IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

v.

SALLY ROE, et al.,

Respondents.

_____/

Case No. 86,061

RESPONDENT SALLY ROE'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondents, SALLY and ANN ROE, sued Billy R. Campbell, alleging that while he was a teacher at Ruediger Elementary School he sexually molested SALLY ROE when she was his student in the fourth and fifth grades. In the initial Complaint, Respondents also sued the Leon County School Board for negligently hiring, retaining and supervising Billy Campbell and for failing to warn Respondents of the dangerous condition the School Board had created by hiring a known child molester. Finally, Respondents sued the Leon County School Board; Campbell's principal, Sam Alderman; the Superintendent of Leon County Schools and other unknown employees of the Leon County School Board alleging certain civil rights violations.

By Amended Complaint, Respondents added school principal Nancy Russell as an additional defendant in the civil rights count. The Amended Complaint also added the Department of Education (DOE) as a defendant, alleging that the School Board relied on the DOE to investigate the criminal history and moral fitness of teaching applicants, that the DOE undertook to perform these tasks knowing that the School Board would rely on the DOE for this investigation, and that the DOE acted jointly with the School Board in determining the qualifications and moral fitness of applicants for teaching positions.

Specifically, the Amended Complaint alleged as follows:

> 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 arguing that it failed to show the violation of any statutory or common law duty of care to Plaintiffs which had been breached by DOE so that Respondents' claims were barred by the doctrine of sovereign immunity. The trial court denied this motion.

DOE then filed a Petition for Writ of Common Law Certiorari in the District Court of Appeal. Initially, the District Court treated this Petition as an interlocutory appeal on the authority of Tucker v. Resha, 648 So.2d 1187 (Fla. 1995), and reversed, directing the trial court to dismiss the Amended Complaint with prejudice. (See Exhibit A.)

However, on rehearing, the District Court withdrew its earlier decision, and in a substituted opinion held that the trial court's denial of DOE's Motion to Dismiss was not subject to interlocutory review explaining that "[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., 656 So.2d 507 (Fla. 1st DCA 1995). (Exhibit B.)

DOE filed motions for rehearing, rehearing en banc and for certification which the District Court denied.

DOE then filed a Notice to Invoke this Court's discretionary jurisdiction, alleging that the substituted opinion of the District Court of Appeal dated May 12, 1995, expressly and directly conflicts with this Court's decision in Tucker v. Resha.

SUMMARY OF ARGUMENT

The decision of the First District Court in Department of Education v. Roe, 656 So.2d 507 (Fla. 1st DCA 1995), does not expressly and directly conflict with this Court's decision in Tucker v. Resha, 648 So.2d 1187 (Fla. 1994), on the same question of law.

Tucker involves the standard of review for the denial of a motion for summary judgment on behalf of a public official asserting qualified immunity as a defense to a civil rights claim. The present case involves an attempt to obtain interlocutory review of the denial of a motion to dismiss on behalf of a public official asserting sovereign immunity arising from the factual issue of duty as a defense to a negligence claim.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT IN DEPARTMENT OF EDUCATION v. ROE, 656 So.2d 507 (Fla. 1st DCA 1995), DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN TUCKER v. RESHA, 648 So.2d 1187 (Fla. 1994), ON THE SAME QUESTION OF LAW.

This Court has jurisdiction to review the decision of the First District Court only if that Court's opinion contains "(1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, 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, 733 (Fla. 1975).

The "rule" announced in Department of Education v. Roe does not conflict with the rule announced by this Court in Tucker v. Resha or with any rule previously announced by another District; to the contrary, the rule announced in this case by the District Court is consistent with and required by the rule previously announced by this Court in other cases. Nor did the District Court misapply any rule of law so as to achieve a result different than that reached by this Court or another District when considering the same facts.

In Tucker v. Resha this Court answered the following certified question:

> IS A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS? Tucker v. Resha, supra, at p. 1187. (Emphasis added.)

This Court responded to that question as follows:

> Thus, we answer the certified question in the affirmative and hold that an order denying summary judgment based upon a claim of qualified

immunity is subject to interlocutory review to the extent that the order turns on an issue of law. Id. at 1190. (Emphasis added.)

The present case involves a negligence claim, not a federal civil rights action.

The present case involves the denial of a motion to dismiss, not the denial of a motion for summary judgment.

The present case involves the defense of sovereign immunity based on a claim of the absence of duty, not the defense of qualified immunity granted to officials of state government acting in their discretionary capacities.

These are not differences without distinction. For instance, the defense of qualified immunity in a civil rights action is granted only to public officials who act within their discretionary authority. The "sovereign immunity" raised as a defense in the present case depends on the factual determination of the existence of a duty. The defense of absence of duty is available to any defendant in a negligence case, not just the sovereign.

Moreover, a motion for summary judgment proceeds on undisputed facts which have been fully developed, while a motion to dismiss addresses only allegations of fact which ordinarily are subject to amendment.

The rule of law followed in the present case is that "denial of a motion to dismiss does not ordinarily qualify for certiorari review." Department of Education v. Roe, supra, at page 508. That is the rule of law announced by this Court in Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987); and Fieselman v. State, 566 So.2d 768 (Fla. 1990). That rule of law in no way conflicts with the rule announced by this Court in Tucker v. Resha.

Nor does this rule conflict with any rule previously announced by another District Court. Although the case cited by respondent in its Notice of Supplemental Authority, Department of Transportation v. Wallis, No. 95-492 (Fla. 5th DCA Aug. 11, 1995), appears to conflict with the decision in the present case, the opinion of the Fifth District is subsequent, not previous to the opinion in the present case.

This Court's jurisdiction requires that the opinion in the present case conflict with a "previously" announced rule of another District, not a "subsequently" announced rule. (See Mancini v. State, supra.) Accordingly, although this Court may have jurisdiction to consider certiorari review of Department of Transportation v. Wallis, there is no jurisdiction to review the District Court's opinion in the present case.

CONCLUSION

The decision of the First District Court in Department of Education v. Roe, does not conflict with this Court's opinion in Tucker v. Resha on the same issue of law, or in any other respect. Accordingly, this Court must decline to exercise its discretionary jurisdiction to review the decision of the First District Court.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gordon D. Cherr, P. O. Drawer 229, Tallahassee, FL 32302; C. Graham Carothers, P. O. Box 391, Tallahassee, FL 32302; Laura Rush, Office of the Attorney General, The Capitol, Tallahassee, FL 32399; Jeannette Andrews, P. O. Box 1739, Tallahassee, FL 32302; John Cooper, P. O. Box 14447, Tallahassee, FL 32317; and Billy R. Campbell, D.C. 578085, Liberty Correctional Institution, P. O. Box 999, Bristol, FL 32321-0999, and Bob Hinkle, P. O. Box 11307, Tallahassee, FL 32302, by mail this 25th day of August, 1995.

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By _____
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APPENDIX

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. 392 (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 administrative remedy available

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Appellant, v. ANDERSON COLUMBIA COMPANY, INC., Appellee. 1st District. Case Nos. 94-2834, 94-2914, 94-2997, 94-3043, Consolidated. Opinion filed March 14, 1995. An appeal 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.

* * *

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

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.

No. 94-3040.

District Court of Appeal of Florida, First District.

May 12, 1995.

Rehearing Denied June 16, 1995.

Department of Education filed petition for writ of common-law certiorari, seeking review of trial court's order denying its motion to dismiss amended complaint. The District Court of Appeal, Ervin, J., held that petition for writ of common-law certiorari, challenging denial of claim of sovereign immunity regarding cause of action under state law, would not be construed as appeal from interlocutory order.

Certiorari denied.

1. Appeal and Error ⇐417(1)

Petition for writ of common law certiorari, challenging denial of claim of sovereign immunity regarding cause of action under state law, would not be construed as appeal from interlocutory order.

2. Certiorari ⇐17

Denial of motion to dismiss does not ordinarily qualify for certiorari review.

Robert A. Butterworth, Atty. Gen., Laura Rush, Asst. Atty. Gen., Office of Atty. Gen., 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 Bd. and Superintendent.

John C. Cooper, Tallahassee, for respondent Sam Alderman.

Jeannette M. Andrews, Tallahassee, for respondent Nancy E. Russell.

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

[Original Opinion at 20 Fla.L. Weekly D686]

ERVIN, Judge.

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.

[1] 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 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.

[2] 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.

Jesse M. MONTAGUE, Appellant,

v.

STATE of Florida, Appellee.

No. 94-01131.

District Court of Appeal of Florida, Second District.

May 12, 1995.

Rehearing Denied and Question Certified June 23, 1995.

Defendant was convicted in the Circuit Court, Pinellas County, Susan F. Schaeffer, J., of sexual activity with a child by person in familial authority, and he appealed, challenging sentences imposed. The District Court of Appeal, Lazzara, J., held that: (1) finding that victim suffered from physical injury or trauma was required before trial court could assess victim injury points, and (2) remand was required for evidentiary hearing to determine extent of victim injury.

Reversed and remanded.

1. Criminal Law ⇐1246

Finding that victim suffered from physical injury or trauma was required before trial court could assess victim injury points when sentencing defendant for sexual activity with a child by a person in familial authority. F.S.1992, § 794.041(2)(b).

2. Criminal Law ⇐1181.5(8)

Remand was required in prosecution for sexual activity with a child by person in familial authority, in which trial court assessed victim injury points at sentencing but did not hold evidentiary hearing to determine whether victim's physical trauma or injury was result of defendant's acts, to receive additional evidence regarding extent of victim injury which otherwise may have been inadmissible at trial. F.S.1992, § 794.041(2)(b).

3. Criminal Law ⇐1246

Pregnancy followed by miscarriage resulting from unlawful sexual act constitutes physical injury or trauma which may be scored as victim injury under the sentencing guidelines.

James Marion Moorman, Public Defender, and Julia Diaz, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Ron Napolitano, Asst. Atty. Gen., Tampa, for appellee.

LAZZARA, Judge.

[1] The appellant, Jesse M. Montague, challenges the sentences imposed after a jury trial for three counts of sexual activity with a child by a person in familial authority.[1] Citing *Karchesky v. State*, 591 So.2d 930 (Fla. 1992), he argues the trial court erred in assessing one hundred twenty points for victim injury (forty points for each offense) based on penetration alone without any showing that the victim suffered "any specifically identified physical injury or trauma" as a result of these criminal acts. Under the circumstances presented in this case, we reverse and remand for the trial court to conduct a new sentencing hearing to determine the extent, if any, of victim injury as to each count.[2]

1. § 794.041(2)(b), Fla.Stat. (1991).

2. We note, however, that because appellant committed his crimes prior to the effective date of section 921.001(8), Florida Statutes (Supp.1992), which abrogated the holding of *Karchesky*, the terms of this statute may not be retroactively