IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

v.

Case No. 86,061
District Court of Appeal
First District, No. 94-3040

SALLY ROE, et al.,

Respondents.

_____/

PETITIONER'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

Respondents Sally and Ann Roe sued the Department of Education (DOE), Leon County School Board and Superintendent Richard Merrick, school principals Nancy E. Russell and Sam Alderman, and former teacher Billy R. Campbell, alleging that Campbell was a teacher at Ruediger Elementary School who sexually molested Sally Roe during 1988-89 and 1989-90, when she was in fourth and fifth grades, causing permanent physical and psychological injuries.

The Amended Complaint alleged as follows as to DOE:

> 24. At all material times, the DEPARTMENT was the agency of the state of Florida that issued and renewed certificates of school teachers. The DEPARTMENT was required to determine whether an applicant for issuance or renewal of a teacher's certificate was of good moral character.
>
> 25. The DEPARTMENT and the COUNTY acted jointly in determining the qualifications and moral fitness of applicants for teaching positions. The DEPARTMENT undertook to investigate the moral fitness of applicants for issuance or renewal of licenses, and when considering hiring an applicant for a teaching position the COUNTY relied in part upon the most recent determination of moral fitness by the DEPARTMENT.
>
> 26. The COUNTY relied in part upon the DEPARTMENT to check the criminal record of applicants, to investigate reports of misconduct, and to determine whether applicants were morally fit to serve as teachers. The DEPARTMENT undertook to perform these tasks, knowing that county school boards, including the LEON COUNTY SCHOOL BOARD, would rely in part upon the DEPARTMENT in these respects.
>
> 27. The DEPARTMENT learned, at least by 1985, of misconduct by defendant CAMPBELL. The DEPARTMENT determined that CAMPBELL should not be allowed to teach and that his

> teaching certificate should not be renewed at least pending further investigation.
>
> 28. Nonetheless, in 1986 the DEPARTMENT negligently renewed CAMPBELL's teaching certificate. The DEPARTMENT did so in violation of its own determination that this should not occur absent further investigation. The DEPARTMENT negligently failed properly to investigate, learn or consider the fact that Campbell had a criminal record, had engaged in acts of sexual abuse of minor children during prior employment, and was otherwise morally unfit to hold a teaching certificate or to be employed at any school.
>
> 29. In 1986, the COUNTY, acting cooperatively with the DEPARTMENT, hired CAMPBELL based in part on the negligent renewal of CAMPBELL's teaching certificate earlier that same year by the DEPARTMENT. The COUNTY continued CAMPBELL's employment through the occurrences of sexual abuse at issue in this case based in part upon the negligence of the DEPARTMENT in renewing CAMPBELL's certificate.

DOE moved to dismiss the Amended Complaint on grounds that Roes' claims were barred by sovereign immunity because DOE did not owe a common-law or statutory duty of care to the plaintiffs as to the acts alleged to have been negligently performed. The trial court denied the motion.

DOE filed a petition for writ of common-law certiorari in the District Court of Appeal. The district court treated DOE's petition as an interlocutory appeal on authority of **Tucker v. Resha**, 648 So.2d 1187 (Fla. 1995), stating that "[w]e consider this holding applicable to any denial of a claim of absolute or qualified immunity, and not simply those raised in the context of a motion for summary judgment, so long as the issue is a matter of law, as in the case at bar." **Department of Education v. Roe,**

et al., 20 Fla.L.Weekly D686b, D687 (Fla. 1st DCA March 14, 1995). (Ex. A)

The district court concluded that the Roes' had failed to allege any duty of care owed to them by DOE with respect to the alleged negligently performed licensing and investigatory acts, and reversed the trial court's order, directing it to dismiss the Amended Complaint with prejudice.

On rehearing, the district court withdrew its earlier decision and in a brief substituted decision held that the order denying DOE's immunity claim was not subject to interlocutory review because "[w]e are now of the view that we should not construe **Tucker** as deciding any issue beyond that which was specifically asked in the certified question in that case." **Department of Education v. Roe, et al.**, 20 Fla.L.Weekly D1167, D1167-78 (Fla. 1st DCA May 12, 1995). (Ex. B)

DOE filed motions for rehearing, rehearing en banc and for certification. The trial court on June 16, 1995 denied the motions.

DOE on July 14, 1995 timely filed a Notice to Invoke this court's discretionary jurisdiction on grounds that the district court's May 12, 1995 decision expressly and directly conflicts with this court's decision in **Tucker v. Resha**.

SUMMARY OF ARGUMENT

The decision of the district court in **Department of Education v. Roe, et al.**, **on rehearing**, declining to permit interlocutory review of the order rejecting DOE's sovereign immunity claim, where the order turns on an issue of law, constitutes an erroneous reading of this court's decision in **Tucker v. Resha**. The question of whether an order rejecting a sovereign immunity claim is subject to interlocutory review is of exceptional importance.

ARGUMENT

THE DISTRICT COURT'S DECISION IN DEPARTMENT OF EDUCATION v. ROE, ET AL., 20 Fla.L.Weekly D1167 (Fla. 1st DCA May 14, 1995) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN TUCKER v. RESHA, 648 So. 2d. 1187 (Fla. 1994) ON THE SAME QUESTION OF LAW.

In Tucker v. Resha, this court reviewed a certified question asking whether a qualified immunity claim asserted in a federal civil rights action is entitled to interlocutory review. The court answered the question in the affirmative on the following rationale:

> Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [cite omitted] "The central purpose of affording public official qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." [cites omitted]
>
> Consistent with this purpose, the qualified immunity of public officials involves *"immunity from suit* rather than a mere defense to liability." [cite omitted] The entitlement "is effectively lost if a case is erroneously permitted to go to trial." [cite omitted] Furthermore, an order denying qualified immunity "is effectively unreviewable on appeal from a final judgment" [cite omitted] as the public official cannot be "re-immunized" if erroneously required to stand trial or face the other burdens of litigation.
>
> We also note that the defendant official is not the only party who suffers "consequences" from erroneously lost immunity. As the Supreme Court explained in Harlow, society as a whole also pays the "social costs" of "the expenses of litigation, the diversion of

> official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" [cite omitted] Thus, if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Id., 648 So.2d at 1189-90.

The district court in Department of Education v. Roe, et al., 20 Fla.L.Weekly D686b (Fla. 1st DCA March 14, 1995), held that the order rejecting DOE's immunity claim was entitled to interlocutory review on authority of this court's decision in Tucker. The district court opined that Tucker was "applicable to any denial of a claim of absolute or qualified immunity, and not simply those raised in the context of a motion for summary judgment, so long as the issue is a matter of law, as in the case at bar. Id., 20 Fla.L.Weekly at D687.

On rehearing, the district court receded from its earlier decision as to DOE's entitlement to interlocuroty review, stating that "[w]e should not construe Tucker as deciding any issue beyond that which was specifically asked in the certified question in that case." Department of Education v. Roe, et al., 20 Fla.L.Weekly at D1167-68.

Although the certified question in Tucker involved the right to interlocutory review of an order denying a claim of qualified immunity raised in a motion for summary judgment, this court expressly based its holding on a recognition that the government

immunity in that case was intended to shield public officials from suit rather than act as a mere defense to liability, and that a public official cannot be reimmunized if erroneously required to stand trial or face the other burdens of litigation.

Sovereign immunity is indistinguishable from qualified immunity insofar as it is intended to shield the government defendant from the costs and burdens of litigation. The social costs attendant to defending government agencies and officials in state tort claims are indistinguishable from those involved in defending federal civil rights claims.

This court's jurisdiction to review decisions of the district courts under Rule 9.030(2)(A)(iv), Florida Rules of Appellate Procedure and Art. V, §3(b)(3), Fla. Const., is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. **Mancini v. State**, 312 So.2d 732 (Fla. 1975). Conflict jurisdiction may be predicated upon an erroneous reading of precedent. **See Arab Termite and Pest Control v. Jenkins**, 409 So.2d 1039,1041 (Fla. 1982). The discretionary power of this court is concerned with decisions as precedent rather than adjudications of rights of particular litigants. **Seaboard Air Line R.R. Co. v. Branham**, 104 So.2d 356 (Fla. 1958).

The district court's refusal in this case to recognize **Tucker** as authorizing interlocutory review of the order rejecting DOE's immunity claim constitutes an erroneous reading of

controlling precedent. Although Tucker involved a qualified immunity claim asserted by motion for summary judgment and this case involves a sovereign immunity claim asserted by motion to dismiss, these factual distinctions have no significance to the issue before the court. The operative facts in Tucker and this case are the same. Both cases involve claims of government immunity asserted prior to trial. Both involve orders which rejected immunity and turned exclusively on issues of law.

Tucker confined the right to interlocutory review of orders rejecting qualified immunity claims to those which turn on an issue of law. The issue of law in Tucker was whether the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. The issue of law in this case is whether DOE owed a common-law or statutory duty of care to Roes as to the acts the agency was alleged to have negligently performed.

The district court on rehearing did not expressly recede from that portion of its earlier decision holding that DOE was immune from tort liability for Roes' claims. That Roes' claims against DOE have been held to be barred even though DOE cannot obtain review of its immunity claim prior to trial should weigh in favor of this court exercising its discretionary jurisdiction.

The question of whether state agencies and officials may immediately appeal an order rejecting a sovereign immunity claim, where the order turns on an issue of law, is of exceptional importance. The answer to this question will affect many cases. An affirmative answer will preclude the useless and wasteful

expenditure of state resources in those cases in which the trial court has erroneously rejected an immunity claim.

For the above reasons, DOE requests this court to exercise its discretionary jurisdiction to review the decision of the district court.

CONCLUSION

Because the district court's decision in **Department of Education v. Roe, et al.**, **on rehearing**, expressly and directly conflicts with this court's decision in **Tucker v. Resha** on the question of whether an order rejecting a claim of government immunity is subject to interlocutory review, where the order turns on an issue of law, DOE requests this court to exercise its discretionary jurisdiction to review the decision of the district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by U.S. Mail to the **Honorable L. Ralph Smith, Jr.**, Circuit Court Judge, Room 365J, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301; **Thomas L. Powell**, Esquire, P.O. Box 1674, Tallahassee, FL 32302-1674; **Gordon D. Cherr**, Esquire, P.O. Drawer 229, Tallahassee, FL 32302; **C. Graham Carothers**, Esquire, P.O. Box 391, Tallahassee, FL 32303, **Jeannette Andrews**, Esquire, 111 North Calhoun Street, P.O. Box 1739, Tallahassee, FL 32302; **John C. Cooper**, Esquire, 3303 Thomasville Road, Suite 301, P.O. Box 14447, Tallahassee, FL 32317; **Billy R. Campbell**, DOC#578085, Liberty Correctional Institution, P.O. Box 999, Bristol, FL 32321 this 24th day of July, 1995.

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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

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SALLY ROE, et al.,

Respondents.

_____/

APPENDIX

A. Department of Education v. Roe, et al., 20 Fla.L.Weekly D686 (Fla. 1st DCA March 14, 1995)

B. Department of Education v. Roe, et al., 20 Fla.L.Weekly D1167 (Fla. May 14, 1995)

(i) Except as authorized by this chapter, it is unlawful for any person to sell, purchase, manufacture, or deliver, . . . a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, . . . Any person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree, . . . and shall not be eligible for parole or release under the Control Release Authority pursuant to s. 947.146 or statutory gain-time under s. 944.275.

* * *

Criminal law—Attempted manslaughter—Jury instructions—Instruction which permitted jury to convict defendant of nonexistent crime of attempted manslaughter by culpable negligence constituted fundamental error which was not waived by defendant's failure to object at trial—Defendant entitled to new trial on attempted manslaughter charge

MICHAEL REID, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-1223. Opinion filed May 12, 1995. An appeal from the Circuit Court for Duval County. David C. Wiggins, Judge. Counsel: T. Francis Shoemaker of Harris, Guidi, Rosner, Dunlap & Mordecai, Jacksonville, for Appellant. Robert A. Butterworth, Attorney General, Richard Parker, Assistant Attorney General, Tallahassee, for Appellee.

(ERVIN, J.) Michael Reid appeals his convictions for attempted manslaughter and armed burglary and his departure sentence. He claims the trial court committed fundamental error by giving a jury instruction that permitted him to be convicted of the nonexistent crime of attempted manslaughter by culpable negligence; that the jury verdicts are inconsistent; and that the trial court erred in permitting his prior juvenile adjudication to be used as a basis for exceeding the sentencing guidelines. We reverse Reid's conviction for attempted manslaughter and remand for new trial, and affirm his conviction for armed burglary, but reverse his sentence and remand for resentencing.

A defendant may be convicted of attempted manslaughter if there is proof that the defendant had the requisite intent to commit an unlawful act; however, there is no crime of attempted manslaughter by culpable negligence. *Taylor v. State*, 444 So. 2d 931, 934 (Fla. 1983). The trial court below erred by giving the following instruction on attempted manslaughter:

> Now another lesser included would be attempted manslaughter. Before you can find the defendant guilty of attempted manslaughter, the state must prove the following element beyond a reasonable doubt: *That the attempted death was caused by the culpable negligence of Michael Reid*[.]

The state argues that Reid did not object at trial, thus he did not preserve the issue for appeal, citing *Murray v. State*, 491 So. 2d 1120 (Fla. 1986). On the contrary, we consider the charge constitutes fundamental error. *Arline v. State*, 550 So. 2d 1180 (Fla. 1st DCA 1989).

The standard jury instruction on manslaughter at the time of trial[1] provided that manslaughter can be proved by showing that the victim was killed by the intentional act of the defendant, intentional procurement by the defendant, or culpable negligence of the defendant. If the court instructs on attempted manslaughter, any reference to culpable negligence must be omitted. *Taylor*. In *Murray*, although the trial court erred in including culpable negligence in its charge, the court did instruct on act or procurement, and because there was sufficient evidence to support a verdict under one of such alternatives, the court affirmed Murray's conviction.

In contrast, in *Arline*, the court gave the following instruction:

> For the purpose of this case manslaughter is defined as the unlawful killing of a human being by culpable negligence of the defendant.

Applying *Taylor*, this court held that giving an instruction on the nonexistent criminal offense of attempted manslaughter by culpable negligence constituted fundamental error requiring a new trial. In deciding, the court cited *Brown v. State*, [illegible] DCA 1989), wherein we concluded that it was erroneous for the defendant to be convicted of the crime of attempted solicitation. The error in the case at bar was fundamental—as it was in *Brown* and *Arline*—because it did not simply involve an erroneous instruction that *may* have misled the jury, as in *Murray*, but, in fact, it permitted the defendant's conviction of a nonexistent crime. The failure to object to an instruction which permits the jury to find the defendant guilty of a nonexistent crime does not constitute waiver of such fundamental defect. *State v. Sykes*, 434 So. 2d 325 (Fla. 1983). The defendant therefore must be allowed a new trial for the homicide.

We affirm appellant's conviction for armed robbery. *Gonzalez v. State*, 449 So. 2d 882 (Fla. 3d DCA), *review denied*, 458 So. 2d 274 (Fla. 1984). Because, however, our reversal of his conviction for attempted manslaughter will affect his score under the sentencing guidelines, we reverse his sentence for armed burglary and remand for resentencing. Accordingly, we do not reach his third issue involving the alleged sentencing error.

AFFIRMED IN PART, REVERSED IN PART and REMANDED for further proceedings consistent with this opinion. (MINER, J. CONCURS. BENTON, J., CONCURS IN RESULT.)

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[1]The jury instructions as amended May 5, 1994, after the trial in this case, now provide a specific instruction on "Attempted Voluntary Manslaughter," which includes "Notes to Judge" explicitly stating that there is no crime of attempted involuntary manslaughter by culpable negligence, referring to *Taylor*. Fla. Std. Jury Instr. 58K-1.

* * *

Appeals—Certiorari—Denial of claim of sovereign immunity regarding a cause of action under state law is not reviewable as an interlocutory appeal—Denial of motion to dismiss does not ordinarily qualify for certiorari review—Petition denied

DEPARTMENT OF EDUCATION, Petitioner, v. SALLY ROE, a minor child, by and through her mother and next friend, ANN ROE, and ANN ROE, individually, Respondents. 1st District. Case No. 94-3040. Opinion filed May 12, 1995. Petition for Writ of Certiorari, Original Jurisdiction. Counsel: Robert A. Butterworth, Attorney General, Laura Rush, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Petitioner. Thomas L. Powell of Douglass, Powell & Rudolph, Tallahassee, for Respondents Sally Roe and Ann Roe; Gordon D. Cherr and Patricia Hart Malono of McConnaughhay, Roland, Maida & Cherr, P.A., Tallahassee for Respondent Leon County School Board and Superintendent; John C. Cooper for Respondent Sam Alderman; Jeannette M. Andrews for Respondent Nancy E. Russell.

ON MOTIONS FOR REHEARING, MOTIONS FOR REHEARING EN BANC, AND MOTION FOR CERTIFICATION OF CONFLICT

[Substituted Opinion]

[Original Opinion at 20 Fla. L. Weekly D686b]

(ERVIN, J.) Respondents seek rehearing, rehearing en banc, certification of conflict, and clarification of our opinion issued March 14, 1995, which reversed the trial court's denial of petitioner's motion to dismiss Roes' amended complaint, with prejudice, because Roe failed to allege a duty that the Department of Education owed to her. *Department of Education v. Roe*, 20 Fla. L. Weekly D686 (Fla. 1st DCA Mar. 14, 1995). We grant respondents' motions for rehearing, withdraw our previous opinion, and substitute the following revised opinion. Because of this disposition, we deny respondents' motions for rehearing en banc and for certification of conflict.

The Department of Education filed a petition for writ of common law certiorari, seeking review of the trial court's order denying its motion to dismiss Sally and Ann Roe's amended complaint, relying in part upon *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), as supporting its contention that this court had jurisdiction. We agreed, and construed the petition as an appeal from an interlocutory order, concluding that the principle stated in *Tucker*, that denial of a claim of qualified immunity in response to a cause of action under 42 U.S.C. § 1983 was an appealable nonfinal order, applied as well to denial of a claim of sovereign immunity regarding a cause of action under state law. We are

EXHIBIT A

now of the view that we should not construe *Tucker* as deciding any issue beyond that which was specifically asked in the certified question in that case. Therefore, we decline to construe the petition for certiorari relief as an interlocutory appeal.

Moreover, denial of a motion to dismiss does not ordinarily qualify for certiorari review. *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987); *Fieselman v. State*, 566 So. 2d 768 (Fla. 1990).

CERTIORARI DENIED. (JOANOS and WOLF, JJ., CONCUR.)

* * *

Child support—Trial court erred in prospectively modifying father's child support obligation in contempt proceedings where neither petition for contempt nor notice of hearing mentioned modification—Trial court cannot circumvent required pleadings by ordering modification on its own motion unless proper notice is given to parties—Arrearages—Absent extraordinary circumstances such as waiver, laches, estoppel, or reprehensible conduct on part of custodial parent, trial court cannot cancel or retrospectively reduce amount of past due child support installments owed—Trial court's order requiring State of Florida to retain the first $50.00 in child support paid by father is in direct conflict with provisions of federal law relating to Aid to Families with Dependent Children which require state agency to disregard the first $50 of child support payments when determining applicable benefit level

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and GENEATH WILLIAMS, Appellants, v. LARRY BURNS, Appellee. 1st District. Case No. 94-1729. Opinion filed May 12, 1995. An appeal from the Circuit Court for Bay County, Russell Cole, Judge. Counsel: Joseph R. Boyd and William H. Branch of Boyd & Branch, P.A.; Chriss Walker of Department of Revenue, Tallahassee, for Appellants. No appearance, for Appellee.

(VAN NORTWICK, J.) The State of Florida, Department of Health and Rehabilitative Services (HRS), appearing on behalf of Geneath Williams, appeals an order that modified appellee's child support obligations; reduced the amount of child support arrearages; and ordered the state to retain the first $50 of child support paid by appellee, rather than to pay the $50 amount to Williams as provided in 42 U.S.C. § 602(a)(8)(A)(vi). We reverse.

In 1986, appellee, Larry Burns, was adjudicated the father of two boys born to Geneath Williams and was ordered to pay $150 per month for their support. On March 28, 1994, HRS and Williams filed a contempt action alleging that Burns was in arrears on his child support obligations. At the time, Williams had custody of the two boys and a third child, who is unrelated to Burns.

Initially, Williams received Aid to Families with Dependent Children (AFDC) benefits of $241 per month for her third child. However, in January 1994, she began receiving AFDC benefits of $303 per month for one of the parties' sons and the third child,[1] a $62 increase.

In the order appealed, the trial court reduced the amount of Burns' child support arrearages owed for three months from $450 to $186, which would be the equivalent of three payments of $62 per month. In addition, the court reduced the amount of Burns' prospective child support obligation from $150 to $62 per month. Finally, the trial court ordered the State of Florida not to pay the first $50 of child support required to be paid to Williams by 42 U.S.C. § 602(a)(8)(A)(vi). The court ordered this $50 payment, commonly known as the "disregard check," to be retained by the State of Florida.

Turning first to the trial court's prospective modification of Burns' child support obligation, we note that the petition for contempt and the notice of hearing therefor do not contain any mention of modification proceedings or notice that the issue of modification would be considered. Modification of child support must be specifically requested with notice to the adverse party and may not ensue upon a motion for contempt. *Morgan v. Morgan*, 429 So. 2d 432 (Fla. 1st DCA 1983). A trial court cannot circumvent the required pleadings by ordering child support modification on its own motion unless proper notice is given so that the opposing party has a fair opportunity to oppose the motion. *Jackson v. Powell*, 546 So. 2d 1145, 1146 (Fla. 3d DCA 1989). Thus, the trial court was without authority to reduce Burns' child support obligations from $150 per month to $62 per month and the order modifying child support was error.

Turning next to the trial court's order reducing the amount of past-due child support arrearages from $450 to $186, we observe that the right to arrearages in child support is a vested right which inures to the benefit of the child. Absent extraordinary or compelling circumstances such as waiver, laches, estoppel, or reprehensible conduct on the part of the custodial parent, a trial court cannot cancel or retrospectively reduce the amount of past due installments owed. *Ashe v. Ashe*, 509 So. 2d 1146, 1148 (Fla. 1st DCA 1987). The record does not indicate the presence of any of these circumstances, and therefore the trial court's order reducing the arrearages was error.

Finally, we conclude that the trial court erred in ordering that the state ". . . not pay the first $50.00 of child support paid by the Defendant to Ms. Williams [but] [t]he $50.00 payment . . . shall be retained by the State of Florida." Title IV of the Social Security Act (42 U.S.C. § 601, et seq.) governs the entitlement of families to AFDC benefits. Since Florida has previously elected to participate in the AFDC program, it is required to operate its program in accordance with the provisions of Title IV. *Zeigler v. Department of Health and Rehabilitative Services*, 601 So. 2d 1280 (Fla. 1st DCA 1992); *Ealey v. Holt*, 523 So. 2d 173 (Fla. 1st DCA 1988). Under Title IV, to receive AFDC benefits, Ms. Williams must assign the right to receive child support payments to the state. The state collects child support monies and offsets them against amounts paid out in AFDC benefits. As a result of a 1984 amendment to Title IV, families receiving AFDC benefits were required to include in the filing unit any child for whom support payments were being received, which had the effect of reducing the income of many families. To mitigate somewhat this impact of the change, Title IV was amended to provide that the participating state agency, HRS in Florida, ". . . *shall* disregard the first $50 of any child support payments for such month received in that month," 42 U.S.C. § 602(a)(8)(A)(vi), thereby enabling the AFDC family to receive that $50 payment of child support. The legislative intent of this $50 disregard provision was recognized by the United States Supreme Court in *Bowen v. Gilliard*, 483 U.S. 587, 594, 107 S. Ct. 3008, 3013-14, 97 L. Ed. 2d 485 (1987), as follows:

> The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level. See 42 U.S.C. §§ 602(a)(8)(A)(vi), 657(b)(1) (1982 ed., Supp. III). Thus, the net effect of the 1984 amendments for a family . . . would include three changes: (1) the addition of the child receiving support would enlarge the filing unit and entitle the family to a somewhat larger benefit; (2) child support would be treated as family income and would be assigned to the State, thereby reducing the AFDC benefits by that amount; and (3) the reduction would be offset by $50 if that amount was collected from the absent parent. In sum, if the assigned support exceeded $50 [illegible] the difference in the benefit level caused by adding the child children receiving support, the family would suffer; if less than $50 and the difference in the benefit level was collected as support, it would not.

(Footnote omitted).

The trial court's order requiring the State of Florida to retain the $50 disregard amount, rather than pay this amount to Williams, is in direct conflict with the provisions of 42 U.S.C. § 602(a)(8)(A)(vi) and the intent of Congress in enacting that statute.

the assistant principal, and the victim herself conceded that appellant's opponent could have struck the blow. In response to appellant's motion for judgment of acquittal, the state successfully argued that appellant's intent to strike his opponent could be transferred to the assistant principal. Accepting this argument, the trial court found the appellant guilty of attempted battery upon a school employee.

We agree with the appellant that the doctrine of transferred intent will not sustain the finding of guilt. As we held in *Mordica v. State*, 618 So. 2d 301 (Fla. 1st DCA 1993), the doctrine only operates to transfer the defendant's intent as to the intended victim to the unintended victim. Thus, only the appellant's intent to strike his opponent—a student—could be transferred, and there could be no intent to strike a school employee.

Concerning the affray,[1] we conclude that the evidence was sufficient to sustain the finding of guilt and the adjudication of delinquency. Florida has adopted the common law definition of "affray," which proscribes "the fighting of two or more persons in a public place to the terror of the people." *Carnley v. State*, 88 Fla. 281, 102 So. 333 (1924); *see O.A. v. State*, 312 So. 2d 202 (Fla. 2d DCA 1975). The appellant has argued that the fight was not in a public place, having occurred at a high school that was not open to the public, and further, that the fight was not "to the terror of the people."

Although Florida authority is nonexistent, we are instructed by the experiences of North Carolina and Alabama, which states have adopted the identical common law definition of affray. The requirement that the fight occur in "a public place" has not been given strict or literal construction in the common law. 12 Am.Jur.2d *Breach of Peace* §20 (1964). Thus, a fight in a fenced private lot could support conviction for an affray where the fight was visible from a public street. *See Carwile v. State*, 35 Ala. [illegible] (1860). It has also been held that the presence of seven persons in addition to the combatants will make a place "public" for purposes of an affray. *State v. Fritz*, 133 N.C. 725, 45 S.E. 957 (1903). In the instant case, the fact that the fight occurred on a campus not open to the public is less significant than the fact that it was witnessed by approximately 100 onlookers. *See In re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (N.C. Ct. App. 1977) (though vacated on double jeopardy grounds, a student was convicted of affray for her part in a fight on a school bus). As for "terror," it has been held that the fight need not create actual terror to constitute an affray, but such may be presumed from fighting in a public place. *Carwile, supra*. This is consistent with the common law notion of an affray as an attack upon the public order and sense of security which could lead to actual violence. *See State v. Huntley*, 25 N.C. 418 (1843). By all accounts, appellant's fight created a considerable disruption sufficient to constitute an affray.

We therefore affirm the adjudication of delinquency on the basis of affray, and reverse insofar as the adjudication rested on the offense of attempted battery upon a school employee.

AFFIRMED in part, REVERSED in part and REMANDED. (ERVIN, MINER and WOLF, JJ., CONCUR.)

[1]Section 870.01(1), Florida Statutes (1993), makes an affray a misdemeanor of the first degree.

* * *

Jurisdiction—Circuit court erred in exercising subject matter jurisdiction over action to enjoin Department of Transportation from awarding road construction contracts during pendency of administrative proceedings initiated by plaintiff to protest bid proceedings on basis that company that was awarded contract was not the lowest responsible bidder—Plaintiff had adequate remedy available

DEPARTMENT OF TRANSPORTATION, Appellant, v. ANDERSON COLUMBIA COMPANY, INC., Appellee. 1st District. Case Nos. 94-2997, 94-3043, Consolidated. Opinion filed March 14, 1995. Petitions from the Circuit Court for Columbia County, E. Vernon Douglas, Judge. Petitions for Writ of Prohibition - Original Jurisdiction. Counsel: Thornton J. Williams, General Counsel, and Marianne A. Trussell, Assistant General Counsel, Department of Transportation, Tallahassee, for Appellant. J. Victor Barrios and Brant Hargrove of Beck, Spalla & Barrios, P.A., Tallahassee, for Appellee.

(PER CURIAM.) These consolidated interlocutory appeals and petitions for writs of prohibition challenge the jurisdiction of the circuit court to enter orders enjoining the Department of Transportation from awarding road construction contracts to White Construction Company during the pendency of administrative proceedings initiated by Anderson Columbia to protest the bid proceedings on the basis that White was not the lowest *responsible* bidder. We agree with the Department's position that the circuit court erred in exercising subject-matter jurisdiction over the cause, as Anderson had an adequate administrative remedy available to it under chapter 120. *See State ex rel. Department of General Services v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977).[1] Accordingly, we vacate the orders granting injunctive relief and grant the petitions for writs of prohibition. (ZEHMER, C.J., DAVIS, J., and WENTWORTH, SENIOR JUDGE, CONCUR.)

[1]We have considered the supplemental authority filed by Anderson but find the cases to be unpersuasive or inapposite. Anderson presently has pending before this court three consolidated appeals challenging the Department's actions concerning its bid protests.

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Torts—Negligence—Action against Department of Education and others arising out of schoolteacher's sexual molestation of student—Denial of claim of absolute or qualified immunity is appealable non-final order whether denial occurs in context of summary judgment or motion to dismiss, as long as order turns on issue of law—DOE had no common law duty to use reasonable care in hiring and retaining the teacher because DOE has no authority with regard to hiring and retaining teachers—Statute setting forth procedure for dealing with all manner of complaints against teachers exists for benefit of public rather than a particular class of persons, and therefore statute did not provide cause of action for plaintiffs against DOE under the facts alleged—Statute pertaining to issuance of teacher certificates and recertifications does not establish that DOE owes a private duty to any student who is harmed by a teacher—Error to deny DOE's motion to dismiss

DEPARTMENT OF EDUCATION, Appellant, v. SALLY ROE, a minor child, by and through her mother and next friend, ANN ROE, and ANN ROE, individually, Appellees. 1st District. Case No. 94-3040. Opinion filed March 14, 1995. An appeal from the Circuit Court for Leon County, L. Ralph Smith, Jr., Judge. Counsel: Robert A. Butterworth, Attorney General, Laura Rush, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Appellant. Thomas L. Powell of Douglass, Powell & Rudolph, Tallahassee, for Appellees Sally Roe and Ann Roe; Gordon D. Cherr and Patricia Hart Malono of McConnaughhay, Roland, Maida & Cherr, P.A., Tallahassee, for Appellee Leon County School Board and Superintendent; John C. Cooper for Appellee Sam Alderman; Jeannette M. Andrews for Appellee Nancy E. Russell.

(ERVIN, J.) The Department of Education (DOE) filed a petition for writ of certiorari, seeking review of the trial court's order denying its motion to dismiss the amended complaint Sally and Ann Roe filed against it. We treat the petition as an appeal from an interlocutory order for the reasons stated below, and reverse, because the Roes failed to allege a duty owed to them by DOE.

Sally Roe, a student, and her mother, Ann Roe, sued DOE, the Leon County School Board, former teacher Billy Campbell and others, alleging that Campbell was a teacher at Ruediger Elementary School who sexually molested Sally Roe during 1988-89 and 1989-90, when she was in the fourth and fifth grades, causing permanent physical and psychological injuries. In Count II against DOE, the Roes alleged that DOE had learned by 1985 of misconduct on the part of Campbell, and determined that he should not be permitted to teach and that his teaching certificate should not be renewed, "at least pending further investigation." Nevertheless, DOE negligently renewed Campbell's

certificate in 1986, whereupon the Leon County School Board hired him to teach at Ruediger.

DOE filed a motion to dismiss the amended complaint, contending that it was barred by the doctrine of sovereign immunity and that DOE owed no duty of care to the plaintiffs. It claimed that recertification of a teacher's certificate is a licensing function that does not create a duty to specific persons under the common law. The court denied the motion.

Before reaching the merits, we first construe DOE's petition for writ of certiorari as an interlocutory appeal. *See Tucker v. Resha*, 19 Fla. L. Weekly S570 (Fla. Nov. 10, 1994). In *Tucker*, this court held that an order denying a motion for summary judgment based upon a claim of qualified immunity is an appealable nonfinal order, to the extent that the order turns on an issue of law.[1] We consider this holding applicable to any denial of a claim of absolute or qualified immunity, and not simply those raised in the context of a motion for summary judgment, so long as the issue is a matter of law, as in the case at bar.

Turning to the merits, the Roes contend that DOE owed them a common-law duty to use reasonable care in hiring and retaining Campbell. Under the common law a plaintiff may recover damages for injuries caused by the negligence of an *employer* who knowingly keeps a dangerous employee on the premises. *Mallory v. O'Neil*, 69 So. 2d 313 (Fla. 1954); *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. 1st DCA 1991), *review denied*, 595 So. 2d 558 (Fla. 1992). DOE was not, however, Campbell's employer. The school board is statutorily authorized to hire teachers,[2] whereas DOE is charged merely with the authority to issue teacher certificates.[3] Therefore, the Roes failed to allege a common-law duty on the part of DOE.

Leon County School Board argues that DOE had a statutory duty to these plaintiffs under section 231.262, Florida Statutes (1985), which requires the department to investigate any complaint against a teacher filed before it, or any matter otherwise called to its attention. In their amended complaint, the Roes alleged that DOE knew in 1985 of prior misconduct by Campbell and did not properly investigate.

A statute enacted to protect a particular class of persons or a particular interest may establish a private cause of action for violation of the statute. On the other hand, a statute whose purpose is to protect the interests of the state or the rights and privileges of people as members of the general public cannot be a basis for liability. *Department of Corrections v. Vann*, 20 Fla. L. Weekly D381 (Fla. 1st DCA Feb. 9, 1995); *Freehauf v. School Bd. of Seminole County*, 623 So. 2d 761 (Fla. 5th DCA), *cause dismissed*, 629 So. 2d 132 (Fla. 1993).

Section 231.262 provides a procedure for dealing with all manner of complaints against teachers.[4] It contains requirements directed to investigative personnel within DOE, the Commissioner of Education, and the Education Practices Commission. It contains due-process protections for the teacher being investigated. It provides a means of disciplining teachers who commit certain acts that are inconsistent with their obligations. The harms that this statute was designed to address are so wide-ranging that we consider the statute to be for the benefit of the *public* rather than a particular class of persons. It does not, in our opinion, establish a cause of action for the Roes under the facts alleged in their amended complaint.

The Roes also claim that once DOE adopted the policy of recertifying teachers, it had a duty to implement this policy nonnegligently. In the amended complaint, they alleged that DOE "was required to determine whether an applicant for issuance or renewal of a teacher's certificate was of good moral character." This statement tracks the language of section 231.17(1)(e), Florida Statutes (1985); therefore, it is possible that the Roes attempted to allege a statutory duty under that statute. As with section 231.262, however, this statute sets forth a duty owed the general public, not these particular plaintiffs. Section 231.17 articulates the requirements for obtaining a teaching certificate, enumerating a lengthy list of personal and academic criteria. The statute then continues to detail examination procedures; the yearlong beginning teacher program; and procedures for certification of noncitizens. There is nothing in this statute which would indicate that the department owes a private duty to any student who is harmed by a teacher.

To conclude, the trial court erred in declining to dismiss the amended complaint against DOE, because the plaintiffs failed to allege any common-law or statutory duty owed to them by DOE, which is a prerequisite for suing a governmental entity for negligence. Because there is no duty owed, we do not reach the issue of whether DOE's conduct was discretionary and thus immune from liability, or operational, which is not immune. *Vann*, 20 Fla. L. Weekly at D381.

REVERSED and REMANDED with directions to the trial court to dismiss with prejudice the amended complaint against DOE. (JOANOS and WOLF, JJ., CONCUR.)

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[1]The court directed the Florida Bar Appellate Court Rules Committee to submit a proposed amendment to Florida Rule of Appellate Procedure 9.130(a)(3), which deals with appeals of nonfinal orders.

[2]§ 230.23(5), Fla. Stat. (1985).

[3]§ 231.17, Fla. Stat. (1985).

[4]Examples include complaints that a teacher obtained a certificate fraudulently, is incompetent to teach, is guilty of gross immorality or moral turpitude, had a teaching certificate revoked elsewhere, was convicted of a crime, is guilty of conduct that reduces his or her effectiveness, breached a contract, or violated certain laws or administrative rules. § 231.28(1), Fla. Stat. (1985).

* * *

Criminal law—Juveniles—Defendant may not be convicted for both possession of firearm on school property and discharging firearm on school property—Sentencing—Error to impose adult sanctions without addressing all statutory criteria, and without entering contemporaneous written order containing findings of fact and reasons for adult sanctions

MICHAEL WHITE, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-2406. Opinion filed March 14, 1995. An appeal from the Circuit Court for Duval County. L. P. Haddock, Judge. Counsel: Nancy A. Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for appellee.

(PER CURIAM.) Michael White appeals from a judgment and sentence for attempted manslaughter, unlawful discharge of a firearm on school property, and unlawful possession of a firearm on school property. Appellant raises a number of issues on appeal, only two of which have merit: (1) Whether the convictions and sentences for both possession of a firearm on school property and discharging a firearm on school property violates the prohibition against double jeopardy, and (2) whether the trial court erred in sentencing appellant as an adult without making adequate contemporaneous written findings in accordance with section 39.059(7), Florida Statutes (1993).

We find that it is not possible for a person to discharge a firearm on public property without also being in possession of the same weapon. Section 790.115(2)(a), Florida Statutes (1993), prohibiting possession of the firearm on school property, does not contain any elements not included in a violation of section 790.115(2)(d), prohibiting discharge of a firearm on school property.[1] The conviction and sentence for possession of a firearm on school property are, therefore, vacated.

In imposing adult sanctions, the trial court did not address all the statutory criteria contained in section 39.059(7), Florida Statutes (1993), nor did the trial court enter a written order containing findings of fact and reasons for imposing adult sanctions. In addition, the written sentencing order was not entered until 11 days after sentence was orally pronounced. We must, therefore, reverse and remand for resentencing in accordance with the dictates of *Troutman v. State*, 630 So. 2d 528 (Fla. 1993). *See also Thompson v. State*, 640 So. 2d 1236 (Fla. 1st DCA 1994). The convictions for attempted manslaughter and unlawful discharge