I'm trying without the ability to discuss this with Your Honor, to phrase the question in a way to get –

THE COURT: Counsel, you can renew it on a recess, but at this point I've made the ruling.

[COUNSEL FOR MR. BLAND]: Understood.

The court subsequently took a recess, and the parties discussed this line of questioning. Mr. Bland's counsel argued that, because EFS and LMC were asserting

assumption of the risk as an affirmative defense, for which voluntariness was a central component, it was necessary to establish "Mr. Bland's state of mind as he got to the job site, when he decided to go there." Counsel acknowledged that a statement that Mr. Bland was told that the ice was going to be cleared was hearsay, but he argued that it was not being offered for the truth of the matter asserted. Rather, the statement was being offered "for its effect on Mr. Bland's mental impression." He also argued that the statement was admissible under two exceptions to the hearsay rule: (1) Maryland Rule 5-803(b)(1), present sense impressions; and (2) Rule 5-803(b)(3), then existing emotional or physical conditions. In response to the court's question, counsel acknowledged that he could have issued a subpoena to the person who made the statement.

Counsel for EFS argued that the statement was not admissible under any exception. He asserted that the state of mind exception did not apply because it addresses statements made by the declarant, and here, the statement was not made by Mr. Bland, but by his employer. Mr. Bland had other alternatives to get the statement into evidence.

The court then ruled, as follows:

> I have not precluded [Mr. Bland] from making a statement that he believed the walk was going to be cleared. I've precluded . . . [Mr. Bland] from making any statement as to why he believed the walk was cleared because it's going to rely on a hearsay statement at a meeting that took place the day before.
>
> I think that's pretty clear. If his present state of mind was that he acted based on his belie[f] that the, you want to go beyond that. I mean, if he thought the walk was clear, he can say he thought the walk was clear. But he can't tell, tell the jury, you know, that this was based on something he was told at a meeting.

Counsel then called Mr. Bland to the stand and stated that his examination was concluded.

At the close of Mr. Bland's case, counsel renewed his argument that evidence that he had been told the ice would be cleared was admissible. At this point, he asserted that the statement, as it was being offered, was not hearsay because it was being offered to show Mr. Bland's "state of mind."

Counsel for EFS argued that "[t]he statements are clearly hearsay and clearly offered for the purpose of letting the jury have some basis to say that there was some arrangement to go outside the contract terms." Without that evidence, EFS would not be liable because Mr. Bland fell at a time "outside the contract terms."[8]

The court then reiterated its previous ruling to exclude the evidence, stating:

> [Mr. Bland] was not precluded in any fashion from stating . . . that he thought the property would be cleared. . . .
>
> What he was precluded from testifying to was why he believed it would be cleared based on what he was told at this meeting. I . . . view the statements at the meeting to be classic hearsay. And absolutely barred under the rule unless it's subject to an exception.
>
> It's clearly being offered for the truth of the matter asserted. That he's being told at a meeting if he reports to work tomorrow morning at a given time, that the walkways and roadways are going to [be] cleared or some version of that.
>
> . . . I don't know what could be more hearsay than that. And the exceptions that are cited . . . don't . . . apply. I've indicated that on the record yesterday and why. I did want counsel to be able to make his complete record. So, same ruling as yesterday. They're hearsay and they're inadmissible.

[8] As indicated, MRAS's contract with EFS provided that, on non-business days, "all parking, walkways, entrances and exit ways [were] to have snow removed and sand and salt mix applied by 7:00 a.m."

C.

Non-Hearsay Statement Offered for Effect on the Listener

Mr. Bland contends that statements made at the meeting on December 16 were not hearsay because they were being offered for their effect on the listener. Specifically, they were offered to show his state of mind "at [] two critical moments in time – his acceptance of the overtime shift, and the moment he decided to proceed to his place of employment." He asserts that his state of mind was "directly implicated by [EFS and LMC's] defense of assumption of risk" because it pertained to "whether his decision to proceed was reasonable and whether he subjectively believed he incurred any risk in doing so."

EFS and LMC argue that the statements at issue were hearsay because they were "offered to prove that [his] actions were based on what someone else said or did the day prior."[9] They assert that the statements were offered for their truth to rebut EFS's argument that it owed no duty to clear the walkways prior to 7:00 a.m. on December 17. Moreover, they note that Mr. Bland was permitted to testify about his state of mind; he was prohibited only from testifying about "the substance of statements made by others."

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). Hearsay generally is inadmissible. Md. Rule 5-802.

There are two questions the court must answer regarding a hearsay issue: "(1) whether the declaration at issue is a 'statement,' and (2) whether it is offered for the truth

[9] LMC adopted EFS's arguments on this issue, pursuant to Maryland Rule 8-503(f).

of the matter asserted. If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *State v. Young*, 462 Md. 159, 170 (2018) (internal quotations omitted). Here, the declarations at issue clearly were statements, i.e., "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801.

The second part of the hearsay inquiry is whether the statements are offered for their truth. If a statement is being offered for its effect on the listener, or "effect on the hearer's mind," it is not hearsay. *Burgess v. State*, 89 Md. App. 522, 538 (1991), *cert. denied*, 325 Md. 619 (1992). *Accord Jarrett v. State*, 220 Md. App. 571, 583 (2014). Rather, "a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Parker v. State*, 408 Md. 428, 438 (2009) (quoting *Graves v. State*, 334 Md. 30, 38 (1994)).

Here, counsel for Mr. Bland initially seemed to concede that the statements were hearsay. When the motion or judgment was initially made after the conclusion of his case, counsel stated: "[C]ertainly these statements are hearsay, without question . . . saying we were told the ice was going to be cleared, that is itself a hearsay statement." Counsel argued, however, that the evidence was admissible under an exception to the hearsay rule. At the conclusion of the case, however, and on appeal, counsel argues that the evidence

was not hearsay because it was not being offered for its truth, i.e., that the property was going to be safe, but to explain the effect it had on Mr. Bland's state of mind.

In addressing the contention that the evidence was admissible as nonhearsay, we note that the admissibility of statements for a non-hearsay purpose "invokes the evidentiary rules on relevancy. Maryland Rule 5-402 provides that '[e]vidence that is not relevant is not admissible.'" *Parker v. State*, 408 Md. 428, 436 (2009) (quoting Md. Rule 5-402 (2022)). *See also Graves v. State*, 334 Md. 30, 42–43 (1994) (rejecting proffered non-hearsay purpose for extrajudicial statement on relevancy grounds). Mr. Bland seeks to have the statements introduced to show that he relied on them when he accepted the shift, and when he undertook to walk on the ice to his workplace on December 17. He asserts that his reliance shows that he did not voluntarily undertake the risk of walking on the ice. Even if Mr. Bland relied on these statements and accepted the overtime shift because he believed that the premises would be cleared, however, this belief would not negate the voluntariness of his decision to walk on the ice, after he arrived at work and saw that the ice had not yet been cleared. Therefore, MRAS's statements at the meeting on December 16 are not relevant because they do not bear on whether Mr. Bland voluntarily assumed the risk of his injuries.

The circumstances here are like those in *Schroyer*, 323 Md. at 288, where the Court held that,

> [w]ith full knowledge that the parking lot and sidewalk were ice and snow covered and aware that the ice and snow were slippery, McNeal voluntarily chose to park on the parking lot and to walk across it and the sidewalk, thus

> indicating her willingness to accept the risk and relieving the Schroyers of responsibility for her safety.

Accordingly, even if Mr. Bland relied on the statements, they are inadmissible on relevancy grounds for the non-hearsay purpose of showing their effect on Mr. Bland.

D.

Maryland Rule 5-803(b)(3) –
Then Existing Mental, Emotional, or Physical Condition

Mr. Bland contends that, even if the evidence was hearsay, it was admissible under Maryland Rule 5-803(b)(3), which provides an exception to hearsay for

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Mr. Bland argues that this exception applies because his supervisor "express[ed] his future intent to request that Defendant EFS come in early to treat the walkways for ice," which bears on Mr. Bland's "voluntariness and state of mind."

Maryland Rule 5-803 addresses a statement of the **declarant's** then existing state of mind only if it is offered to prove the **declarant's** future action. As appellees note, the exception is only available to show "the state of mind or future actions of the person who made the statements." Here, Mr. Bland seeks to offer another person's statements to explain his own state of mind, rather than the declarant's. The statements were not

admissible under Rule 5-803(b)(3), and the circuit court did not err or abuse is discretion in excluding this evidence.

III.

Exclusion of Plaintiff's Witness

Mr. Bland contends that the court abused its discretion in imposing a discovery sanction, i.e., excluding Mr. McDonald as a witness, when there was no discovery violation. He acknowledges that Mr. McDonald was not disclosed as a witness in discovery, but he argues that "no discovery request from either defendant ever sought to identify all witnesses that may be called to testify at trial." He asserts that, because there was no discovery violation, it was an abuse of discretion to not permit Mr. McDonald to testify.

EFS contends that the court properly excluded Mr. McDonald as a witness because he was not disclosed in discovery. It asserts that the interrogatories propounded by appellees included a "plainly designed . . . catch-all interrogatory requesting that [Mr. Bland] disclose any witnesses who might testify to facts relevant to the occurrence at trial."

LMC contends that it propounded an interrogatory to Mr. Bland to "identify all persons not otherwise mentioned in your answers to these interrogatories who have personal knowledge of facts material to the occurrence." Despite LMC and EFS's interrogatories requesting the disclosure of such witnesses, Mr. Bland did not identify Mr. McDonald until "the Monday evening before trial when he disclosed in an email to counsel for [a]ppellees that he planned to call him as a witness that Thursday at trial." LMC asserts

that Mr. McDonald is a person with "personal knowledge of facts material to the occurrence." Further, it argues that appellees would have been prejudiced by Mr. McDonald being allowed to testify because "they had no time in which to investigate, interview or depose Mr. McDonald or adequately prepare to examine him at trial."

A.

Procedural Background

At the beginning of trial, EFS raised an oral motion in limine to exclude Michael McDonald, one of Mr. Bland's coworkers, from testifying because he was not disclosed in discovery as one of Mr. Bland's witnesses. Mr. Bland's counsel stated that he spoke to Mr. McDonald for the first time on the Friday before trial, and he then disclosed Mr. McDonald to opposing counsel "a couple of nights" before trial. EFS stated that Mr. McDonald should have been disclosed under an interrogatory it propounded, which stated: "Identify all persons not elsewhere named in the answers to these Interrogatories who have personal knowledge of facts concerning the happening of the occurrence or your claimed injuries, losses and damages and specify in which category each such person has knowledge."[10]

Mr. Bland argued that he did not need to disclose Mr. McDonald as a witness because Mr. McDonald did not have any personal knowledge as to Mr. Bland's fall, i.e.,

[10] LMC did not join in the motion, but it propounded an interrogatory asking Mr. Bland to "[i]dentify all persons not elsewhere named in your answers to these Interrogatories who have personal knowledge of facts material to the occurrence." Mr. Bland provided the same answer to both interrogatories: "None other than family members who are aware of Plaintiff's injuries and how they affected his daily activities."

"the occurrence." Rather, Mr. McDonald would testify about "a meeting that took place the day before with Mr. Bland and his employer, at which the upcoming storm and issues pertaining to snow and ice removal were discussed."[11]

The court determined that the interrogatory propounded by EFS was "broad enough to encompass this witness." Given that discovery closed in June 2020, and appellant did not disclose Mr. McDonald until September 2022, several days before trial began, the court ruled that Mr. McDonald would not be allowed to testify.

B.

Analysis

Initially, we note that there is a two-step process to review a circuit court's imposition of sanctions. First, the determination whether there has been a discovery violation is a question of law that we review de novo. *Cole v. State*, 378 Md 42, 56 (2003). If a discovery violation is found, we review the circuit court's decision to impose a sanction for an abuse of discretion. *Kadish v. Kadish*, 254 Md. App. 467, 492 (2022).

Here, Mr. Bland challenges solely the first step; he asserts that the sanction was improper because there was no discovery violation. Because Mr. Bland limited his claim to that issue in his brief, we similarly will limit our opinion.

EFS propounded an interrogatory asking Mr. Bland to identify all persons "who have personal knowledge of facts concerning the happening of the occurrence or [Mr.

[11] At oral argument, Mr. Bland stated that Mr. McDonald may have testified to work consequences. He did not, however, include that proposed testimony in his proffer to the circuit court.

Bland's] claimed injuries, losses and damages." Mr. Bland argues that the word "occurrence" in EFS's interrogatory refers to the "fall itself," and Mr. McDonald did not need to be disclosed as a witness because he had no personal knowledge of the "fall itself." Rather, his testimony would involve "the meeting that took place the day before with Mr. Bland and his employer, at which the upcoming storm and issues pertaining to snow and ice removal were discussed."

We disagree that Mr. Bland did not need to disclose Mr. McDonald in response to EFS's interrogatories.[12] According to the proffer, Mr. McDonald had knowledge of information that Mr. Bland's counsel believed was relevant to the occurrence. The circuit court properly concluded that the failure to disclose Mr. McDonald until a couple of days prior to trial was a discovery violation.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART. COSTS TO BE PAID 50% BY APPELLANT, 50% BY APPELLEES.

[12] As indicated, LMC's interrogatory asked Mr. Bland to identify all persons "who have personal knowledge of facts material to the occurrence," and Mr. Bland did not identify Mr. McDonald in response to that request.