

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DOCKET NO. 4 EAP 2007

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/and/or t/a THE PHILLIES
SUBPARTNERSHIP, ET AL.; JOHN SCARUZZI; JOSEPH FABRIZZIO; AND
MICHAEL IBBETSON,

Appellees

BRIEF AS AMICI CURIAE OF THE WOMEN'S LAW PROJECT AND
THE PENNSYLVANIA COALITION AGAINST RAPE, ET AL. IN SUPPORT
OF APPELLAND C.C.H., AS PARENT AND NATURAL GUARDIAN OF
T.G., A MINOR, AND C.C.H. IN HER OWN RIGHT

On Appeal From the Decision Entered August 30, 2006 in the Superior Court of
Pennsylvania, No. 3326 EDA 2005 Affirming Judgment Entered November 29, 2005 in the
Court of Common Pleas of Philadelphia County, Civil, No. 001054 August Term, 2002

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CLINTON COUNTY WOMEN'S CENTER
CRIME VICTIMS' CENTER OF CHESTER COUNTY, INC. (CVC)
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<u>Mary M. v. N. Lawrence Cmty. Sch. Corp.</u> , 131 F.3d 1220 (7 th Cir. 1998).....	7
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Miscellaneous	Page(s)
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- Amy M. Young & Hannah d’Arcy, Older Boyfriends of Adolescent Girls: The Cause or a Sign of the Problem, 36 *Journal of Adolescent Health* 410, 411 (2005).....15, n. 12
- Barbara Vanoss Marin et al., Older Boyfriends and Girlfriends Increase Risk of Sexual Initiation in Young Adolescents, 27 *Journal of Adolescent Health* 409, 411 (2000)..... 16, n. 13
- C. Raymond Bingham & Lisa J. Crockett, Longitudinal Adjustment Patterns of Boys and Girls Experiencing Early, Middle, and Late Sexual Intercourse, 32 *Developmental Psychology* 647, 647 (1996).....14, n. 11
- Candice Feiring and Lynn S. Taska, “The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery,” *Child Maltreatment* 337, 338 (2005)9, n. 2
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- Lucia F. O’Sullivan, The Development of the Sexual Self-Concept Inventory for Early Adolescent Girls, 30 *Psychology of Women Quarterly* 139, 139 (2006).....13, n. 6
- Luna et al., Maturation of Cognitive Processes From Late Childhood to Adulthood, 75 *Child Development* 1357, 1357 (2004).....12, n. 4
- Michelle Oberman, Regulating Consensual Sex with Minors: Defining A Role for Statutory Rape, 48 *Buff. L. Rev.* 703, 705 (2000)..... 16, n. 17
- Nancy D. Kellog & Thomas J. Hoffman, Unwanted and Illegal Sexual Experiences in Childhood and Early Adolescence, 19 *Child Abuse & Neglect* 1457, 1457 (1995).....14, n. 9

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National Center for Health Statistics, “2 to 20 years: Girls, Stature-for-age and Weight-for-age percentiles,” at
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Responding To Child Sexual Abuse, at
<http://aacap.org/page.wv?name=Responding+To+Child+Sexual+Abuse§ion=Facts+for+Families>.....10, n. 3

Restatement (Second) of Torts §892(c)(2).....6, 8

Rigel Oliveri, Statutory Rape Law and Enforcement in the Wake of Welfare Reform,
52 Stan. L. Rev. 463, 506-07 (2000).....16, n. 18

Tina Raine et al., Determinants of Contraceptive Method Among Young Women at Risk for Unintended Pregnancy and Sexually Transmitted Infections, *Contraception* 19 (2003).....16, n. 16

Vernon R. Wiehe and Ann. L. Richards, Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape 30 (1995)9, n. 2

INTEREST OF AMICI CURIAE

Amici are thirty (30) non-profit organizations with a long history of working to vindicate the legal rights of child sexual assault victims. Many of the organizations provide direct services to victims of sexual assault, ranging from crisis intervention and counseling to education and prevention advocacy to raise the awareness of the public, the legislature, and the courts about the realities of sexual assault. These services also include supportive accompaniment to court of victims of sexual assault. Many of the amici engage in system advocacy, working for fair and equal treatment of women and girls in the justice system and for sexual assault laws that effectively protect women and girls.

Amici are highly knowledgeable about the experience of sexual assault victims, including child sexual assault victims. They have supported victims as they seek vindication in the criminal and civil courts and are familiar with the trauma that sexual assault causes child victims and the further ordeal to which they are subjected when they seek legal redress in the courts.

Amici share a common interest in insuring that the law provides child victims with appropriate protections commensurate with their age and holds perpetrators of child sexual assault accountable for their actions. Amici therefore respectfully urge this Honorable Court to bar consent as a defense in a civil suit seeking a remedy for the commission of sexual assault of a victim under the age of 13, consistent with the corresponding criminal law statute and Restatement (Second) of Torts, the public interest in shielding young children from sexual predation, and the majority of jurisdictions who have adopted this rule. Barring the defense of consent will deter sexual assault of children by older teens and adults and protect children from unfair harm.

STATEMENT OF QUESTIONS INVOLVED

Whether the defense of consent is available in civil cases stemming from sexual contact with a minor under the age of 13 where the legislature has precluded such defense by statute in criminal proceedings?

STATEMENT OF THE CASE

Amici adopt and incorporate by reference the Statement of the Case set forth in the brief of Appellants.

SUMMARY OF ARGUMENT

This Court should bar the defense of consent in civil cases arising from sexual contact with minors under the age of 13 because the Pennsylvania Legislature has already precluded such a defense in criminal cases. Barring the consent defense in civil cases is a natural application of the societal norm of protecting children, a norm embodied by well-settled legal principles and decades of research on child development. Amici respectfully request this Court to rule in favor of Plaintiff/Appellant.

The Pennsylvania Legislature has recognized a young minor's inability to understand the nature and possible consequences of sexual activity with older minors and adults and has established the public policy of protecting children from physical and psychological harm by making the defense of consent unavailable in criminal cases stemming from sexual contact with minors under the age of 13. Common law principles, as articulated in the Restatement (Second) of Torts and cases in other jurisdictions, encourage consistency between the criminal and civil systems by denying the defense in the civil context if the Legislature has denied the defense in the criminal context for the purpose of protecting the class of persons to which the plaintiff belongs. This legal position is consistent with the social science research establishing that children are not adults developmentally. With incomplete psychological development, children are incapable of meaningful consent to sexual advances by relatively older individuals.

This Court should further Pennsylvania's policy of protecting children by applying the same restriction on the defense of consent to civil cases stemming from sexual contact with minors under the age of 13. Barring the defense in the civil context deters sexual predators and alleviates the unfairly burdensome process a child-plaintiff experiences to acquire civil remedies for her injuries.

ARGUMENT

I. The Pennsylvania Legislature has already established a bright line at the age of 13 for minor's inability to consent to sexual activity.

Pennsylvania law makes it a first degree felony “when [a] person engages in sexual intercourse with a complainant who is less than 13 years of age.” 18 Pa. Cons. Stat. §3121(c) (2006). By criminalizing sexual activity with a minor under the age of 13, the Pennsylvania Legislature sought to protect children from the physical and psychological harms associated with sexual contact between minors and older teenagers and adults. In criminal cases, consent is not a defense when the complainant is under the age of 13. The statutory criminal law is thus consistent with social science research on a child's capacity to consent, as described in Section III below.

This Court and the Superior Court have both recently discussed the Legislature's public policy recognizing the need for extensive legal protections for children. In In the Interest of B.A.M., the Superior Court held that the statutory predecessor of Section 3121(c) was “deliberately protective, specifically intended by the Legislature to shield young children from sexual predation by older teenagers and adults.” 806 A.2d 893, 895 (Pa. Super. 2002). The Superior Court relied on this Court's discussion in Commonwealth of PA v. Albert of other child protective legislation prohibiting relatively older individuals from having sexual contact with minors. 758 A.2d 1149 (Pa. Sup. 2000). In Albert, this Court held the “government has a legitimate interest in assuring that a significantly older individual cannot take advantage of a young child's complete lack of knowledge, inexperience or poor judgment. There is a legitimate interest in fostering healthy surroundings to yield well-adjusted citizens, free of social and psychological scars.” Id. at 1153.

Under common law principles, the defense of consent should be unavailable in the civil arena because the Legislature criminalized sexual activity with a minor under the age of 13. The Restatement (Second) of Torts states, "If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action." Restatement (Second) of Torts §892(c)(2). Indeed, as Illustration 7 to Section 892(c) states: "A statute makes it rape to have sexual intercourse with a girl under the age of sixteen even with her consent. At the solicitation of A, a girl of fourteen, B has intercourse with her. A's consent does not bar her action for battery." As this Court has said before, "In recent years, this Court has not hesitated to adopt sections of the Restatement (Second) of Torts (1965) when our common-law precedents varied from the Restatement or when the Pennsylvania common law provided no answer." Gilbert v. Korvette's Inc., 327 A.2d 94, 100, n. 25 (Pa. Sup. 1973). The unambiguous purpose of 18 Pa. Cons. Stat. §3121(c), "Rape of a child," is the protection of children under the age of 13. The Legislature chose to protect children as a class without individualized fact-finding into the maturity of each child complainant in the criminal context, where greater protections are extended to protect defendants' due process rights than in civil cases.

The Restatement supports the application of the Legislature's public policy decision to protect children as a class to the civil context, where much less is at stake for the defendant in comparison to the criminal system, thereby prohibiting consent as a defense to sexual activity with minors under the age of 13. Of those courts that have recently addressed this question, a majority has followed the Restatement by prohibiting consent as a defense in civil cases stemming from sexual conduct that the Legislature has criminalized to protect children. See, e.g., Christensen v. Royal Sch. Dist. No. 160, 124 P.3d 283, 286 (Wash. 2005) (declaring that the

“notion that minors are incapable of meaningful consent in a criminal law context should apply in the civil arena and command a consistent result”); Wilson v. Tobiassen, 777 P.2d 1379 (Or. Ct. App. 1989) (holding a “person's incapacity to consent under [Oregon’s criminal statute] extends to civil cases”); Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220 (7th Cir. 1998) (concluding that if “children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context”); Doe ex rel. Roe v. Orangeburg County Sch. Dist. No. 2, 518 S.E.2d 259 (S.C. 1999) (holding the evidence of a child’s consent to sexual intercourse is inadmissible on the issue of civil liability because of the public policy reasons behind the state’s statutory rape laws); Bohrer v. DeHart, 943 P.2d 1220 (Colo. Ct. App. 1996) (denying the availability of consent as a defense because of the power imbalance between the child-victim and an older religious counselor); Bjerke v. Johnson, 727 N.W.2d 183 (Minn. App. 2007) (prohibiting the application of the doctrines of primary and secondary assumption of risk because “Minnesota has unambiguously declared its strong interest in preventing the sexual abuse of children.”).

A minority of jurisdictions permit the defense of consent in civil cases. Many of these cases can be distinguished from the case here because the plaintiff was an older minor at the time of the incident and the defendant was a minor close in age to the plaintiff. See, e.g., Tate v. Bd. of Educ. of Prince George's County, 843 A.2d 890, 901 (Md. Ct. Spec. App. 2004) (finding that “a minor's consent is relevant for purposes of determining civil liability” where the plaintiff was 15 years old); Cynthia M. v. Rodney E., et al., 228 Cal. App. 3d 1040 (1991) (finding the “consent of an individual under the age of 18 a permissible consideration” when addressing civil liability under a “parental responsibility” statute where the plaintiff was 16 years old and the father of her baby was also a minor relatively close in age to the plaintiff); McNamee, et al. v.

A.J.W., et al., 2519 S.E.2d 298 (Ga. Ct. App. 1999) (holding a minor’s consent to sexual intercourse admissible in a civil case where the plaintiff was only nine months younger than the minor defendant). In this case, the plaintiff was 11 years old at the time of the incident and the defendants were between four and five years older than the plaintiff.

Pennsylvania should follow the majority of jurisdictions that apply the Restatement by prohibiting the defense of consent in civil cases stemming from sexual conduct with a minor when the Legislature has precluded the defense of consent in criminal cases. As illuminated by Albert and In Re B.A.M., supra, the Pennsylvania Legislature has criminalized sexual intercourse with minors under the age of 13 to protect children who cannot protect themselves due to their “immaturity, inexperience or lack of judgment.” Restatement (Second) of Torts §892(c)(2), cmt. e. Barring the defense of consent in civil cases furthers the Legislature’s public policy of protecting children under the age of 13.

II. Barring the defense of consent in civil cases furthers the public policy of protecting children from psychological and physical harm.

Prohibiting the defense of consent in civil cases protects children by deterring sexual predators, holding them accountable for all the social and personal harm they cause, and shielding young minors from the most psychologically harmful aspects of trial.

A. Deterring sexual predators furthers Pennsylvania’s public policy of protecting children.

Like the criminal system, the civil system sends messages about which injurious behaviors are socially acceptable and which are not. These messages, particularly when accompanied by monetary damages, may deter some individuals from behaving in socially

harmful ways.¹ By passing Section 3121(c), thus prohibiting the defense of consent in criminal cases involving sexual intercourse with a minor under the age of 13, the Legislature sent the message that such action is socially unacceptable and harmful to children. Applying the same restriction of the defense to civil cases would strengthen the Legislature's message and would help effectuate the Legislature's purpose. By holding sexual predators economically responsible, barring the defense of consent in civil cases protects children from physical and psychological harm by deterring a defendant from targeting a child in the future, and more generally, by deterring future sexual predators from targeting children in the first place.

B. Shielding children from psychologically harmful cross-examination on the issue of consent promotes the public policy of protecting children.

Denying the defense of consent in civil suits arising from sexual acts with minors younger than the criminal statutory age of consent will likely have the practical effect of shielding children from psychologically harmful cross-examination on the issue of consent. When a child is subjected to direct cross examination and opposing testimony on the issue of liability, the child will be told that the issue is whether she brought the harm upon herself by desiring the sexual conduct.

There is widespread agreement that victims of sexual assault and abuse often experience fear, shame, and anger.² They may believe that no one cares about them or understands them. In children, the effect is magnified. As the American Academy of Child and Adolescent Psychiatry describes, "Most children in attempting to make sense out of the abuse will believe that

¹ John C. P. Goldberg, Twentieth-Century Tort Theory, 91 Geo. L.J. 513, 521-22 (2003) (discussing the compensation-deterrence theory of tort law).

² See Candice Feiring and Lynn S. Taska, "The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery," Child Maltreatment 337, 338 (2005) (providing a discussion of abuse-related shame); See also Vernon R. Wiehe and Ann. L. Richards, Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape 30 (1995) ("self-blame is a recurring theme in survivors' comments.").

somehow they caused it or may even view it as a form of punishment for imagined or real wrongdoings.”³

Thus, a great danger to children's psychological well-being lies with the blame-shifting inherent in admitting evidence of consent during the liability phase. Such blame-focused evidence, testimony, and cross-examination run a serious risk of impairing or even reversing the child's steps towards psychological recovery. As stated in Commonwealth of PA v Albert, *supra*, at 1153, the Legislature’s purpose behind its child protective legislation is “fostering healthy surroundings to yield well-adjusted citizens, free of social and psychological scars.” To promote the child’s psychological well-being, it is imperative that a child’s experience with the civil system does not focus on blaming her for the defendant’s injurious conduct. The focus of the evidence should be the *effect* of the sexual conduct on the child, rather than whether the child had a role in causing the sexual conduct to occur.

C. The application of collateral estoppel in civil cases furthers the public policy of protecting children by increasing the efficiency of the civil system for child-plaintiffs.

If this Court permits the defense of consent in civil cases, such a ruling will force future child victims of sexual assault by adult perpetrators to navigate a more complicated and burdensome process than adult victims of rape seeking civil remedies after the State has already obtained a criminal verdict against the defendant.

As this Court has held, "it is well established that a criminal conviction collaterally estops a defendant from denying his acts in a subsequent civil trial." Shaffer v. Smith, 673 A.2d 872, 874 (Pa. Sup. 1996). After the State obtains a guilty verdict in a criminal case involving the rape of an adult victim, the guilty verdict is "admissible in civil actions arising from the same

³ Responding To Child Sexual Abuse, at <http://aacap.org/page.wv?name=Responding+To+Child+Sexual+Abuse§ion=Facts+for+Families> (last visited April 17, 2007).

operative facts and circumstances [as]... conclusive evidence of the criminal acts." Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 952 (Pa. Super. 1993).

Thus, after a conviction in a criminal rape case involving an adult victim, the defendant is collaterally estopped from asserting his innocence in the subsequent civil trial. The civil claim for battery proceeds directly to damages. Yet, if this Court permits the defense of consent in cases involving sex with children under the age of thirteen, a child victim would be forced to re-litigate liability, even where a prior criminal proceeding had already established the adult defendant's guilt for sexual assault. The availability of the consent defense in civil cases creates an inconsistent and unfair result: a child rape victim has to go through a more burdensome process than an adult rape victim for her civil claim. There is no justification for making it harder for a child victim to recover upon proven criminal conduct than an adult victim. Such an additional requirement for child victims would be unduly burdensome and incompatible with the principles of collateral estoppel that afford the victims of crime parallel tort relief.

III. The law must strongly protect children from sexual activity with older teenagers and adults and hold those older individuals fully accountable for the harm they cause.

A review of available social science research indicates children are unable to appreciate the nature of and possible consequences resulting from sexual advances made by older teenagers and adults. Given children's psychological immaturity and other social and physical power disparities, truly consensual sexual relationships between children and relatively older individuals are virtually impossible. This type of sexual activity inflicts substantial harm on the children involved and on society.

A. Children cannot meaningfully consent to sexual activity with older minors or adults given children's cognitive and psychological development and the inherent social and physical inequalities between children under the age of 13 and relatively older individuals.

While children and adolescents may have the limited capacity to determine many aspects of their lives when such decisions occur in a controlled, deliberative fashion, those same children and early adolescents have not fully developed the mental capacity to process information and control their behavior in the highly stressful, emotional, and coercive situation of a sexual advance by a relatively older individual. Thus, children do not have the legal capacity to consent to sexual activity with older teenagers and adults.

1. Cognitive and Psychological Development of Children and Early Adolescents.

The plaintiff, being 11 years old at the time of the incident, was most likely unable to meaningfully consent to sexual activity with older teenagers because young minors and early adolescents often have immature cognitive processes and are still in the relatively early stages of developing their perception of themselves and navigating interactions with society. According to Luna et al.,

Mental abilities, including problem solving and reasoning abilities, continue to develop during adolescence. These improvements are supported by developments in specific core cognitive processes that are still immature in late childhood, including processing speed, voluntary response suppression, and working memory.⁴

The immature cognitive processes of children and early adolescents restrict their ability to process information efficiently, choose a course of action and stay on task, and control their behavior.⁵

⁴Luna et al., Maturation of Cognitive Processes From Late Childhood to Adulthood, 75 Child Development 1357, 1357 (2004); See also Jennifer Ann Drobac, Developing Capacity: Adolescent 'Consent' at Work, at Law, and in the Sciences of the Mind, 10 U.C. Davis J. Juv. L. & Pol'y 1 (2006).

⁵Id.

In addition to the mental capacity of children and early adolescents, the psychosocial changes that children and early adolescents experience render them incapable of assessing the risks of sexual contact in order to truly consent to sex.

There are important changes in the lives of early adolescents pertinent to the assessment of sexual self-concept. Most notably, early adolescents begin to experience the dramatic physical changes of puberty, to become aware of sexual drive and erotic feelings, and to develop previously unfamiliar views of themselves as individuals capable of eliciting sexual interest in others. At this time, peers gain considerable social influence and frequently provide social contexts for early romantic sexual encounters.⁶

The unfamiliar territory of sexuality, the onset of peer pressures, dramatic physiological changes, and underdeveloped self-concepts combine with the immature mental processes of children and early adolescents to render them both particularly susceptible to sexual advances from relatively older individuals yet still incapable of assessing the physical, psychological, and emotional risks involved with sexual contact with those relatively older individuals.

2. Other indicia of a power disparity between young minors and older teenagers and adults.

In addition to a child's psychological immaturity, other differences between minors under the age of 13 and older teenagers and adults indicate power disparities. Generally, older teenagers and adults are larger in physical size in comparison to children, since childhood and adolescence are times of immense growth.⁷ In this case, at least one of the defendants was twice the plaintiff-child's weight, and the two defendants who testified in the civil trial were both significantly taller than the 11-year-old plaintiff. (R. at 353a; R. at 377a; R. at 519a). At over six

⁶Lucia F. O'Sullivan, The Development of the Sexual Self-Concept Inventory for Early Adolescent Girls, 30 *Psychology of Women Quarterly* 139, 139 (2006).

⁷See National Center for Health Statistics, "2 to 20 years: Boys, Stature-for-age and Weight-for-age percentiles," at < http://www.cdc.gov/nchs/about/major/nhanes/growthcharts/clinical_charts.htm>; See also National Center for Health Statistics, "2 to 20 years: Girls, Stature-for-age and Weight-for-age percentiles," at http://www.cdc.gov/nchs/about/major/nhanes/growthcharts/clinical_charts.htm.

feet tall, one of the defendants was more than a foot taller than the plaintiff-child. (R. at 377a). Other factors associated with age, such as life experience and social position, may also contribute to the inequality of power between a child under the age of 13 and an older teenager or adult.⁸ This power disparity makes children vulnerable to sexual coercion and decreases the likelihood that a young minor's seemingly voluntary sexual action with an older teenager or adult is truly consensual.

B. Sexual activity between minors and older teenagers or adults often leads to long-term physical and psychological harm to children.

Professionals who study the effects of childhood sexual contact on the children who experience it recognize that childhood sexual experiences that the law prohibits place the child at risk for emotional and psychological injury.⁹ Child sexual abuse is defined as “sexual exploitation involving physical contact between a child and another person. Exploitation implies an inequality of power between the child and the abuser on the basis of age, physical size, and/or the nature of the emotional relationship.”¹⁰ When a child engages in sexual contact with a partner who holds physical or emotional power over the child, that child has been exploited and victimized. The child has suffered abuse. Children who are victimized by sexual contact in pre- and early adolescence are placed at risk for a wide range of health, psychological, and social development problems. Adolescents who experience early sexual contact have a great risk of developing “more problem behavior and substance abuse, disrupted family and parental relationships, and poor school performance.”¹¹

⁸See Jacqueline E. Darroch et al., Age Differences Between Sexual Partners in the United States, 31 Fam. Plan. Persp. 160, 163 (1999).

⁹Nancy D. Kellog & Thomas J. Hoffman, Unwanted and Illegal Sexual Experiences in Childhood and Early Adolescence, 19 Child Abuse & Neglect 1457, 1457 (1995).

¹⁰Daniel S. Bromberg & Blair T. Johnson, Sexual Interest in Children, Child Sexual Abuse, and Psychological Sequelae for Children, 38 Psychology in the Schools 343, 343 (2001).

¹¹C. Raymond Bingham & Lisa J. Crockett, Longitudinal Adjustment Patterns of Boys and Girls Experiencing Early, Middle, and Late Sexual Intercourse, 32 Developmental Psychology 647, 647 (1996).

The early sexual experiences of early adolescent girls with either adult or older adolescent partners is directly associated with the long-term detriment of the girls' physical and psychological health.

The association between older partner and high-risk sex behaviors among adolescent girls is well documented. Adolescents who have an older partner are more likely to engage in sexual intercourse at a younger age. Moreover, having an older partner among adolescent girls has been associated with decreased condom use and increased rates of pregnancies and sexually transmitted diseases. . . . Adolescent girls who have an older partner are more likely than their peers with same-age partners to have a higher rate of previous suicide attempts, drug and alcohol use, and previous pregnancies.¹²

Early adolescent girls who have sexual contact with their older partners are extremely likely to have suffered sexual exploitation by their partner, despite the fact that the girl may have “consented” to the contact. A study of sixth-graders (median age 11.5 years) who had older sex partners made the following conclusion:

[A]t least for preadolescents, sexual activity occurs often in situations of pressure or power differential between partners. . . . [S]ixth graders with a boyfriend or girlfriend who is ≥ 2 years older are over 30 times more likely to have had sex than their peers who have never had a boyfriend or girlfriend. . . . Having an older boyfriend or girlfriend was also strongly associated with reporting unwanted sexual advances.¹³

This early and coerced sexual interaction is associated with an increased tendency to get in fights, suicidality, risky sex, prostitution, teen pregnancy, violence, and HIV infection.¹⁴ Indeed, “sixth-grade is a developmentally inappropriate time for young people to have sex.”¹⁵

¹²Amy M. Young & Hannah d'Arcy, Older Boyfriends of Adolescent Girls: The Cause or a Sign of the Problem, 36 *Journal of Adolescent Health* 410, 411 (2005).

¹³Barbara Vanoss Marin et al., Older Boyfriends and Girlfriends Increase Risk of Sexual Initiation in Young Adolescents, 27 *Journal of Adolescent Health* 409, 411 (2000).

¹⁴Id. at 415.

¹⁵Id.

Sexual activity with a minor under the age of 13 may also result in long-term consequences for a child-victim's physical health, as it exposes young minors to sexually transmitted infections (STIs) and pregnancy if the female child has reached menarche. Initiation of sexual activity before the age of 15 is associated with decreased use of contraception, which, if used correctly and consistently, is necessary to decrease the likelihood of pregnancy and STI transmission.¹⁶ As a result, sexually active young minors are at risk of potentially life-threatening STIs and pregnancy. Some girls have not started menstruating by the age of 13, but for those who have, pregnancy is a possibility.¹⁷ Early pregnancy in the teenage years may imperil a young woman's educational future, thereby inhibiting her ability to support herself and her family.¹⁸ Thus, the sexual activity of young minors is a public health and welfare concern that merits the attention of this Court.

¹⁶Adejoke B. Ayoola, et al., Epidemiology and Prevention of Unintended Pregnancy in Adolescents, Primary Care: Clinics in Office Practice (2006); See Tina Raine et al. "Determinants of Contraceptive Method Among Young Women at Risk for Unintended Pregnancy and Sexually Transmitted Infections." *Contraception* 19 (2003).

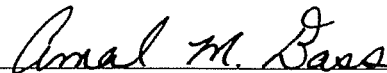
¹⁷Michelle Oberman, Regulating Consensual Sex with Minors: Defining A Role for Statutory Rape, 48 *Buff. L. Rev.* 703, 705 (2000).

¹⁸Id. But see, Rigel Oliveri, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, 52 *Stan. L. Rev.* 463, 506-07 (2000) (warning against over emphasizing teenage pregnancy and welfare consequences as justifications for statutory rape laws and proposing the elimination of the current form of statutory rape laws but in favor of "categorical prohibitions on specific types of sexual relationships. For example, legislatures could still define a cut-off age somewhere in the early teens... below which sexual activity counts as child abuse").

CONCLUSION

For all of the foregoing reasons, amici respectfully request that this Court rule in favor of Plaintiff/Appellant by prohibiting the defense of consent in civil cases stemming from sexual contact with minors under the age of 13.

Respectfully submitted,



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APPENDIX

STATEMENTS OF INTEREST FOR AMICUS BRIEF IN C.C.H. v. PHILADELPHIA PHILLIES, INC.

A WAY OUT

A Way Out is a not-for-profit organization in rural Potter County, Pennsylvania which provides services to victims of domestic violence and sexual assault, and sees on a daily basis people who have been sexually abused as children. That experience affects people for the rest of their lives. Children are traumatized by rape. It is an act of power and violence that uses sex as a weapon. Engaging in sexual intercourse with anyone under the age of 13 is a crime to which the consent of the child is not a defense. That must be true in civil court as well. Minors seeking civil redress should be afforded the same protection as is given in criminal court.

ALICE PAUL HOUSE

The Alice Paul House (APH) is a domestic violence shelter, rape crisis center and comprehensive victim services agency in Indiana, Pennsylvania. The APH is a private, non-profit organization and member agency of the Pennsylvania Coalition Against Rape (PCAR). APH provides advocacy through the court system for child victims of sexual assault and is therefore very concerned that child victims be fully protected by the criminal and civil justice systems. APH believes that the civil law should follow the same rules for consent to sexual activities as do the criminal statutes. Children should, at all times, be protected from sexual crimes committed against them by older minors or adults.

BLACKBURN CENTER AGAINST DOMESTIC AND SEXUAL VIOLENCE

Blackburn Center Against Domestic and Sexual Violence is one of the oldest sexual assault and domestic violence agencies in Pennsylvania, having celebrated 30 years of service to Westmoreland County in 2006. Blackburn Center is the only organization in Westmoreland County offering free services in counseling, advocacy and supportive programs for survivors of sexual assault, sexual harassment, child sexual abuse, and incest. Blackburn Center also operates one of two domestic violence programs in Westmoreland County. As an agency that provides services to hundreds of sexual assault victims each year, Blackburn Center is gravely concerned by the possibility that sexual predators in Pennsylvania will have means of escaping civil liability for the injuries caused by their sexual assault of children under the age of 13.

CENTER FOR VICTIMS OF VIOLENCE AND CRIME

The Center for Victims of Violence and Crime is one of the oldest and largest comprehensive crime victim assistance agencies in the Southwestern Pennsylvania region, providing service to Allegheny County for over 30 years. During the fiscal year of 2005/2006, CVVC served over 10,000 individuals through all of its programs. Approximately 16 percent of the population served is sexual assault victims. Approximately six percent of our population served was

children under the age of 12. The Center for Victims of Violence and Crime believes strongly that the children of Pennsylvania should be protected in all courts of law. A child's mental functioning does not change based on whether the case is being tried in criminal court or civil court. Therefore, the same protection should be afforded to minors who seek civil redress for their injuries caused through sexual contact.

CENTRE COUNTY WOMEN'S RESOURCE CENTER

The Centre County Women's Resource Center (CCWRC) serves victims of domestic and sexual violence in Centre County. Children who have been victimized by sexual assault deserve protection. Children are the most vulnerable to sexual assault and to victimization by sexual predators. This is clearly recognized by the criminal justice system and civil remedies must acknowledge the vulnerability of children and provide appropriate remedies for them, as well.

CITIZENS AGAINST PHYSICAL, SEXUAL & EMOTIONAL ABUSE, INC.

Citizens Against Physical, Sexual & Emotional Abuse, Inc. (CAPSEA, Inc.) is a private non-profit organization that provides life-saving services to victims of sexual violence, domestic violence, serious crime victims, and the homeless in Elk and Cameron counties in Western Pennsylvania. CAPSEA, Inc. is committed to ending violence and protecting children from the dangers of sexual contact with adults and older minors. CAPSEA, Inc. tirelessly works to educate communities about violence and advocates on a regular basis for changes in the law that will protect people from the trauma of sexual violence.

CLINTON COUNTY WOMEN'S CENTER

Clinton County Women's Center has nearly a 30 year history of providing crisis intervention services to adult and child victims of sexual violence. Children are the most vulnerable population affected by sexual violence. Clinton County Women's Center is significantly concerned with the ability of child victims to heal from their experiences and believes explicitly in supporting and upholding the rights of child victims to receive justice in both the criminal and civil systems.

CRIME VICTIMS' CENTER OF CHESTER COUNTY, INC. (CVC)

The Crime Victims' Center of Chester County, Inc. (CVC), was established in 1973 as the Rape Crisis Council and in 1976 became a comprehensive victim services center handling all types of crime. CVC is a private non-profit comprehensive victim services agency whose purpose is to support adult and child victims of all types of crime as they work toward recovery. As the sexual assault center for Chester County, CVC believes children are especially vulnerable. CVC believes the age of consent law should apply to both civil and criminal cases.

HAVIN, INC. (HELPING ALL VICTIMS IN NEED)

HAVIN, Helping All Victim's In Need, is a 501(c)(3) private non-profit Sexual Assault/Domestic Violence Program located in Armstrong County, Pennsylvania. HAVIN is one of the Pennsylvania's 57 Rape Crisis Centers, providing crisis counseling, support and advocacy for victims of sexual violence. It is critical that child victims of sexual assault have comprehensive protection, under civil and criminal law, to ensure that perpetrators are held accountable for these heinous acts. Disparities between the criminal and civil law in Pennsylvania as to whether consent is a defense based on the age of the victim will inhibit efforts to adequately and ethically protect and support child victims and hold perpetrators accountable.

NATIONAL CENTER FOR VICTIMS OF CRIME

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, D.C., is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates for laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly committed to advocating for full redress under the law for victims of sexual assault and child abuse.

THE NATIONAL CRIME VICTIM LAW INSTITUTE

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. This case presents the critical issue of the fair treatment of sexual violence victims in this country's justice systems; particularly whether child victims can be adequately protected as they pursue civil remedies.

NETWORK OF VICTIM ASSISTANCE

Network of Victim Assistance (NOVA), founded in 1974, supports, counsels and empowers victims of sexual assault and other serious crimes and works to eliminate violence through advocacy, prevention programs and community education activities. As the rape crisis center for Bucks County, NOVA serves more than 1200 victims of sexual assault each year, half of whom are under the age of 18. NOVA supports these clients through all legal proceedings and has an interest in ensuring that victims have fair access to criminal and civil remedies against their perpetrators and any other parties who might be reasonably responsible for their safety. The age of consent for sexual activity is clear in the criminal statutes and establishing different consent provisions for civil court will only serve to unfairly deter victims and their families from seeking civil redress for injuries suffered.

PASSAGES, INC.

Passages, Inc. (Prevention and Service for Sexual Assault through Guidance Empowerment and Support) is a small non-profit sexual violence crisis center which provides free and confidential intervention and prevention services in three rural counties (Clarion, Clearfield and Jefferson) in western Pennsylvania. Passages serves many young children (age 12 and younger) who have been sexually abused by someone whom they know and trust. Permitting the defense of consent in any case involving sexual assault of a child by a relatively older person is a way to deflect responsibility for the violence away from the offender. It is important that all victims maintain the right to seek civil redress for the injuries they experience from incidents of sexual violence.

PENNSYLVANIA COALITION AGAINST RAPE

Founded in 1975, the Pennsylvania Coalition Against Rape (PCAR) is a non-profit, tax-exempt organization that advocates for the rights and needs of victims of sexual violence. PCAR's network of fifty-two centers provides free and confidential crisis counseling and intervention twenty-four hours a day, one-on-one counseling, prevention education programs to the public, information and referral, and hospital and court accompaniment for all victims of sexual violence and their significant others. PCAR, the first coalition of its kind in the nation, has long been the organization other rape crisis organizations look to for technical assistance.

RAPE AND VICTIM ASSISTANCE CENTER OF SCHUYLKILL COUNTY

The Rape and Victim Assistance Center of Schuylkill County was established in 1983 to address the issue of sexual violence on a local level through the delivery of direct support services and community education. The Center's mission is to address the needs and advocate for victims of sexual assault and those members of the community most at risk. The Center serves men, women, and children whose lives have been significantly affected by sexual victimization. Over the past twenty-four years, community members have become more sensitive and educated about sexual violence, and local systems have made changes in policies and procedures to preserve the rights of victims.

SEXUAL ABUSE PREVENTION NETWORK

The Sexual Abuse Prevention Network is a national organization with a mission of preventing the sexual abuse of children. The Sexual Abuse Prevention Network believes that public policy should be focused on the protection of children, and policies or interpretations that would suggest that a minor can give consent to sexual activity is not in the best interest of the minor and sets a terrible precedent should such an assertion be used as a defense. Allowing consent to be used as a defense in a civil case is contrary to the societal interest of protecting children.

VICTIMS' INTERVENTION PROGRAM

Victims' Intervention Program is a non-profit organization that provides services to victims of domestic violence, sexual assault and other serious crimes in Wayne County, Pennsylvania. The Program's mission is to educate, empower, and envision. Victims' Intervention Program works to educate the community on the issues of domestic and sexual violence and provides services to women, men and children ages 5 and up. Services include: 24-hour crisis hotline, crisis intervention, individual and group counseling, legal and medical advocacy and accompaniment, emergency shelter assistance, emergency food vouchers, relocation assistance, information and referral, emergency transportation, risk reduction programs, and training programs. Victims' Intervention Program works with many children who are victims of abuse and also adults who work victimized as children. Engaging in sexual intercourse with a child under age 13 is a felony; Victims' Intervention Program believes that the same rule should apply in a civil proceeding.

VICTIMS RESOURCE CENTER

Victims Resource Center (VRC) has been providing services to victims of sexual violence in Luzerne County, Pennsylvania since 1974. VRC advocates for the rights of victims of sexual violence and believes that the principles that protect children from the dangers of sexual contact with adults and older minors in Pennsylvania's crimes code should apply in civil remedies available to child victims of sexual assault.

WOMEN AGAINST ABUSE

Women Against Abuse (WAA) is a private non-profit organization committed to halting violence against women via the provision of intervention, prevention, and advocacy programs and services. WAA is one of the largest and most comprehensive domestic violence service providers in the country. WAA provides hotline, emergency shelter, transitional housing, counseling, advocacy, legal representation, and other supportive services to battered women and their children.

WOMEN IN NEED, INC.

Women In Need, Inc. (WIN) has worked with rape and sexual assault victims since 1976 and is committed to protecting children from the dangers of sexual contact with adults and older minors. WIN believes that it is vital that those responsible for committing such acts do not have a way to escape liability for injuries caused by the sexual assault of children under the age of 13 and that the criminal law's preclusion of a consent defense must apply in the civil system as well. Without such protection, our children are at an increased risk of exposure to the dangers of sexual assault and rape.

WOMEN ORGANIZED AGAINST RAPE

Women Organized Against Rape (WOAR) was founded in 1973 with a mission to eliminate all forms of sexual violence and to advocate for the rights of victims of sexual assault

and sexual abuse. WOAR is the only rape crisis center in Philadelphia and provides direct service to sexual assault/sexual abuse victims and their families/significant others. WOAR's services include a 24/7 hotline staffed with trained agency personnel and volunteers, hospital emergency room accompaniment/support, and Court advocacy and accompaniment/support throughout the criminal justice process, and individual and support group counseling. WOAR also provides community education programs about sexual assault prevention.

WOMEN'S CENTER OF BEAVER COUNTY

The Women's Center of Beaver County is committed to promoting safety and independence, with the goal to reduce and eliminate the causes and effects of abuse. The Center provides shelter, counseling, support, advocacy and education to victims and survivors of domestic violence and sexual abuse. Each year, services are provided to over 125 sexual assault victims who are children. Pennsylvania has a long history of protecting its vulnerable citizens, especially children, from certain dangers, exploitation and abuse. The same protection to children should be applied to civil cases as it is in criminal cases.

WOMEN'S LAW PROJECT

The Women's Law Project is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh. Founded in 1974, the Law Project works to abolish discrimination and injustice and to advance the legal and economic status of women. The Law Project is committed to ending violence against women and children and to safeguarding the legal rights of women and children who experience sexual abuse. To that end, the Law Project has provided counseling to victims of violence through its telephone counseling service, engaged in public policy advocacy and written and participated in *amicus curiae* briefs which seek to improve the response of the legal system to victims of sexual assault and violence.

WOMEN'S RESOURCE CENTER

The Women's Resource Center ("WRC") is a private non-profit organization serving survivors of domestic violence and sexual assault in Lackawanna and Susquehanna Counties. Through its work with survivors of child sexual abuse, the WRC knows that children under the age of sixteen are a particularly vulnerable population to sexual exploitation. WRC works with and on behalf of child, teen and adult survivors through various programs, including the Barbara J. Hart Justice Center ("BJHJC"). The BJHJC was established with a vision of combining the skills of advocates and lawyers to provide a holistic approach to meeting the needs of individuals who experience domestic and sexual violence.

WOMEN'S RESOURCES OF MONROE COUNTY, INC.

Women's Resources of Monroe County, Inc. (WR) has been working with victims of sexual assault for over twenty years. WR is a non-profit 501(c)(3) organization serving Monroe County and is a member of the Pennsylvania Coalition Against Rape and Pennsylvania Coalition Against Domestic Violence. Its services range from a twenty-four hour hotline and domestic violence shelter to a wide variety of community prevention and education programs. Women's

Resources believes it is essential that the rights of minor victims be upheld both in the criminal and civil courts.

WOMEN'S SHELTER/RAPE CRISIS CENTER OF A LAWRENCE COUNTY

The Women's Shelter/Rape Crisis Center of Lawrence County (WS/RCC) located in Lawrence County, Pennsylvania has provided services to victims of domestic and sexual violence since 1981. Educational programs are provided to community groups, professionals, and school students. WS/RCC is a non-profit, private organization that is a member agency of the Pennsylvania Coalition Against Rape and Pennsylvania Coalition Against Domestic Violence. Annually, over 400 sexual assault victims and their family members receive a range of services including crisis intervention, twenty-four hour hotline, emergency room advocacy, supportive counseling, court accompaniment, and post-trial advocacy. As an agency that works to advocate for victims of sexual violence, the Women's Shelter strives to raise public awareness surrounding sexual assault myths and realities and about the trauma and pain victims face following an assault.

WOMEN'S WAY

WOMEN'S WAY, the nation's oldest and largest funding federation, raises money and public awareness to fight for and achieve women's equality, safety, self-sufficiency and reproductive freedom through women-centered funding, education and advocacy. The safety of women and girls and an end to violence against women and girls, is at the heart of WOMEN'S WAY's mission. For 30 years, WOMEN'S WAY has proudly supported these causes.

YWCA OF GREATER HARRISBURG

The YWCA of Greater Harrisburg was founded in 1893 and is the leading women's organization in the Pennsylvania capital region, serving Dauphin and Perry counties. The mission of the YWCA of Greater Harrisburg emphasizes the empowerment of women and children by providing quality services designed to maximize their spiritual, emotional, educational and physical development. The YWCA actively serves as an advocate and a resource in the community on issues that impact women and children. The YWCA is the sole provider of free, comprehensive, and confidential domestic violence and sexual assault services in Dauphin County, Pennsylvania. The YWCA was one of the first domestic violence/sexual assault programs in Pennsylvania to add a full-service, not-for-profit law office to its continuum of services. The committed staff of the YWCA delivers programs and services to over 45,000 women and children annually. The YWCA has long been dedicated to protecting the rights of sexual assault victims in our Commonwealth.

YWCA OF LANCASTER

The YWCA of Lancaster has been serving the Lancaster, PA community since 1889. Since 1990, the YWCA has been designated by the PA Coalition Against Rape as Lancaster County's sexual assault center. The YWCA's Sexual Assault Prevention and Counseling Center provides direct services to 900-1000 individuals annually, in addition to prevention education

programs to 7000 people. Approximately 250-300 of the direct service clients are children who have been sexually abused/assaulted. On a daily basis, the Center sees the damage done to these children, most of whom are under the age of thirteen. It is important to protect these children and provide redress without revictimization.

YWCA OF NORTHCENTRAL PA/WISE OPTIONS

The ywca of northcentral pa/Wise Options serves victims of domestic violence, sexual assault and other violent crimes, many of whom are children who have been sexually assaulted. The ywca is committed to advocating for options to help young victims return their lives to some semblance of normalcy. Each year YWCA provides a 'Safe Touch' prevention program to nearly 1000 preschool, elementary and middle school students. Still, the YWCA ends up counseling about 80 children, each year, for sexual assault. Accountability to perpetrators through criminal and civil suits is of great importance to send the right message to our community.

PROOF OF SERVICE

I, Amal Bass, Esquire, hereby certify that I am this day serving two copies of the foregoing Brief as Amici Curiae of The Women's Law Project and the Pennsylvania Coalition Against Rape, et al. in Support of Appellant C.C.H., as Parent and Natural Guardian of T.G., a Minor, and C.C.H., in Her Own Right upon the persons and in the manner indicated below, which service satisfies the requirement of Pa.R.A.P. 121:

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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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

IN THE SUPERIOR COURT OF
PENNSYLVANIA

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., JOHN
SCARUZZI, JOSEPH FABRIZIO AND
MICHAEL IBBETSON,
Appellees

No. 3326 EDA 2005

Appeal from the Judgment entered November 29, 2005
In the Court of Common Pleas of Philadelphia County,
Civil, No. 001054 August Term, 2002

BEFORE: MUSMANNO, KLEIN and TAMILIA, JJ.

MEMORANDUM:

FILED AUGUST 30, 2006

This appeal stems from plaintiffs' allegations that 11-year-old T.G. was gang-raped at a Philadelphia Phillies game by three teenage boys working at a concession stand in Veterans Stadium. The defense was that there was no rape, but instead that T.G. had initiated the contact and voluntarily gave "hand jobs" to the three boys and gave one of them a hickey. There was disputed testimony as to whether the Phillies' security guards were negligent when

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T.G.'s aunt reported the girl missing. The jury obviously believed the defense. The jury found that there was no rape and that the Phillies were not negligent.¹

Plaintiffs now appeal. Despite a Statement of Questions Involved that is twice the maximum limit allowed by rule, a brief that is just shy of the maximum page limit, and even more issues presented to the trial judge in the Pa.R.A.P. 1925(b) statement, we conclude that plaintiffs' claims have no merit.² Therefore, we affirm on the thorough and cogent opinion of the distinguished trial judge, the Honorable Paul P. Panepinto.

1. Did the trial court err in allowing a defense of consent to the claims of rape and sexual assault?

The individual defendants did not claim that there was consensual sexual intercourse, but rather that there was *no* sexual intercourse at all. Two of the boys admitted that they received consensual "hand jobs" and a hickey from T.G., which were, in fact, initiated by T.G. Because rape was charged, the individual defendants were certainly entitled to claim that there was no rape and explain their side of the story. Moreover, T.G. claimed that she suffered mental anguish, so the consensual nature of the acts would be relevant to that issue.

¹ One of the individual defendants, Michael Ibbetson, did not appear at trial, and a default judgment was entered against him. (N.T. Trial, 3/16/05, at 10.) He is not a party to this appeal.

² See Pa.R.A.P. 2116, 2135.

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2. Did the trial court err in failing to charge that in criminal cases T.G. was below the age of consent?

The mere fact that there is an age of consent for criminal statutes does not mean that it automatically applies in civil battery cases. Judge Panepinto appropriately charged the jury on the *civil* tort of battery as well as rape. Plaintiffs cite no civil case holding that there is a civil remedy for every crime.

More importantly, during cross-examination of plaintiffs' psychological expert, plaintiffs' counsel stated, "If the jury determines there is no rape, there is no cause of action. It ends there. . . . And I will tell the jury that a dozen times." (N.T. Trial, 3/7/05, at 103-04.) In fact, the entire theory of plaintiffs' case, from opening statements to closing arguments, was that T.G. was raped by the defendants.

Plaintiffs unsuccessfully tried to change their theory of the case at the eleventh hour when they asked the trial judge to instruct the jury on the additional crimes of indecent assault, aggravated indecent assault, and sexual assault. Judge Panepinto appropriately denied this request. As Judge Panepinto explained in his opinion:

Rather than instruct the jury as requested by Plaintiff, this Court instead instructed the jury as to the definition of a battery and the definition of rape. In viewing the allegations made by Plaintiff, it was this Court's determination that instructing the jurors on the definition of battery and rape would certainly include the allegations that were set forth in both her underlying complaint and her testimony at trial.

At trial, Plaintiff testified that she was both vaginally and anally raped by the Defendants. Certainly, the definition of both battery and rape would include the allegations made by Minor Plaintiff against the respective Defendants.

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(Trial Court Op., 3/10/06, at 21.) We agree. Because plaintiffs proceeded exclusively under a rape theory at trial, any attempt now to claim error for failure to instruct the jury as to other crimes is waived.

3. Did the trial court err in failing to charge on the Phillies' duty under its "Lost People" policy?

Read as a whole, the charge adequately advised the jury that the Phillies had a duty to use the ordinary care a business should use to protect its patrons. The trial judge charged, "Specifically, a business person has a duty to use reasonable care to find out if a customer is being harmed or is likely to be harmed by others on the premises and to warn or protect him or her." (N.T. Trial, 3/17/05, at 48.) It was made clear to the jury through testimony that the Phillies had a "Lost People" policy and it would have been negligent not to take a child to the Fan Accommodations Room if lost. (*Id.*, 3/2/05, at 22-26.) The jury charge was fair and more than adequate.

4. Did the trial court err in denying a directed verdict against the individual defendants?

There was a question about whether any touching was consensual or whether it was welcomed (and initiated) by T.G. As discussed above, although a consensual touching might have violated the Crimes Code due to the victim's age, that does not supply a basis for civil recovery.

In any event, upon review of the record, we can find no place in the notes of testimony where plaintiffs' counsel moved for a directed verdict as to

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individual defendants John Scaruzzi and Joseph Fabrizzio.³ Notably, in their brief, plaintiffs fail to cite the location in the record where such a request was made. Therefore, this claim is waived.

5. Did the trial court err in permitting defense witness Ashley Ritaldato to testify?

Ashley Ritaldato testified that T.G., in the presence of the individual defendants and others, stated that she wanted to "suck their dicks" and also grabbed one boy's crotch area. This testimony supports the defense theory that any sexual contact was consensual and there was no rape. Because Ritaldato was listed on the police report as a Rita's Water Ice employee, she was as accessible to plaintiffs as she was to defendants. There was no error in calling Ritaldato to testify. Even if there was, any error was cured because plaintiffs were permitted to depose Ritaldato before trial.

6. Did the trial court err in precluding evidence of defendant Scaruzzi's juvenile adjudication of delinquency for rape?

The case against defendant Scaruzzi was not tried in adult court but in juvenile court. A juvenile hearing is not a criminal trial, and many of the procedural safeguards, including the right to a jury trial, are not present. The Juvenile Act only provides certain circumstances when an adjudication of delinquency can be used against the juvenile. The only possible exception is if the juvenile puts his character into question. Here, Scaruzzi did not testify but

³ The only motion plaintiffs made at the close of the evidence was a motion for directed verdict and/or default judgment against defendant Ibbetson for his failure to appear at trial. (N.T. Trial, 3/15/06, at 141-45.) As noted in footnote 1, *supra*, that motion was granted. (*Id.*, 3/16/06, at 10.)

was only called as of cross-examination. Therefore, none of the exceptions applies, and the adjudication was properly excluded.

7. Did the trial court err in allowing evidence of how T.G. became separated from her aunt?

To distinguish between whether T.G. was lost and the Phillies failed to help her, whether she sought out a sexual encounter with the teenagers, or whether she was brutally raped, it was significant for the jury to know whether T.G. simply got lost in the stadium or went off looking for adventure. Therefore, evidence relating to *how* she departed from her aunt was relevant to establish exactly what happened as well as T.G.'s state of mind. Because the evidence was relevant, it was properly admitted.

8. Did the trial court err in allowing the Phillies to call six employees as witnesses?

The witnesses were identified in discovery responses and the Phillies' pre-trial memorandum by attachment of game-day assignment sheets. Because T.G. was vague about which (if any) Phillies employees she encountered, it was difficult for the Phillies to list every person whom T.G. might have contacted. Moreover, plaintiffs had an opportunity to question each witness before trial. There was no error and, in any event, no prejudice.

Plaintiffs' eight claims of error are without merit, as are the other 13 claims of error included in plaintiffs' 1925(b) statement, which Judge Panepinto was required to address.

We are reminded of the oft-quoted statement of Judge Ruggiero Aldisert of the United States Court of Appeals for the Third Circuit:

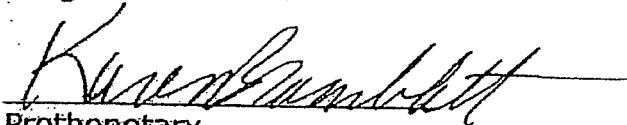
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I have said in open court that when I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.⁴

We agree with the reasoning and analysis of Judge Panepinto's opinion and incorporate it into this memorandum. The parties are directed to attach a copy of that opinion in the event of further proceedings.

Judgment affirmed.

Judgment Entered.



Prothonotary

Date: _____

⁴ Hon. Ruggiero Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility--A View From the Jaundiced Eye of One Appellate Judge*, 11 Capital Univ. L. Rev. 445, 458 (1982); see *United States v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982); *Hughes v. GAF Corp.*, 528 A.2d 173 (Pa. Super. 1987).