IN THE SUPREME COURT OF FLORIDA

JOAQUIN CASADO,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 83,627

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner was charged by informations filed in the Circuit Court of Orange County, Florida, with three counts of sexual activity with a child; three counts of sexual battery; three counts of lewd act upon a child; and use of a child in a sexual performance. (R 33-35, 36-39, 40-42) He was tried by a jury on January 13 through 15, 1993, and found guilty as charged[1]. (R 122-124, 125-128, 129; T 561-563) On March 17, 1993, he was sentenced to concurrent terms totalling 22 years in prison and five years on probation. (R 18-20, 174-176, 197-199, 200-201)

Petitioner appealed to the Fifth District Court of Appeal and on April 22, 1994, the question presented by this appeal was certified to be one of great public importance. Casado v. State, 19 Fla. L. Weekly DD900 (Fla. 5th DCA April 22, 1994). (APPENDIX)

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[1] In Circuit Court Case Number CR92-4721, judgments of acquittal were entered for charges of sexual activity with a child and sexual battery. (R 95; T 304)

STATEMENT OF THE FACTS

Petitioner and his son, Diego Cortez, are accomplished in the martial arts, and taught classes in the garage of their home in Orange County, Florida. (T 137, 152, 199, 233, 234, 260, 261, 283, 344-346, 349, 389, 406-409, 411, 426, 449) Their students referred to Petitioner as "Meijin," a title of respect, and several of them testified that they regarded Petitioner as a father figure and confided in him. (T 138, 140, 156, 157, 190, 191, 200, 205, 225, 259, 264, 265, 368, 387, 399, 450, 451)

Three of Petitioner's students testified that Petitioner had told them that in order to become leaders they must participate in "Sukyu Ni Tai," which involved oral sex and masturbation. (T 142-145, 157, 170, 198, 237, 291) The complainants testified that Petitioner performed various acts on them in his car when he took them home from or picked them up for classes. (T 140, 146-149, 155, 156, 161, 162, 164, 165, 169, 191, 192, 214, 235, 236, 238, 239)

Petitioner and Diego Cortez testified that "Sukyu Ni Tai" refers to "mind and body," has nothing to do with sex, and is a system or term approved by the United State GoJu Association. (T 370, 371, 381, 412) Idel Suira, a very advanced student of the martial arts, testified that his training in Sukyu Ni Tai included no mention whatsoever of masturbation or oral sex, and that he had never seen Petitioner touch anyone in an improper fashion. (T 391, 392, 398, 403)

Defense witnesses testified that the Orange County Sheriff's

detective who interviewed them became belligerent or hostile when they failed to make incriminating statements against Petitioner. (T 317, 318, 331, 332, 398)

Petitioner unequivocally denied the charges. (T 448)

SUMMARY OF ARGUMENT

Sections 800.04 and 794.041(2)(b) are unconstitutional because they prohibit a defendant who engages in sexual activity with a consenting citizen under the age of 16 years from presenting a defense of consent, a defense which would be available were he charged with sexual battery, an offense of the same degree. The requirement that a child be 16 years of age or older in order to consent to sexual relations is arbitrary and the statutes are an invalid attempt to regulate morals.

ARGUMENT

SECTIONS 800.04 AND 794.041(2)(b) ARE VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION.

Petitioner was charged under Section 794.041(2)(b) with sexual activity with a child and under Sections 800.04(1) and (3) with committing a lewd, lascivious or indecent act upon a child. (R 33-35, 36-39, 40-42) Section 800.04 provides that neither the victim's lack of chastity nor the victim's consent is a defense to the charge if the person with whom a defendant engaged in sexual relations is under 16 years of age. Section 794.041(3) provides that the willingness or consent of a child between the ages of 12 and 18 is not a defense to prosecution for sexual activity with a child. The prosecutor argued, and the trial judge six times instructed Petitioner's jury, that the complainants' consent to the acts they engaged in was not a defense to the offenses charged. (T 525, 535, 536, 545, 546, 548)

Article I Section 23 of the Florida Constitution provides that:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. . . .

This Honorable Court has held that the right of privacy, which is implicated in the decision "whether, when, and how one's body is to become the vehicle for another human being's creation," and includes the freedom to make the choice to end a pregnancy, is

fundamental, and extends to minors. In re T. W., 551 So. 2d 1186, at 1192 (Fla. 1989). If a minor has the constitutional right to consent to an abortion without parental consent, a fortiori, he or she has the right to knowingly and voluntarily consent to engage in sexual conduct.

In Jones v. State, 19 Fla. L. Weekly S280 (Fla. May 26, 1994), this Honorable Court recognized that a criminal defendant charged with violating Section 800.04 has standing to assert the privacy interests of his or her minor partner in the right to engage in consensual sexual relations; see Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); but held that the rights of privacy that have been granted to minors do not vitiate the Legislature's efforts and authority to "protect minors from the conduct of others." Id., 19 Fla. L. Weekly at S281. Rehearing has been sought in Jones, Supreme Court Case Number 81,970, however, and Petitioner urges this Honorable Court to reconsider its decision in Jones and declare Section 800.04 unconstitutional.

In Eisenstadt v. Baird, supra, the statute controlling the sale of condoms to unmarried persons was found to be invalid in large part because it "was, in reality, merely an attempt to regulate morals, not a health measure." Stall v. State, 570 So.2d 257 (Fla. 1990). Likewise, Section 800.04(3) is an effort to legislate morality, and in a highly random manner. Had it been alleged that the named complainants in this case did not

consent to sexual intercourse, Petitioner could be found guilty of sexual battery on a person 12 years of age or older, a second-degree felony punishable by up to 15 years in prison. ss. 794.011(5), 775.082(3)(c), Fla.Stat. (1991). Petitioner, however, would have been permitted to present the defense of consent. Lewd assault on a child would not constitute a lesser included offense. See, e. g., Wallis v. State, 548 So. 2d 808, at 810 (Fla. 5th DCA 1989); and Furlow v. State, 529 So. 2d 804 (Fla. 1st DCA 1988). Where a person older than 12 years of age but younger than 16 years of age consents to sexual intercourse, the punishment for his or her partner is the same as though the partner had ravished the minor against his or her will, i. e., it is a second-degree felony. s. 800.04, Fla.Stat. (1991).

In Jones, this Honorable Court found that the Legislature has the right to restrict a fourteen- or fifteen-year-old person's right to engage in consensual sex, but Petitioner maintains that there is no rational basis for arbitrarily setting the "age of consent" at 16 years, particularly where, until 1984, Section 800.04 did not apply unless the alleged victim was under the age of 14, or a year under Petitioner's girl friend's age. See, e. g., s. 800.04, Fla. Stat. (1983); Ch. 84-86, Laws of Florida. (R 15, 24) In speaking of a Florida citizen's right to privacy in his communications, this Honorable Court wrote:

> . . . Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is

> the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over "majoritarian sentiment" and thus cannot be universally defined by consensus. (Footnote omitted.)

Shaktman v. State, 553 So. 2d 148, at 151 (Fla. 1989). Neither, Petitioner would submit, should the parameters of one's exercise of privacy regarding his or her body be defined by randomly picking a number.

Certainly preventing the exploitation of minors by adults is a legitimate state interest; but upholding the constitutionality of Section 800.04 fails to respect the principle that an infringement on the right to privacy will be struck down unless the State meets the heavy burden of establishing both that (1) there exists a compelling state interest and that (2) the interest is advanced through the **least restrictive** means available. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1984); In re T. W., 551 So. 2d 1186, 1192 (Fla. 1989). Petitioner recognizes that the evidentiary considerations and the jury instructions alone would necessitate a mammoth undertaking of judicial drafting and interpretation if persons accused of violating Section 800.04 were granted their right to present a defense of the minor's valid, intelligent consent to sexual relations; but acknowledging the invalidity of precluding consent as a defense to what in **the appropriate cases** must be viewed as a "victimless crime" would also afford persons accused of this crime their right to due process.

Because Section 800.04 prohibits a defendant's assertion of a defense of consent to a criminal charge, especially where consent was given, and because there is no rational basis for denying 14- and 15-year-olds the right to consent to sexual relations, the statute is unconstitutional.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse its decision in Jones v. State, 19 Fla. L. Weekly S280 (Fla. May 26, 1994), declare the unconstitutionality of Section 800.04, reverse Petitioner's convictions and sentences, and direct the District Court to remand this cause to the trial court with directions that he be discharged from the offenses of sexual activity with a child and committing lewd acts upon a child.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
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904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard - Fifth Floor, Daytona Beach, Florida 32118, by hand delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Joaquin Casado, P. O. Drawer 10, Wewahitchka, Florida 32465-0010, this 10th day of June, 1994.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

JOAQUIN CASADO,

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A P P E N D I X

to participate in the Phoenix Program at the Orange County Jail because that would help him with his restitution.[3] The trial judge acquiesced and placed the appellant in the program. The trial judge completed the sentencing by explaining the conditions of probation:

> THE COURT: The probation will be drug offender probation; he will be evaluated for a drug offender program under the drug offender and alcohol offender programs.
>
> You are going to be required from time to time, Mr. McCarthren, to provide to your probation officer either a urine sample or a blood or breath sample in order to determine the presence of cocaine, alcohol or any other illegal drugs; that will be at your expense. Cost of supervision is waived; court costs, $255; and as I said, there's 142 days credit time served.

Neither the appellant nor his trial counsel voiced an objection to any of the conditions of probation at that time. Later, when the trial counsel filed post-trial motions, there were no objections to any of the conditions of probation. The first time an objection appears to any condition of probation is on appeal.

In *Biller v. State*, 618 So. 2d 734 (Fla. 1993), the Florida Supreme Court held that there must be a nexus between a condition of probation and the crime committed by the offender. When a question is raised concerning the relevancy of the condition, the record must support the imposition of the condition. *Larson v. State*, 572 So. 2d 1368 (Fla. 1991), also requires a contemporaneous objection unless the condition of probation "is so egregious as to be the equivalent of fundamental error." *Id.* at 1371. Although there is nothing in this record on appeal that suggests the crimes of grand theft and resisting recovery of merchandise were related in any way to the abuse of drugs, narcotics or controlled substances,[4] the appellant never objected as the appellant did in *Biller*. In *Biller*, the appellant made a contemporaneous objection to the trial court's imposition of a condition of probation that prohibited the use of alcohol. Here the appellant and his attorney stood mute.

Probation is a matter of grace and is subject to exercise of the trial court's discretion. *Bentley v. State*, 411 So. 2d 1361 (Fla. 5th DCA) (en banc), *rev. denied*, 419 So. 2d 1195 (Fla. 1982). If the appellant believes the trial court's imposition of a condition of probation is improper, the appellant must make a timely objection. The trial court can then reevaluate its sentencing plan in light of the objection and fashion a proper sentence. If the problem is with the sufficiency of the record to prove a nexus between the offense and the condition, the state can either cure the deficiency or the trial court can reconsider the condition of probation. Regardless of the outcome, the appellant must make a contemporaneous objection to preserve the appellant's rights on appeal unless the condition is egregious. *Larson*, 572 So. 2d at 17. We hold that two year drug offender probation is a legal condition of probation and not so egregious as to constitute fundamental error; hence, the appellant should have objected to its imposition.

Lastly, we note that the first time the appellant considered this condition of probation to be egregious was on appeal. In fact, it was not mentioned as a ground in the renewed motion for judgment of acquittal and motion for new trial filed with the trial court nor was it specifically mentioned in the statement of judicial acts to be reviewed. The appellate counsel and the trial counsel are two different attorneys, but appellate counsel is bound by the objections made or not made by trial counsel. Since we have determined that drug offender probation is not so egregious as to be fundamental error, we will not consider this issue raised for the first time on appeal. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Accordingly, the judgment and sentence is affirmed.

AFFIRMED. (DAUKSCH and GRIFFIN, JJ., concur.)

[1]§ 812.014(2)(c)(1), Fla. Stat. (1991).
[2]§ 812.015(6), Fla. Stat. (1991).
[3]The Phoenix Program is a vocational training program in the Orange County Jail. If an inmate successfully completes the program, he is certified as an apprentice and placed in a job once he is released from jail.
[4]At sentencing, the state produced a judgment and sentence from 1988 wherein the appellant had been convicted of possession of cocaine and placed on probation. The crime was too remote in time to show a nexus to the crime before this court. The state's arguments on appeal, to show that the appellant should be on drug offender probation, were that he gained weight while in the county jail awaiting trial and that the actions of the appellant show he committed this crime because he was guilty of "stupidity or supporting a drug habit." The validity of these arguments stand on their merit and this court gave them all the attention they deserved.

* * *

Criminal law—State attorneys—Fees—Error to assess attorney's fee of $250—Public defender's lien of $100 stricken without prejudice to reimposition of lien upon remand after defendant is advised of right to hearing to contest amount of lien

LAWRENCE R. FULMORE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-501. Opinion filed April 22, 1994. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. James B. Gibson, Public Defender and M.A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Lawrence R. Fulmore appeals his convictions for possession of cocaine[1] in count one and the lesser included offense of battery[2] in count two of the information. We affirm his convictions and sentence but we strike the assessment of fees. It was error for the trial court to assess the state attorney's fee of $250. *Turkaly v. State*, 615 So. 2d 222 (Fla. 5th DCA 1993); *Smith v. State*, 606 So. 2d 501 (Fla. 5th DCA 1992). The defense argues that it was also error to assess a public defender lien of $100 without prior notice to Fulmore that he had the right to contest the amount of the lien to be imposed. Florida Rule of Criminal Procedure 3.720(d)(1) requires that Fulmore be advised of his right to a hearing to contest the amount of the lien. The $100 public defender's lien is stricken without prejudice to the reimposition of the lien upon remand after Fulmore is advised of his rights. *Bull v. State*, 548 So. 2d 1103 (Fla. 1989); *Smith v. State*, 622 So. 2d 638 (Fla. 5th DCA 1993).

JUDGMENT and SENTENCE AFFIRMED; PUBLIC DEFENDER'S LIEN QUASHED and REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. (HARRIS, C.J., and GOSHORN, J., concur.)

[1]§ 893.13(1)(f), Fla. Stat. (1991).
[2]§ 784.03, Fla. Stat. (1991).

* * *

Criminal law—Constitutional right to privacy does not render unconstitutional portions of statutes which provide that consent is not a defense to prosecution for sexual activity with minor under 16—Question certified

JOAQUIN CASADO, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-937. Opinion filed April 22, 1994. Appeal from the Circuit Court for Orange County, Dorothy J. Russell, Judge. James B. Gibson Public Defender and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Joaquin Casado was tried by a jury and found guilty of two counts of sexual activities with a child,[1] two counts of sexual battery on a child under the age of 16 years,[2] three counts of lewd act upon a child[3] and one count of use of a child in a sexual performance.[4] Casado was sentenced to concurrent terms totalling 22 years in the Florida Department of Corrections followed by five years supervised probation. Casado appeals the constitutionality of sections 800.04 and 794.041(2)(b).[5] He argues that they are unconstitutional because they prohibit a defendant who engages in sexual activity with a consenting citizen under the age of 16 years from presenting a defense of consent; a defense which would be available had the defendant been charged with the same offense upon a child 16 years of age or older. We affirm his convictions and sentences. This court has

previously upheld the constitutionality of section 800.04. *Jones v. State*, 619 So. 2d 418 (Fla. 5th DCA), *review granted*, 629 So. 2d 133 (Fla. 1993). We specifically uphold the constitutionality of section 794.041(2)(b) based upon the reasoning in *Jones*. *Id*. We again certify to the Florida Supreme Court the question of whether the constitutional right to privacy renders unconstitutional those portions of section 800.04 and 794.041 providing that consent is not a defense to a prosecution for sexual activity with a minor under the age of 16.

AFFIRMED. (SHARP, W., and GRIFFIN, JJ., concur.)

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[1]§ 794.041(2)(b), Fla. Stat. (1991).
[2]§ 800.04(3), Fla. Stat. (1991).
[3]§ 800.04(1), Fla. Stat. (1991).
[4]§ 827.071(2), Fla. Stat. (1991).
[5]Section 794.041, Florida Statutes (1991) provides:
(2) Any person who stands in a position of familial or custodial authority to a child 12 years of age or older but less than 18 years of age and who:
(b) Engages in sexual activity with that child is guilty of a felony of the first degree.

* * *

Dissolution of marriage—Alimony—Order requiring husband to pay more money in alimony than record reflected his earnings would allow reversed where trial judge made no specific findings of fact to support imputation of income—Order requiring husband to "provide wife with adequate health insurance" upon obtaining full-time employment reversed where requirement was too vague

JOHN W. KAMINSKI, Appellant, v. RITA M. KAMINSKI, Appellee. 5th District. Case No. 93-1880. Opinion filed April 22, 1994. Appeal from the Circuit Court for Orange County, George A. Sprinkel, IV, Judge. Jon S. Rosenberg, Orlando, for Appellant. Charles J. Collins, Jr., Orlando, for Appellee.

(PER CURIAM.) This is an appeal from a judgment in a marital dissolution case.

The trial judge ordered appellant to pay more money in alimony than the record reflects his earnings will allow. The judge apparently found that appellant was capable of earning more than he was earning and had intentionally avoided earning enough to provide for appellee. Therefore, the judge imputed some amount of income to the husband in order to provide for the wife's alimony. Because the trial judge made no specific findings of fact to support any imputation, we reverse the award and remand for a rehearing on this issue. Additionally, the order that "upon husband obtaining full time employment, he shall provide wife with adequate health insurance, unless she has full time employment and is afforded the right to have group health insurance" is too vague, open-ended and incapable of reasonable interpretation as to intent. Without knowing what the judge means by "adequate" and without some determination as to how much appellant can reasonably afford to pay, this requirement is too nebulous to understand or enforce. Upon remand a proper award of alimony and provision for health insurance, if available, should be made after a proper hearing. In all other respects the judgment is affirmed.

AFFIRMED in part; REVERSED in part; REMANDED. (DAUKSCH, PETERSON and GRIFFIN, JJ., concur.)

* * *

Dissolution of marriage—Contempt—Order of contempt resulting from non-custodial parent attempting to keep children in excess of five weeks in summer reversed and remanded for rehearing on issue of residential custody and visitation where judgment permitted "unlimited" visitation to subsume residential custody and therefore failed to clearly apprise either party of rights, and parties waived issue of residential custody based on stipulation

WALTER A. NEUMAN, Appellant, v. CHERI LEE NEUMAN, Appellee. 5th District. Case No. 93-1848. Opinion filed April 22, 1994. Appeal from the Circuit Court for Citrus County, John Thurman, Judge. Gary A. Poe, of Gary A. Poe & Associates, P.A., Inverness, for Appellant. James Martin Brown, Brooksville, for Appellee.

(HARRIS, C. J.) Walter A. Neuman brings this timely appeal from a final judgment and order of contempt. The primary issue determined at trial was the custody of the children and visitation for the nonresidential parent.

The issue of which parent would be the residential parent was hotly contested until the parties agreed that the father would have "unlimited" visitation. Based on this understanding, the father agreed that the mother could be named residential parent but that he should have a minimum of three weekends per month and the entire summer vacation excluding two weeks with the mother. The mother, while agreeing that the father's visitation should be "essentially unlimited," nevertheless did not agree as to what the minimum visitation should be. The court, instead of rejecting the incomplete stipulation, proceeded to trial and awarded the father "unlimited visitation" with the children which included a *minimum* of alternate weekends and five weeks each summer.

When the father attempted to keep the children *in excess* of five weeks in the summer, he was (at a contempt hearing) ordered to immediately return the children to their mother. One wonders how, if the father has *unlimited* (as opposed to liberal or reasonable) visitation with a *minimum* (as opposed to maximum) of five weeks during the summer, he can be held in contempt for keeping the children longer than the five-week minimum period.

The problem is that the judgment itself is inconsistent and therefore fails to clearly apprise either party of their rights under it. As worded, the judgment permits the "unlimited" visitation to subsume the residential custody. This is the problem of attempting to give effect to an incomplete and confusing stipulation. The judgment as to visitation and designation of residential parent must be reversed for rehearing. Because the parties waived the issue of which should be the residential parent due to the proposed stipulation, at rehearing both parents should be permitted to contest for that position. The visitation for the nonresidential parent should be determined in such a way that there can be no doubt as to the rights of both parents.

REVERSED and REMANDED for a rehearing on the issue of residential custody and visitation. (COBB and SHARP, W., JJ., concur.)

* * *

Civil procedure—Summary judgment—Error to enter summary judgment against plaintiff where defendant repeatedly failed or refused to appear for deposition and therefore prevented plaintiff from obtaining discovery, so that case was not yet fully at issue

FRANCES ANN ROBSON, Appellant, v. GARY T. HAINES, WARREN J. PASHLEY, III, and DEL ROSE, Appellees. 5th District. Case No. 93-1508. Opinion filed April 22, 1994. Appeal from the Circuit Court for Hernando County, John W. Booth, Judge. Donald R. Peyton, New Port Richey, for Appellant. Darryl W. Johnston of Johnston & Sasser, P.A., Brooksville, for Appellees W. J. Pashley, III, and Gary Haines. No Appearance for Appellee, Del Rose.

(PER CURIAM.) This is an appeal from a summary judgment in a case involving alleged breaches of warranty and failures to disclose defects in a home sale case.

Because the defendant Haines repeatedly failed or refused to appear for his properly noticed deposition he has prevented plaintiff from obtaining discovery concerning her lawsuit against him and the other defendants. Thus the case is not yet fully at issue so the trial court was premature in its summary judgment against the plaintiff. *Sica v. Sam Caliendo Design, Inc.*, 623 So. 2d 859 (Fla. 4th DCA 1993); *A & B Pipe and Supply Co. v. Turnberry Towers Corp.*, 500 So. 2d 261 (Fla. 3d DCA 1986); *Danna v. Bay Steel Corp.*, 347 So. 2d 704 (Fla. 4th DCA 1977).

REVERSED and REMANDED. (DAUKSCH, PETERSON and GRIFFIN, JJ., concur.)

* * *