MEMORANDUM OF LAW

Date: APRIL 16, 2010
To: RDC
From: MLS
RE: Consent to Battery Involving Criminal Sexual Activity

This memorandum addresses the issue of consent as a defense to a civil action based upon criminalized sexual activity between a minor and adult. I have not had an opportunity to finish researching the Legislative History or additional §796.09 issues that you discussed with me this morning and later this afternoon. The question of whether a plaintiff in a civil action can use the criminal statute to negate consent will depend on the statute's underlying purpose. This particular issue is unsettled in Florida, as it appears to be in other jurisdictions as well, based on the particular language in the specific penal statute at issue.

I. PRIVATE CAUSE OF ACTION

Florida Statutes provide a cause of action for *criminal* prosecution for a) Sexual Battery (§794.011); b) Unlawful Sexual Activity (§794.05); and c) Lewd and Lascivious Offenses (§800.04(4-7)). However, none of these criminal statutes expressly provide for a private cause of action, based upon a violation of these statutes. In contrast, see §796.09, Florida Statutes, expressly provides a private civil cause of action.[1]

With that said, generally speaking, consent will not be held to be a valid defense when it is obtained from an individual that lacks capacity to give consent, such as a

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[1] Faulkner v. Graske, 2008 WL 3832639 7 (S.D.Fla. 2008), relying on federal and Florida law, the Southern District of Florida dismissed the claims with prejudice finding that the claims were based upon violations of statutes that do not establish private rights of action. See also Horowitz v. Plantation General Hosp. Ltd. P'ship, 959 So.2d 176, 182 (Fla.2007)(noting that under Florida law when determining whether a statute confers a private right of action a court must look at the legislative intent and that the primary guide to determining legislative intent is the plain language of the statute).

minor child.[2] Statutes that criminalize sexual activity with minors under certain ages (which vary) unilaterally deprive such individuals of the capacity to consent to such acts--as a matter of criminal law.

The question of whether a plaintiff in a civil action can use the criminal statute to negate a consent defense will depend on the criminal statute's underlying purpose. In my research, I did not find a Florida case law that squarely addresses this issue. Moreover, case law from other jurisdictions evinces a prevailing view that cases concerning "statutory rape" or certain unlawful sexual activity or similar strict liability claims, imposing a strict liability age of consent, preclude a defendant from asserting consent as a defense in the incident civil action. Essentially, the courts do not allow the consent defense in civil actions, in cases arising out of strict liability criminal statutes where a Court determines that a minor child needs protection of such statutes. See, e.g., Angie M. v. Superior Court, 37 Cal. App. 4th 1217 (4th Dist. 1995); Bohrer v. DeHart, 943 P.2d 1220, 1226-27 (Colo. Ct. App. 1996); Wilson v. Tobiassen, 97 Or. App. 527, 777 P.2d 1379 (1989); and Doe by Doe v. Greenville Hosp. System, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994).

Here, Plaintiffs have filed civil actions alleging battery, without citing to specific criminal statutes. We must therefore argue that Florida law does not provide a private cause of action for so-called "sexual battery,"[3] and thus a claim for battery, despite involving conduct of a sexual nature between a minor and adult, as a matter of law, falls within the purview of common law battery and its elements, thus preserving consent as a viable defense. Conceptually, prohibiting a defendant from asserting consent in a civil

[2] Generally, a "minor child" is defined as a child who is under the age of 18 years old.
[3] In contrast, California legislature expressly provides a civil remedy in tort analogous to rape titled sexual battery, codified at Cal.Civ.Code §178.5 (West 1996).

action, a court erroneously is imposing separate and distinct principles of the criminal statute (i.e., creating a private civil cause of action), and without any authority, applying them in a civil action.[4] However, pragmatically speaking, it appears from my sample research, that courts are willing to prevent defendants from asserting a consent defense in the civil arena, cloaked under a "public policy" argument from the state Legislature to protect minors from sexual exploitation.

To combat such an argument, I think we also need to inform the court that "deterrence and punishment for illegal acts should be left to the criminal law. The public's interest are sufficiently protected by the imposition of criminal sanctions . . . . Thus, civil actions for damages should be left to proceed under ordinary tort principles." Doe v. Mama's Taori's Premium Pizza, LLC, 2001 WL 327906 *21, 25-6 (Tenn. Ct. App. 2001).

II. IF COURT LOOKS TO UNDERLYING CRIMINAL STATUTE

Assuming the Court rules against our argument, and looks to the underlying criminal statute to decide whether the minor had the capacity to consent to the sexual activity, the following hypotheticals set forth how the Court might rule upon the consent defense issue in a civil context.

Scenario 1: A 50-year old male had a 14-year old female over his home, and he touched the breasts and/or buttocks of 14-year old *over her clothing* with no penetration. In this instance, consent to this touching would be a viable defense under 1) common

[4]See Mantooth v. Richards, 557 So.2d 646, 646 (Fla. 4th DCA 1990) (holding that a violation of a criminal statute did not afford a civil remedy); see also Gunn v. Robles, 100 Fla. 816, 130 So. 463, 463 (1930) ("Where a particular remedy is conferred by statute, it can be invoked only to the extent and in the manner prescribed."); cf. 48A Fla. Jur.2d Statutes § 227 (2000) ("In general, a statute that does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability.").

law battery and 2) if §794.011: "Sexual Battery" would be applied; however, because she was 14 years old, consent would not be an available defense under the age consent restrictions in §800.04 if the Court would apply the criminal standard.

Scenario 2: A 50-year old man has a 14-year old female over to his house, she massages him and he penetrates her vagina by inserting a finger and/or other object. In this instance, consent to this touching would be a viable defense under 1) common law battery and 2) §794.011; however, because she was 14 years old, consent would not be an available defense under the age of consent restrictions set forth in §794.05 or §800.04 if the Court would apply the criminal standard.

Scenario 3: A 50-year old man has a 14-year old female over to his home, where she massages him, but he does not touch her. Instead, he masturbates in her presence. Because there was no unlawful touching, there should be no battery claim; however, under a claim for Intentional Infliction of Emotional Distress, Plaintiffs' will certainly try to get the Court to instruct the jury using §800.04, where consent would not be a defense.

III. JURY INSTRUCTIONS

Florida Standard Jury Instruction in Civil Cases for Battery (There is no "Sexual Battery" instruction):

[Plaintiff] also makes a claim for battery against [Defendants].

A battery is an intentional infliction of harmful or offensive contact on the person of another. In order to find [Defendant] liable for a battery, you must find that Plaintiff has shown by the greater of the evidence that:

(1) [Defendant] actually touched [Plaintiff];
(2) the contact was harmful or offensive to [Plaintiff]; and
(3) [Defendant] intended such contact.

If you find, however, that [Plaintiff] gave consent to [Defendant] for the alleged harmful or offensive contact, your verdict on [Plaintiff's] claim for battery should be for the Defendant.

"Consent" is defined as willingness in fact for conduct to occur, and it may be manifested by action or inaction and need not be communicated to the actor. If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact."

See Medina v. United Christian Evangelistic Association, et al, Case No. 08-22111-CIV-COOKE/BANDSTRA (Jan. 27, 2010), applying Florida law to a battery involving sexual activity.

My research has not located any cases where a jury was instructed any differently on a battery case involving a sexual battery case between a minor and adult. I will look at other standard jury instructions in other states to see if special instructions exist; and additionally, look for cases where money was paid by the adult to the minor for sexual activity.

Bob, per our discussion, over the weekend, I will thoroughly research the Legislative Intent/History of the specific criminal statues addressed in this memorandum, which should shed more light on how a Florida court would address the issue. More specifically, it may explain the underlying reasoning for the Legislature's use of different ages of consent among the 3 statutes, §794.011 (Consent is a valid defense if minor at least 12 years old), and §794.05 (Consent is not a valid defense for a minor that is 16 and 17 years old unless disabilities of age were removed under 743, Fla. Stat.), §800.04 (Consent valid defense if minor is at least 16 years old).