

[J-38-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

C.C.H. AS PARENT AND NATURAL
GUARDIAN OF T.G., A MINOR AND
C.C.H. IN HER OWN RIGHT,

Appellants

v.

PHILADELPHIA PHILLIES, INC., d/b/a
and/or a/k/a and/or t/a THE
PHILLIES, d/b/a and/or a/k/a and/or t/a
PHILLIES BALLPARK, d/b/a or t/a THE
PHILLIES SUBPARTNERSHIP, et
al., JOSEPH FABRIZIO, JOHN
SCARUZZI, AND MICHAEL IBBETSON,

Appellees

: No. 4 EAP 2007
:
: Appeal from the judgment of the Superior
: Court entered on August 30, 2006 at No.
: 3326 EDA 2005, affirming the judgment of
: the Court of Common Pleas of
: Philadelphia County, Civil Division,
: entered on November 29, 2005 at No.
: 001054, August Term, 2002
:
:
: ARGUED: October 15, 2007
: RE-SUBMITTED: January 11, 2008
:

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE¹

Decided: February 19, 2008

I join the Majority Opinion to the extent that it affirms the Superior Court's order affirming the judgment entered for appellee Philadelphia Phillies, Inc. I respectfully disagree, however, with the Majority's holding that consent is never available as a defense

¹ For much of this concurring and dissenting opinion, I am indebted to former Chief Justice Ralph J. Cappy and former Justice James J. Fitzgerald, who each drafted a proposed concurring and dissenting opinion prior to departing from this Court.

in a civil action arising out of allegations of sexual contact with a minor under 13 years of age.

The basis for my disagreement is twofold. First, in my view, the policies that led the General Assembly to criminalize sexual contact with a minor under 13 irrespective of the minor's consent are inapt in this civil setting. While the criminal justice system reflects larger societal concerns, and aims to punish and deter wrongful conduct, see 18 Pa.C.S. §104 and Commonwealth v. Church, 522 A.2d 30, 36 (Pa. 1987), the civil tort system offers the prospect of a private remedy, in the form of monetary compensation to individuals injured by another to make them whole. See Trotsky v. Civil Service Comm'n, 652 A.2d 813, 817 (Pa. 1995). These fundamental differences between a criminal prosecution on the one hand and a tort action on the other would cause me to refrain from importing the bar on the issue of consent in the former to the latter. I believe that justice would be better served in the present case if appellees, from whom compensatory damages were sought, were properly afforded the opportunity to establish that the minor, who sought those damages from them, had the capacity to consent and did in fact consent to the events that she claims injured her. See Restatement (Second) of Torts §892A ("One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it. To be effective, consent must be (a) by one who has the capacity to consent or by a person empowered to consent for him, and (b) to the particular conduct, or to substantially the same conduct.").

The second basis for my dissent is my belief that the question of whether a minor's consent should be available as a defense in civil proceedings for sexual offenses is a question of public policy which is best left to the Legislature.² As this Court has long held:

² Although the Majority evaluates this case as one stemming from "sexual contact" with a minor, I note that appellant proceeded at trial on the exclusive theory that she was brutally raped. Appellees countered with evidence that no intercourse at all had taken place, and (continued...)

[w]hat the law shall be upon a subject over which the legislature has power is a legislative question.” In re Ruan St., 19 A. 219, 223 (Pa. 1890). Moreover:

[t]he enunciation of matters of public policy is fundamentally within the power of the legislature. While the courts may in a proper case, in the absence of a legislative pronouncement, determine what is against public policy, as stated in Mamlin v. Genoe, 340 Pa. 320, 321, at 325, 17 A.2d 407, at 409 (1941): ‘It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.’ This is not such a case... As stated recently by this Court in Commonwealth ex rel. Fox v. Swing, ... 409 Pa. at 247, 186 A.2d at 27, ‘It is not for us to legislate or by interpretation to add to legislation matters which the legislature saw fit not to include.’

Lurie v. Republican Alliance, 192 A.2d 367, 370 (Pa. 1963) (some citations omitted).

Here, while the Legislature has spoken as to the availability of the consent defense to sexual offenses in the criminal context, it has not addressed the defense in the civil context. Furthermore, the fact that the lower courts reached a different conclusion than does the Majority Opinion in the instant matter is one indication that this is not an issue upon which “there is a virtual unanimity of opinion in regard to it.” Id. Thus, this Court should be reluctant to effectively supplement existing legislation with provisions our General Assembly did not include.

For these reasons, I concur in part and respectfully dissent in part, and would affirm the Superior Court’s order in its entirety.

Mr. Justice Eakin joins this opinion.

(...continued)

the jury found that there was no rape. Appellees never argued that appellant consented to the alleged intercourse for which she sought damages.