Circuit Court for Baltimore City
Case No. 24-C-19-004857

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 994

September Term, 2020

PAULINA CALLINAN

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

Berger,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: December 23, 2021

*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.

The appellant, Paulina Callinan, appeals from orders granting three motions in the Circuit Court for Baltimore City in favor of the appellees: the Baltimore Ravens Limited Partnership ("Ravens"), Sam Koch, and the National Football League ("NFL"). First, the court granted the Ravens and Koch's motion to dismiss a battery count. Second, the court granted the Ravens and Koch's motion for summary judgment on negligence claims. Third, the court granted the NFL's motion for summary judgment as to a negligence count. For the reasons to be discussed, we shall affirm the judgments of the circuit court.

BACKGROUND

This case stems from injuries that Callinan sustained in November 2015 while attending a professional football game between the Baltimore Ravens and the San Diego Chargers at M&T Bank Stadium in Baltimore. Once at the stadium, Callinan walked to her seat, which was six rows away from the field. While players were running out of the tunnel to be introduced at the game, Callinan took out her cell phone to record what was happening on the field. Around that time, Baltimore Ravens punter, Sam Koch, was practicing punting on the sidelines. Shortly after Callinan had begun recording, "an errant punt kicked by Defendant Sam Koch" traveled into the stands and struck Callinan's face. The back of Callinan's ticket contained the following language: "Ticket holder assumes all risks incident to the game or related events, including the risk of lost, stolen or damaged property or personal injury of any kind[.]"

Callinan filed a complaint in the circuit court, alleging negligence claims against the Ravens, Koch, and the NFL. The complaint stated that Callinan attended the game with her husband, who had purchased her ticket for her as a gift. During a deposition, Callinan

described her football fandom leading up to that November 2015 game. Although it was her first time attending a football game, she indicated that she had become, by her description, a "football fanatic" since gaining an interest in the sport in 2011. She said that she had been aware that errant throws and kicks entered the stands at football games. An amended complaint was later filed.[1]

The Ravens and Koch moved for summary judgment on two grounds. First, they claimed that, as a spectator, Callinan had assumed the risk of being struck by an errantly kicked football at the game. Second, they argued that an exculpatory clause printed on the back of Callinan's ticket barred her claims as a matter of law. Callinan then filed an amended complaint, which added a count of battery against Koch. The Ravens and Koch moved to dismiss the battery count on the grounds that it failed to state a claim upon which relief could be granted.

The parties appeared remotely before the circuit court for oral argument on two motions: the Ravens and Koch's motion for summary judgment and motion to dismiss the battery claim. After hearing arguments, the court granted both motions, thereby dismissing all claims against the Ravens and Koch with prejudice. The court made the following four rulings from the bench. First, there were no disputes as to any material facts. Second,

[1] The court's automated scheduling order presented a scheduling conflict for the appellees if the Ravens played in the 2020 Superbowl. Callinan agreed to adjust the scheduling order. The court granted a consent motion to modify the scheduling order, but later denied a subsequent joint motion to again modify the scheduling order. In accordance with the parties' agreement, Callinan filed a voluntary motion to dismiss without prejudice in September 2019. Later that month, Callinan re-filed the complaint in the circuit court.

Callinan assumed the risk as a matter of law. Third, the exculpatory clause was valid, and the clause did not fall into any of the exceptions to enforceability under Maryland law. Fourth, the amended complaint failed to plead facts showing that Koch intended to harm Callinan.

A few days later, the NFL moved for summary judgment on the same grounds presented by the Ravens and Koch's motion for summary judgment. The court granted the NFL's motion and dismissed the case with prejudice. We supply additional facts as necessary below.

QUESTIONS PRESENTED

Callinan presents three questions for our review, which we have rephrased:[2]

> 1. Did the circuit court err in dismissing the battery claim against Sam Koch?
>
> 2. Did the circuit court err when it ruled that Callinan had assumed the risk of being struck by an errantly kicked football at a professional football game?
>
> 3. Did the circuit court err in not allowing Callinan to conduct additional discovery before the circuit court entered summary judgment?

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[2] Callinan phrased the questions presented as follows:

> 1. Did the court err in dism[is]sing the battery claim against Sam Koch?
>
> 2. Is being struck by a football at a professional football game before the game has begun a basis for an assumption of risk and release of liability under Maryland law?
>
> 3. Did the circuit court err [by] not allowing appellant to conduct discovery before entertaining a summary judgment motion and did the circuit court err in granting summary judgment?

STANDARDS OF REVIEW

Motion to Dismiss

We review for legal correctness a trial court's decision to grant a motion to dismiss for failure to state a claim. *Rounds v. Md.-Nat'l Cap. Park & Plan. Comm'n*, 441 Md. 621, 635-36 (2015). We assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that may be reasonably drawn from them, in the light most favorable to the non-moving party. *Id*. at 636. "The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010).

Summary Judgment

'"The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal."' *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 67 (2006) (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)). '"In reviewing a grant of summary judgment under Md. Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law."' *Id*. (quoting *Myers*, 391 Md. at 203). "We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Id*. (quotation marks and citation omitted). Summary judgment is appropriate when there is "no genuine dispute as to any material fact

and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f).

DISCUSSION

I. The circuit court did not err in dismissing the battery count.

Callinan argues that she pleaded sufficient facts as to the battery claim against Koch and the court erred in dismissing that claim. Callinan also suggests that the doctrine of transferred intent applies here. The amended complaint, which added the battery count against Koch, contains the following allegations:

- "The Defendant Sam Koch is a professional football player punter and is #4 on the Baltimore Ravens."
- "At all times relevant hereto, Defendant Sam Koch was an employee of the Baltimore Ravens."
- "On November 1, 2015, the Defendant Sam Koch was on the side of the field close to the Ravens bench practice punting during pre-game warm-ups."
- "At all times relevant hereto, the Defendant was in control over where and when he was to practice punting on November 1, 2015 during pre-game warm-ups."
- "As a professional punter, with the ability to punt the football at speeds upwards of 70 miles per hour, Defendant Sam Koch intentionally kicked the football which ended up in the grandstands and ultimately struck Mrs. Callinan in the head."
- "The errant football striking Mrs. Callinan constitutes an intentional offensive touching when the errant punt hit Mrs. Callinan in Section 130, Row 6 of M&T Bank Stadium."
- "Defendant Sam Koch intentionally, recklessly, and without due regard to patrons and the NFL policies, kicked a football into the grandstands and struck Mrs. Callinan in the head rendering her temporarily unconscious."

- "As a direct and proximate result of the offensive intentional touching, the Plaintiff has suffered and will continue to suffer severe physical injuries and economic losses."

Battery is an intentional tort: "A battery occurs when one intends a harmful or offensive contact with another without that person's consent." *Nelson v. Carroll*, 355 Md. 593, 600 (1999) (citing Restatement (Second) of Torts § 13 & cmt. d (AM. L. INST. 1965)). A "purely accidental touching, or one caused by mere inadvertence, is not enough to establish the intent requirement for battery." *Id*. at 602. Indeed, even recklessness or wantonness, without more, does not constitute intent for a battery claim. *Hendrix v. Burns*, 205 Md. App. 1, 20 (2012).

In *Hendrix*, we noted that the Court of Appeals has quoted with approval comment f to § 500 of the Restatement (Second) of Torts. *Id*. (citing *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 253 (1986)). That comment distinguishes intentional wrongdoing, which is required for a battery claim, from recklessness:

> *Intentional misconduct and recklessness contrasted.* Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

Restatement (Second) of Torts § 500 cmt. f (AM. L. INST. 1965).

Callinan's amended complaint fails to state a battery claim against Koch because it does not allege facts sufficient to show that Koch "intend[ed] to cause a harmful or

offensive contact." *Nelson*, 355 Md. at 601 (cleaned up). The complaint says that Koch intentionally kicked the football and the football struck Callinan. To be sure, one can commit a battery through indirect contact, e.g., by "putting an instrumentality in motion[.]" *Hendrix*, 205 Md. App. at 20. But the complaint does not allege that Koch intended the football to cause a harmful or offensive contact with anyone. Nor does the complaint plead facts showing that Koch punted the football with a "substantial certainty" that he would cause an offensive contact with anyone. *See id*. at 20-21. The complaint also fails to plead facts showing that Koch had "a general intent to unlawfully invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact." *Nelson*, 355 Md. at 602-03.

Instead, the complaint concludes, without support, that the football striking Callinan was an "intentional offensive touching[.]" Indeed, in that same sentence, the complaint describes the punted football as "errant[.]" Callinan argues that the court incorrectly defined the word "errant." The court ruled that "errant means something that has sort of taken its own path, wandered off, done something that it was not intended for." Instead, Callinan argues in support of a Merriam-Webster definition of the word: "straying outside the proper path or bounds." *Errant*, Merriam Webster, https://www.merriam-webster.com/dictionary/errant. But even under Callinan's definition of "errant," the complaint still fails to plead any facts to support Callinan's conclusion. An allegation that the punt "stray[ed] outside [of] the proper path or bounds" does not show that Koch had intended to cause a harmful or offensive contact with anyone. That allegation does not

even show that Koch had intended to punt the football into the stands. Instead, the complaint suggests that the punt striking Callinan was a "purely accidental touching, or one caused by mere inadvertence," which "is not enough to establish the intent requirement for battery." *Nelson*, 355 Md. at 602. When viewed in the light most favorable to Callinan, Callinan's battery claim contains conclusory statements that cannot defeat a motion to dismiss for failure to state a claim upon which relief can be granted.

Callinan also contends that the court erred because it failed to consider the doctrine of transferred intent. In *Hendrix*, we held that the doctrine of transferred intent may be applied in a civil claim for battery on legally sufficient facts. 205 Md. App. at 25. According to the doctrine, "a defendant who intends to strike a third person is liable if the blow miscarries and strikes the plaintiff." *Id*. at 24 (quoting 1 Harper James & Gray on Torts § 3.3 at 318 (3d ed. 2006)). Callinan did not allege that Koch intended to strike anyone. The doctrine of transferred intent thus cannot apply here.

II. The circuit court did not err when it ruled that Callinan assumed the risk of being struck by an errantly kicked football at a professional football game. Summary judgment was proper.

Callinan next argues that the court improperly applied the doctrine of assumption of the risk. If established, assumption of the risk is a complete bar to recovery. *Crews v. Hollenbach*, 358 Md. 627, 640 (2000). To establish that Callinan's claims are barred because she assumed the risk, the appellees must show that Callinan: '"(1) had knowledge of the risk of danger, (2) appreciated that risk and (3) voluntarily exposed [herself] to it[.]"'

Kelly v. McCarrick, 155 Md. App. 82, 93-94 (2004) (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630 (1985)).

In some cases, a court may rule as a matter of law that the plaintiff knew about the risk: "the evidence and all permissible inferences must make clear that the plaintiff had full, actual, and subjective knowledge of the risk or that 'a person of normal intelligence in the position of the plaintiff *must* have understood the danger.'" *Poole v. Coakley & Williams Constr., Inc.*, 423 Md. 91, 125 (2011) (quoting *Schroyer v. McNeal*, 323 Md. 275, 283-84 (1991) (emphasis added in *Poole*)). By contrast, "[w]hen it is unclear that the plaintiff knew of the risk, but there is evidence that a person of normal intelligence in the position of the plaintiff must have understood the danger, the issue is for the trier of fact." *S & S Oil, Inc. v. Jackson*, 428 Md. 621, 646 (2012).

During her deposition, Callinan testified about her football fandom preceding the November 2015 game. She said that she gained an interest in football in 2011, and she indicated that she had become a football fanatic. She stated that when she had been unable to watch NFL games on live television, she would record them to watch later. More to the point, she testified that she had been aware that thrown and kicked footballs entered the stands at football games:

> [Defense counsel]: Did you ever see—like, in all those football games you watched, did you ever see a kicker miss the netting?
>
> [Callinan]: Yes. Sometimes yes.
>
> [Defense counsel]: And it went in the stands; right?
>
> [Callinan]: Yes, yes.

> [Defense counsel]: And sometimes—the quarterback, sometimes he throws the ball poorly and it goes in the stands; right?
>
> [Callinan]: Yeah.

The court correctly observed that Callinan "had full knowledge of balls flying into the stands unintentionally."

As to the second element—appreciation of the risk—the appellees point to *Kelly v. McCarrick*, in which this Court ruled that a plaintiff's experience and familiarity with a sport can determine whether a plaintiff appreciated the dangers associated with that sport. 155 Md. App. at 108. In *Kelly*, Tara and her parents brought negligence claims after Tara had severely fractured her ankle while playing second base for St. Mark's Parish during a Catholic Youth Organization ("CYO") fast pitch softball game. *Id*. at 87-88. According to Tara's account, she was injured while tagging out a sliding St. Joseph's Parish player who was trying to stretch a single into a double. *Id*. at 88. Tara and her parents brought negligence claims against the CYO, St. Joseph's Parish, its coach, St. Mark's Parish, and the Archdiocese of Washington. *Id*. at 89. The circuit court granted summary judgment on all counts as to all defendants. *Id*. at 92. This Court affirmed the judgment, noting that, "given the Kellys' experience and familiarity with the sport as it is commonly played, they must have understood and appreciated the danger that Tara could be hurt as she tried to tag out a sliding runner." *Id*. at 108. Here, the appellees argue that Callinan's experience and familiarity with football shows that she appreciated the dangers associated with the sport.

Of course, we recognize an obvious difference between *Kelly* and this case. *Kelly* involved a plaintiff who was playing fast pitch softball. Callinan was a spectator in the stands.

Callinan and the appellees cite no Maryland cases that apply the doctrine of assumption of the risk when a spectator is struck by a ball coming from the field at a sporting event. We note that cases from jurisdictions across the country have ruled that a spectator at a sporting event assumes that risk. *See Harting v. Dayton Dragons Pro. Baseball Club, L.L.C.*, 171 Ohio App. 3d 319, 324 (2007) (assumption of the risk applied when a spectator, who was distracted by a mascot, was hit by a foul ball at a baseball game); *Thurmond v. Prince William Pro. Baseball Club, Inc.*, 265 Va. 59, 65 (2003) (adopting the general rule "that as a matter of law, a spectator assumes the normal risks of watching a baseball game, which includes the danger of being hit by a ball batted into an unscreened spectator area."); *Nemarnik v. Los Angeles Kings Hockey Club, L.P.*, 103 Cal. App. 4th 631, 633-34 (2002) (affirming the trial court's grant of motion for nonsuit because a hockey team was immune from liability under the primary assumption of the risk doctrine when a spectator was hit by a puck during pre-game warmups). *But cf. Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 203 (Mo. 2014) (the risk of injury from the mascot's hotdog toss is not one of the risks inherent in watching a baseball game).

The Superior Court of Pennsylvania's decision in *Loughran v. The Phillies*, 888 A.2d 872 (Pa. Super. Ct. 2005) is instructive. In that case, Philadelphia Phillies centerfielder, Marlon Byrd, intentionally threw a baseball into the stands after catching the final out of the top of the seventh inning. *Id.* at 874. That ball struck and injured a

spectator. *Id*. The appellate court suggested that, although it is not formally part of the game of baseball, players tossing balls to fans between half innings is a customary part of the game. *Id*. at 875-76. Similarly, although it is not formally part of the game of football, players warming up before a game is a customary part of the game.

In *Coomer*, the Supreme Court of Missouri distinguished the activity in *Loughran*—a player throwing a ball into the stands—with an activity unconnected to the game of baseball—a mascot throwing hotdogs into the stands:

> Baseball is the reason centerfielder Marlon Byrd was there, just as it was the reason the fans were in the stands (including the many who were yelling for Byrd to toss the ball to them). Here, on the other hand, there is no link between the game and the risk of being hit by [the Royals' mascot's] hotdog toss. The Hotdog Launch is not an inherent part of the game; it is what the Royals do to entertain baseball fans when there is no game for them to watch.

Coomer, 437 S.W.3d at 202-03. Here, football was the reason that Koch was punting, just as it was the reason that the fans were in the stands. Unlike the Royals' mascot, Koch was practicing to warmup for the football game that the fans were there to watch. We find Callinan's assertion in her brief that she could not assume the risk "prior to the game even beginning" to be without merit.

In support of the argument that she did not assume the risk, Callinan claims that this case is "eerily similar" to *Shanney v. Boston Madison Square Garden Corp.*, 5 N.E.2d 1 (Mass. 1936). Callinan's reliance on *Shanney* is unpersuasive. Shanney was attending her first hockey game on an evening in 1932 when she was hit by a puck that entered the stands from the ice playing surface. *Id*. at 1. Shanney's sister bought Shanney's ticket to the game. *Id*. Shanney was unaware that pucks were likely to go into the stands where she

was sitting. *Id*. at 2. The *Shanney* court thus rejected the defendant's assumption of the risk defense:

> The flying off of the 'puck' into the vicinity where the plaintiff sat seems to have been an occasional event which took place often enough so that the jury might find that the defendant with its familiarity with the game and the place ought to have anticipated it, but that the possibility of danger from the source would not naturally occur to the mind of a patron who had never seen it happen.

Id. Callinan contends that this case is like *Shanney* because Callinan was attending her first football game with a ticket that her husband had bought as a gift. But unlike Callinan, Shanney had no knowledge of the risk. *Id*. Indeed, Callinan's candid deposition testimony makes clear that she was a football fan who knew that footballs entered the stands.

As to the third element of assumption of the risk, the record establishes that Callinan voluntarily exposed herself to the risk. It is undisputed that no one forced Callinan to go to the game. Callinan's testimony shows that she was excited to attend the game. Callinan, who had full knowledge that balls sometimes were thrown or kicked into the stands, voluntarily attended the football game with seats six rows away from the field. The circuit court thus did not err when it ruled that Callinan assumed the risk of being struck by an errantly kicked football while in the stands.[3]

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[3] The court ruled that the exculpatory clause on the back of Callinan's ticket provided an alternative basis for summary judgment. On appeal, Callinan challenges that ruling. Because we have decided that the court did not err in granting summary judgment based on the doctrine of assumption of the risk, we need not address whether the exculpatory clause provided an alternative basis for summary judgment.

III. Callinan was not entitled to additional discovery before the court's rulings on the motions to dismiss and for summary judgment.

Callinan argues that she was entitled to additional discovery before the court ruled on the motions to dismiss and for summary judgment. First, she states that she had not been provided with the Ravens and NFL's policies and procedures manuals, which outline when and where players can warm up before a game. Second, Callinan contends that the granting of the dispositive motions was premature because she had not yet deposed Ravens employees, NFL employees, and Koch. At the hearing on the motions to dismiss and for summary judgment, Callinan's counsel stated: "Respectfully, Your Honor, if the Court is inclined to grant either this Motion for Summary Judgment or the Motion to Dismiss, I would ask the Court to stay that decision and let the Plaintiff depose the [Federal Rule of Civil Procedure 30(b)(6)[4]] representative for the Rules Committee of the NFL and Mr. Koch."

"While it is true that the court has the discretion to deny a motion for summary judgment so that a more complete factual record can be developed, it is not reversible error if the court chooses not to do so." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 262-63 (1994). *See also Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373, 391 (2000) ("[T]he mere submission of an affidavit, or other evidence in opposition to a motion for summary judgment, does not ensure that a triable issue of fact will be generated.").

[4] Callinan's counsel referred to a 30(b)(6) representative for the NFL Rules Committee. Federal Rule of Civil Procedure 30(b)(6) allows for a party to depose a corporation or other organization and requires that entity to designate one or more individuals to testify on its behalf. Maryland Rule 2-412(d) is our counterpart to Federal Rule of Civil Procedure 30(b)(6).

As we have explained, Callinan's deposition testimony establishes that the court did not err in granting summary judgment based on Callinan's assumption of the risk. Based on our independent review of the record in the light most favorable to Callinan, her deposition testimony establishes that she had full knowledge of the risk, appreciated that risk, and voluntarily exposed herself to it. We agree with the court's ruling that there was no genuine dispute as to any material fact and Callinan assumed the risk as a matter of law. The court did not err in denying Callinan's request to stay that decision pending further discovery.

As to the battery count in the amended complaint, Callinan notes that if she "had the opportunity to conduct discovery, [she] would have been able to . . . overcome the . . . Motion to Dismiss." When ruling on a motion to dismiss, however, the court is generally limited to "the four corners of the complaint and its incorporated supporting exhibits[.]" *D'Aoust v. Diamond*, 424 Md. 549, 572 (2012) (quoting *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)). Further discovery would fall outside of those limits. As we have explained, the court did not err in granting the motion to dismiss the battery count based on Callinan's failure to state a claim upon which relief could be granted.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.