0/A 3-7-89

IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ, Governor of the State of Florida,

Appellant,

v.

CASE NO. 73,601

THE FLORIDA LEGISLATURE, composed of the Florida House of Representatives and The Florida Senate; JON L. MILLS, in his capacity as a citizen and taxpayer of the State and as Speaker of the Florida House of Representatives; TOM GUSTAFSON, in his capacity as citizen and taxpayer of the State and as Speaker-designate of the Florida House of Representatives; SAMUEL P. BELL, III, in his capacity as a citizen and taxpayer of the State and as Chairman of the Appropriations Committee of the Florida House of Representatives; JOHN W. VOGT, in his capacity as a citizen and taxpayer of the State and as President of The Florida Senate; and ROBERT (BOB) CRAWFORD, in his capacity as a citizen and taxpayer of the State and as President-designate of the Florida Senate,

Appellees.

Answer Brief of Appellees

On Appeal from the Circuit Court of the
Second Judicial Circuit,
In and for Leon County, Florida

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Introduction

The governor introduces his appeal by attributing special significance to this court's order which dismissed the petition for writ of mandamus filed by the legislature and five individual legislators.[1] The governor had moved to dismiss the legislature's mandamus proceeding by suggesting in pertinent part that the issues raised by the petition were more appropriately resolved by a declaratory judgment action where a full record could be developed, rather than by this court in a discretionary proceeding. (R. 123-24). The court might reasonably have believed from the governor's naked assertions that there indeed might be factual issues to be resolved. (See R. 120-21, 124). Mandamus being a wholly discretionary proceeding, of course, the court simply chose to permit a declaratory action for resolution of the legislature's claim.

When given the opportunity, the governor was completely unable to demonstrate any factual dispute pertinent to the legal issue raised by the legislature's circuit court action. Based upon more than ample memoranda filed by all parties and argument which lasted the better part of an entire day, the trial court

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1/ In this brief, Appellant will be referred to as the governor, and Appellees will be referred to individually by name when necessary, otherwise, they will be referred to collectively as the legislature. The legislature will cite to the record on appeal as "R."

correctly decided that there was no genuine issue of material fact to be resolved on the plaintiff's claim. In doing so, the trial court clearly appreciated the significance of this court's order, including its directive that the trial court proceeding be expedited, and his duties in adjudicating the parties' claims.

Far from being condemned (as the governor has done), Judge Gary should be commended for following a path toward an expedited resolution of the legislature's claim by carefully picking his way through a series of procedural land mines and booby traps strewn on the pathway by a governor scrambling to avoid a decision on the legislature's amended complaint. These obstacles ranged in sophistication and complexity from an initial, facially-misguided contention that this court had directed fact-finding even if no facts material to the legislature's cause of action were disputed, through the governor's insistence that his issue (the validity of intent documents) was the fulcrum of the legislature's case. Along the way, the governor (1) inexplicably avoided offering any explanation for having vetoed "portions" of specific appropriations (as stated in his veto message) while advising the trial court that he lacked the authority for any such partial vetoes; (2) repeatedly failed to come to grips with the constitutional restriction that vetoable specific appropriations must be in a general appropriations bill, all the while acknowledging to the trial judge that he vetoed specific appropriations which were found in "intent documents"; and (3)

persistently dwelled on legislative work papers in an unabashed effort to circumvent constitutional limits on his authority to use the judiciary for advisory opinions. He further attempted to obfuscate the simple legal issue posed in the amended complaint by offering non-material opinion testimony as "facts" which would purportedly bear on the propriety of a summary judgment.

The governor has now had every opportunity to convince the circuit court that a simple legal determination was not appropriate for the narrow legal question at issue. He was unpersuasive. A complete record has now been developed as the governor requested and the issues raised by the pleadings and resolved by the trial court are ripe for review on the merits by this court. (R. 123).

Statement of the Case and Facts

On June 8, 1988, the legislature adopted the General Appropriations Act of 1988. (R. 27-31). That act has now been published as Chapter 88-555, Laws of Florida. Pursuant to section 216.181(1) of the Florida Statutes, the General Appropriations Act, a summary statement of intent and detailed computer work papers ("D-3A's") from each governmental department were transmitted to the governor by the chairmen of the House and Senate Committees on Appropriations. (R. 744). On June 29, Governor Bob Martinez filed his official veto message in which he vetoed over one hundred fifty precisely designated "specific appropriations" contained in the 1988 General Appropriations Act.

(R. 35-111). He also purported to veto five dollar amounts which he denominated as being "[t]he portion of Specific Appropriation[s]." (R. 36, 51, 52). For the court's convenience, the legislature has attached an appendix which sets out the precise language of the particular appropriations to which the challenged vetoes relate, followed by the corresponding text of the official veto message. (App. 1).

On September 12, the Florida Legislature and five of its members in their official capacities and as citizens and taxpayers petitioned this court for issuance of a writ of mandamus to expunge the governor's partial vetoes from official state records. (R. 3-20). The governor moved to dismiss on the grounds that the petition failed to state material facts essential for obtaining relief; the petition failed to allege any compelling or exigent circumstances to warrant extraordinary relief; and that there were other remedies available to petitioners. (R. 120-23). He also attacked the legislature's and the individual petitioner's standing to bring suit in their official capacities. (R. 124-25). The governor asked for a dismissal of the mandamus proceeding in favor of a declaratory judgment action in the circuit court. (R. 123-24). The court granted that motion, and transferred the action to the circuit court with leave to file an amended complaint. (R. 1-2; initial brief at 22).

The legislature and the same individual legislators promptly brought suit under Chapter 86 of the Florida Statutes to

have the governor's partial vetoes declared unconstitutional. (R. 235-303). The governor sought to avoid a declaration in the legislature's favor by alleging that he had vetoed legislative work papers (D-3A's), which purportedly had been incorporated by reference into the General Appropriations Act by a letter from two legislative committee chairmen dated June 22, 1988. (R. 327). The governor alternatively sought to avoid a declaration on the ground that the legislature had failed to state a cause of action for declaratory relief and by claiming that the individual plaintiffs in their official capacities lacked standing to sue. (R. 327-28).

The governor also counterclaimed against Jon L. Mills, Tom Gustafson, Samuel P. Bell, III, John W. Vogt and Robert (Bob) Crawford, as citizens and taxpayers, primarily for a declaration as to the effect of legislative intent documents on executive and governmental agencies. (R. 328-31). He also sought a declaration that legislative work papers (D-3A's) were subject to veto because they had been incorporated by reference into the General Appropriations Act. (Id.). The governor also cross-claimed against the Secretary of State and the Comptroller to have the implementing and conforming laws to the 1988 General Appropriations Act declared null and void. (R. 331-35). In addition, he asked the court to declare the effect of the intent documents on all executive departments and government agencies. (R. 335-36).

On November 1, the legislature and all individual plaintiffs named in the complaint moved for final summary judgment on their claim. (R. 304-313). The five individual plaintiffs named as defendants in the governor's counterclaim moved to dismiss that claim. (R. 368-70). The cross-defendants, Gerald Lewis and Jim Smith, moved to abate consideration of the cross-claim pending disposition of the main action. (R. 371-74, 1614-17). Although the governor had earlier blocked a first hearing date on the legislature's motion for summary judgment, for failure to provide the full twenty days required by the rules for the hearing, the governor set the hearing for his motion for summary judgment on his cross-claim without providing the requisite twenty day notice. (R. 348-50; App. 2). As a consequence, his motion for summary judgment on the cross-claim was never heard.

On December 22, the legislature's motions for summary judgment and to dismiss the counterclaim were heard. (R. 1712). At that same hearing, Jim Smith and Gerald Lewis moved ore tenus to dismiss the cross-claim.[2] On December 29, 1988, final summary judgment in the legislature's favor was entered. (R. 1705-08). The governor's purported vetoes were declared null and void. (R. 1706). The Secretary of State was directed to expunge those

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2/ The legislature will not address any of the issues raised in the governor's brief related to the cross-claim. Those issues are appropriately addressed only by the parties to that claim.

vetoes from the official state records. (R. 1707). The governor's counterclaim was dismissed with prejudice, and the crossclaim declared moot. (R. 1707-08).

The governor appealed to the First District Court of Appeal, which, upon the legislature's suggestion, certified the case to this court. (R. 1709-10, 1711).

Summary of the Argument

There was no imperative to consider whether intent documents are binding on state agencies in order to reach the seminal issue raised by the legislature. The evidence proffered by the governor on this non-issue (which was not raised as a defense to the legislature's claim) could not bar summary judgment.

The Florida Constitution limits the governor's veto power to specific appropriations contained in an appropriations act. This provision was construed in Brown v. Firestone, 382 So.2d 654 (Fla. 1980), to balance power between the executive and legislative branches of government in a manner which precludes any veto authority other than that which the constitution expressly confers.

The governor's veto message expressly vetoed "portions" of five specific appropriations in the 1988 appropriations bill. In vetoing portions of specific appropriations, the governor exceeded constitutional bounds. The governor incorrectly argues that he vetoed legislative work papers which were specific

identifiable sums incorporated into the appropriations act by a letter from two committee chairmen. The governor's failure to raise facts or to offer a sufficient legal explanation for his position entitled the legislature to a summary judgment declaring his purported vetoes unconstitutional.

The trial court's refusal to entertain the governor's request for advice on the effect of legislative intent documents on governmental agencies also was correct. This counterclaim issue failed because the governor lacks constitutional authority to seek a declaratory judgment on the issue raised, and because he failed to join indispensible parties.

The governor concedes that the individual plaintiffs had standing to prosecute this claim. The appellees in their official capacity also had standing to bring this claim.[3] Summary judgment was correct.

The governor's counterclaim was not ripe for consideration in the trial court and cannot be determined here as if it had been tried below. The trial court's dismissal with prejudice was proper.

3/ All issues dealing with the governor's cross-claim will be addressed in the cross-defendants' brief, as appellees are not parties to the cross-claim.

Argument

1. **The legislature was entitled to a judgment as a matter of law.**

The trial court was correct in refusing to give credence to the governor's extraordinary power play in seeking to amend the Constitution of Florida by rewriting article III, section 8 as it relates to his veto authority. That section of the constitution expressly limits the governor's power to vetoing "specific appropriations" which are contained in a "general appropriations bill." In his counterclaim, the governor affirmatively alleged that Chapter 88-555 is the general appropriations bill at issue in this case. (R. 329). The governor has never suggested that there was any other general appropriations bill enacted by the 1988 legislature (as there was in Thompson v. Graham, 481 So.2d 1212 (Fla. 1986)). Nor has he ever explained how legislative work papers transmitted by two committee chairmen attained the status of laws enacted by the legislature, let alone be judicially endowed with the constitutionally recognized status of an appropriations bill.

These impediments notwithstanding, the governor has attempted to extend his veto power beyond the constitutional limitations imposed. As this court on more than one occasion has confirmed: "[t]he governor's veto power is balanced against [and limited by] the legislature's power." Thompson, 418 So.2d at 1215; Brown, 382 So.2d at 653. To accord the governor power to do as he requests to veto every dollar "element" in legislative

work papers supporting the annual general appropriations act--no matter how minuscule and even though not contained in a general appropriations act--would destroy the balance of power carefully crafted in the constitution between the executive and legislative branches. Indeed, the governor's position mocks the rationale and teaching of the Brown decision, and nullifies its analysis of legislative prerogative to risk a veto of entire programs by appropriating amounts larger than the smallest dollar sum in agency budgets.

The trial court was not deceived by the governor's less than subtle attempt to obtain a judicially decreed constitutional revision. The power to revise the constitution, of course, resides solely in the electorate. Absent any evidence to show that the governor vetoed a specific appropriation in a general appropriations bill, the court was correct in entering judgment as a matter of law in the legislature's favor.

(a) Constitutional framework for appropriations vetoes.

Article II, section 3 of the Florida Constitution directs that one branch of government may not intrude on the powers of another branch:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein.

Under Florida's constitutional scheme, the legislature's power is plenary and is restricted only by express constitutional limitation. Farragut v. City of Tampa, 156 Fla. 107, 22 So.2d 645 (1945); State v. Board of Public Instruction for Dade County, 126 Fla. 142, 170 So. 602 (1936). Conversely, the governor's veto authority is exercisable only within the confines of express constitutional grants:

> The authority of an executive to set aside an enactment of the legislative department is not an inherent power, and can be exercised only when sanctioned by a constitutional provision, and only in the manner and mode prescribed.
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> . . . .
>
> The veto power is in derogation of the general plan of the state government, and provisions authorizing it must be strictly construed, so as to limit its exercise to the powers expressly enumerated or necessarily implied.

82 C.J.S. Statutes sec. 52 (1953); see also Brown v. Firestone, 382 So.2d 654, 668 (Fla. 1980).

In this context, article III, section 1 vests solely in the legislature the power to make law, including the power to enact appropriations. Article III, section 8 in relevant part authorizes the governor to veto only "specific appropriation[s] in a general appropriation bill . . . ." No power is conferred on the governor to either alter or amend specific appropriations in a general appropriation bill, or to veto a portion of a specific appropriation.

In Brown v. Firestone, 382 So.2d 654 (Fla. 1980), this Court evaluated a number of gubernatorial vetoes of provisions in the General Appropriations Act of 1979. In doing so, the court examined the legislative history of the 1968 revision of article IV, section 18 of the 1885 Constitution, as the touchstone to construing the very section of the Florida Constitution which is at issue in this proceeding. The court's analysis was facilitated by a clear track record evidencing the reason that the constitution limits the governor's vetoes of appropriations only to "specific appropriations in a general appropriation bill." The court found that article III, section 8 was written for the express purpose of changing its earlier counterpart as construed by this court in Green v. Rawls, 122 So.2d 10 (Fla. 1960).

The Green case arose because the governor vetoed portions of a number of appropriations--exactly what the governor did here. In Green, for example, the governor had vetoed $12,000 out of the $143,580 appropriated for the Division of Corrections, and $10,000 out of the $1,014,794 appropriated for the Florida Board of Forestry. Although these vetoes reached only portions of specific appropriations, this court upheld the vetoes. Subsequently, this court held in Brown that the constitution was changed in 1968 for the express purpose of overturning the Green result:

> We believe the conclusion to be inescapable, and the minutes of the [constitutional revision] commission hearings so indicate, that the intent of

> the framers of the 1968 Constitution in revising Article IV, section 18 of the Constitution of 1885 was to supersede this Court's decision in Green v. Rawls. . . .

Brown, 382 So.2d at 666-67 (footnote omitted).

As the court in Brown noted, the governor's vetc power was the subject of considerable discussion during the 1968 constitution revision process. After the Constitution Revision Commission submitted its recommendation to the legislature, then-Governor Claude Kirk proposed an amendment that would have authorized the governor "to veto, strike or reduce any item, section or provision in appropriations bills or bills making appropriations." (R. 100)(emphasis added). A memorandum to members of the legislature dated July 27, 1967, which accompanied the governor's proposal, explained that the suggested language was along the lines of veto authority in New Jersey and a few other states which expressly allowed vetoes of less than a "specific appropriation."[4] (R. 95).

4/ California, Hawaii, Illinois, Massachusetts, Nebraska, New Jersey, Tennessee, and Virginia have authorized vetoes of less than a specific appropriation. (See R. 1723, 1735). For example, article IV, section 10(b) of the California Constitution states:

> The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill . . . .

Id. (emphasis added).

Footnote continued on next page.

On August 10, 1967, the Senate considered and rejected amendment 99 proposed by Senator Stolzenburg, which was identical to the governor's proposal regarding line-item vetoes. (R. 113). On August 11, 1967, Representative Osbourne, the minority leader pro tem, offered a similar amendment (amendment 338) before the House of Representatives sitting as the Committee of the Whole House, which would have given the governor the power to reduce items in appropriations bills. (R. 115). The amendment was withdrawn. (R. 117-18).

The legislature's rejection of then-Governor Kirk's suggestion and proposed amendments 99 and 338, makes it abundantly clear that the governor cannot reduce a specific appropriation by vetoing a portion of it. This constitutional imperative was confirmed by this court in Brown when it stated that the changes to article III, section 8, which the voters approved in 1968, were designed to prevent the creative exercise of the veto power. See Brown, 382 So.2d at 666-67. The power to veto portions of a specific appropriation which had been

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Footnote continued from previous page.

The New Jersey Constitution (1947) has similar provisions in article V, section I, para. 15:

> If any bill presented to the Governor shall contain one or more items of appropriation of money, he may object in whole or in part to any such item or items while approving the other portions of the bill . . . .

Id. (emphasis added).

conferred by the Green decision has unequivocally been withdrawn by the people of Florida. Id.

Under the 1968 Constitution, the governor's power to veto unidentified portions of an appropriation simply does not exist. This is not, as the governor suggested in the court below, merely a mindless labelling of numbers written into a general appropriations act. In Brown, this court carefully analyzed the interplay of constitutional authority surrounding an executive veto of a legislative appropriation. The court noted that legislative judgment is called for in fashioning specific appropriations for an appropriation bill. That exercise of legislative judgment involves consideration of whether to set out specific appropriations that are not so project-specific as to attract a veto, on the one hand, yet not so broad in scope that an entire category of expenditure is at risk of veto, on the other hand.[5] That is, the legislature must constantly weigh its too-specific versus its too-broad veto exposure by its selection

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5/ The court said:

> Thus, if the legislature deems it expedient to allocate $50,000,000 to the Department of Corrections without breaking the allocation down into its components, then that lump sum would be a specific appropriation under article III, section 8(a). Conversely, if the legislature allocated $1,000,000 of the $50,000,000 to maintenance of the corrections system, then that would be considered a specific appropriation.

Brown, 382 So.2d at 668.

of the constitutionally-referenced specific appropriations which are placed in the general appropriations act. In Brown, the court explicated the constitutional balance in the appropriations process by noting that the constitution gave the legislature, in the first instance, the very discretion to define a "specific appropriation in a general appropriation bill" which the governor now criticizes as overly technical.

The philosophical underpinning on which this court predicated its Brown decision leaves no room for argument: the governor cannot veto amounts which are not specifically identified by legislative choice in a general appropriations bill. Any such argument would contravene the constitutional balance which the court so carefully crafted:

> [T]he framers' overriding concern was to prevent the creative exercise of the gubernatorial veto.

Brown, 382 So.2d at 667. In Brown, the court went further in addressing the constitutional limit on a gubernatorial veto which does not address a specific appropriation in a general appropriation bill. "An attempted exercise of the veto power in any other manner is absolutely forbidden regardless of the motivation." 382 So.2d at 668.

(b) The vetoes at issue in this case.

Turning to the specifics of the purported vetoes in this case, it remains a simple matter to demonstrate that the vetoes exercised by the governor are unauthorized. They are

identical to the vetoes exercised in the now-discredited Green decision. In terms of article III, section 8, the constitution limits the governor's veto to "any specific appropriation in a general appropriations bill." Neither prong of that directive is met here.

By his own characterization in the veto message, the governor purported to veto "portions" of specific appropriations, and not specific appropriations themselves. (R. 36, 51, 52). His counsel has repeatedly acknowledged that the vetoes did not address specific appropriations, by representing to this court that the governor vetoed "legislative work papers." (See, e.g., R. 120). To this day the governor has never offered to reconcile his official veto message which labelled the challenged vetoes as being addressed to a "portion" of specific appropriations, with his post-lawsuit concoction of an incorporation-by-reference theory which mystically converts the "portions" vetoed into full blown specific appropriations in and of themselves.

As to the second prong of the constitutional provision, the monies allegedly vetoed by the governor nowhere appear or are identified in Chapter 88-555, which the governor concedes is the General Appropriations Act of 1988. (R. 329). For example, the governor attempted to veto the expenditure of $500,000 for maintenance of BlackWater River State Forest Road out of a $7,400,000 plus specific appropriation found in item 118 of the General Appropriations Act. The $500,000 expenditure identified

in the veto message is nowhere identified in the General Appropriations Act. Under the analysis in Brown, the legislature risked a veto of the entire $7,400,000 appropriation by aggregating in item 118 all of the expenses for the Department of Agriculture and Consumer Services, rather than identifying the BlackWater River State Forest Road maintenance expenditure as a "specific appropriation" in the act. As a consequence, the governor was left with a choice, to forego a veto or to veto specific appropriation 118 in its $7,441,858.40 entirety.

(c) Governor Martinez' explanation of his vetoes.

Having proclaimed in his official veto message that he vetoed "portions" of the specific appropriations at issue in this case, the governor now explains in an affirmative defense that he has in fact vetoed identifiable amounts contained within legislative work papers known as the D-3A's. (R. 327). This explanation is an admission that his vetoes are a nullity and that summary judgment was properly entered, since the constitution does not confer any power on the governor to veto anything except specific appropriations in an appropriation act.

The governor's defense of his veto of legislative work papers is hinged on an assertion that legislative work papers were incorporated by reference into, and became part of the General Appropriations Act, as a result of a transmittal letter dated June 22, 1988, from two legislative committee chairmen. Id. This contention is untenable.

For one thing, the June 22 transmittal letter does not purport to incorporate by reference anything in the General Appropriations Act. As statutory law directs, it merely transmits comparative budgeting data, in the form of work papers which were used in formulating the general appropriations bill.

> Pursuant to the provisions of Section 216.181(1), Florida Statutes, we are jointly transmitting herewith the General Appropriations Act, Summary Statement of Intent, and detailed legislative intent in the form of computerized work papers (D-3A's), for each department. These work papers are provided through computer releases and reflect the Agency's Request, Governor's Recommendation and Legislative Recommendations. The summary document compares the Governor's Amended Budget Recommendations to the funds appropriated for the 1988-89 Fiscal year. Pursuant to Chapter 216, Florida Statutes, the Appropriations Act and the intent documents are to be considered the <u>original approved budget</u> for operational and fixed capital outlay expenditures for each state agency.

(R. 744) (emphasis added).

As statutory law makes clear, the letter incorporates nothing by reference vis-a-vis the General Appropriations Act. The terms "appropriations act" and "original approved budget" are not synonymous. The term "original approved budget" is defined in Chapter 216 as "the approved plan of operation of an agency consistent with the General Appropriations Act . . . ." Sec.216.011(1)(w), Fla. Stat. (1987). The term "appropriations act" is defined as "the authorization of the Legislature . . . for the expenditure of amounts of money by an agency and the

legislative branch for stated purposes . . . ." Sec.216.011(1)(c), Fla. Stat. (1987). The June 22 transmittal letter carefully tracks the language contained in Chapter 216 with respect to defined terms which are relevant to the government's annual expenditure practices. It makes no attempt to incorporate work papers into the appropriations act. For another thing, two legislators have no power to legislate or to alter or amend a legislative act. See State v. Bledsoe, 31 So.2d 457 (Fla. 1947); In re Advisory Opinion, 43 Fla. 305, 31 So. 348 (1901); see also Gwynn v. Hardee, 92 Fla. 543, 110 So. 343 (1926). Article III, section 1 of the Constitution assigns the power to make laws solely to the legislature, and article III, section 7 provides for the passage of bills and requires a majority vote of all legislators in both houses to enact a law. This latter provision, of course, applies to appropriations bills. See In re Advisory Opinion, 43 Fla. 305, 31 So. 348 (1901).

Once a bill has been duly passed by the legislature, no one chamber, much less two individual legislators, can unilaterally alter that bill. State v. Bledsoe, 31 So.2d 457 (Fla. 1947); see also Gwynn v. Hardee, 92 Fla. 543, 110 So. 343 (1926). Any additions, corrections or changes to a bill not passed upon by both houses are wholly spurious. Id. Individual legislators, whether committee chairmen or not, have no power to legislate. Indeed, the governor has never explained how two committee chairmen could incorporate anything by reference into a general appropriations act.

The governor's contention that the chairmen of the Senate and House Appropriations Committees had the power or authority to amend the General Appropriations Act by incorporating legislative work papers into that act, and that the legislature could confer that right by section 216.181, is simply not credible. No legislative work papers could, by virtue of the June 22 letter, become "law" as part of the 1988 General Appropriations Act, any more than they would have if the chairmen had held a press conference and announced they were defining the specific appropriations in Chapter 88-555 in terms of smaller, identifiable individual amounts.

Dicta in United Faculty of Florida v. Board of Regents, 365 So.2d 1073 (Fla. 1st DCA 1979), on which the governor relies, will not support the governor's contention. In United Faculty, a teacher's union sought to compel its employer, the Board of Regents ("BOR") to fund the total amount of salaries agreed to in a collective bargaining agreement. Id. at 1074. The BOR sought to avoid judgment by arguing that the legislature had appropriated less than had been agreed to under the collective bargaining agreement, and that the lesser amount was all that the teacher's union could obtain.

In agreeing with the BOR, the First District Court of Appeal noted that "the legislative mandate merely corroborates what is otherwise clear [in the appropriations bill]: that less than the requested amount was appropriated." 365 So.2d at 1077 (footnote omitted). The issue in United Faculty was not the

constitutionality of gubernatorial veto. It was not even the meaning, application or effect of intent documents. The United Faculty court only used a legislative letter of intent to confirm the obvious, that the legislature had not fully funded the BOR's request. The court certainly did not hold that certain legislative letters were a part of or incorporated into the General Appropriations Act:

> Further, assuming arguendo that the letter of intent is not dispositive, it is nonetheless entitled to substantial weight in ascertaining the Legislature's will. That is so for precisely the reason that the Legislature has directed its appropriations committee chairmen to issue such letter. Moreover, the budget request presented to the Legislature is to be considered in arriving at any interpretation of an appropriations bill.

Id.

In any event, United Faculty's discussion of letters of intent has long been superseded by statutory revision. It was not until after United Faculty was decided that the legislature created the "statement of intent" to which the governor alludes in this case. Ch. 79-190, sec.14, Laws of Fla. The statement of intent provisions underwent a complete overhaul in 1983:

> The statement of intent shall not amend or correct any provision in the General Appropriations Act, but may provide additional direction and explanation to the Executive Office of the Governor, the Administration Commission and each affected state agency relative to the purpose, objectives, spending philosophy and restrictions associated with any specific appropriation category.

Ch. 83-49, sec.14, Laws of Fla.

The 1983 amendment is a clear statement by the legislature that the statement of intent is not law and cannot amend the law; that it is merely to be used solely as a tool to assist agencies in understanding the "purpose, objectives, spending philosophy and restrictions" associated with appropriations.

In 1987, the legislature eliminated any remaining relevance that United Faculty might have had on this issue. Chapter 87-548, section 63, Laws of Florida added yet a further explication of the statement of intent by prohibiting a statement of intent from allocating or appropriating funds. That measure was signed into law on December 11, 1987, by the appellant in this cause, Governor Bob Martinez. As a matter of law, there could have been no incorporation by reference.

The governor's attempt to veto work papers not contained in an appropriations bill was an extra-constitutional act. As a matter of law, those partial vetoes were properly nullified.

2. **The governor's affirmative defenses do not bar summary judgment.**

The governor suggests that summary judgment was improper because he had stated a legally sufficient affirmative defense. (Initial brief at 13). The governor confuses the test for legal sufficiency on a motion for summary judgment with the test for legal sufficiency of a motion to strike.

An affirmative defense, by definition, is an attempt to avoid an adverse adjudication under a claim asserted in a preceding pleading. It is both an admission of the claim asserted and an avoidance of that claim, based on some justification or excuse. Tropical Exterminators, Inc. v. Murray, 171 So.2d 432 (Fla. 2d DCA 1965); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benton, 467 So.2d 311 (Fla. 5th DCA 1985) (an affirmative defense constitutes a confession of plaintiff's cause of action and an avoidance of liability on that claim). The legal sufficiency of an affirmative defense is tested by a motion to strike under Rule 1.140(b). A motion to strike an affirmative defense under that rule, like a motion to dismiss for failure to state a cause of action, is limited solely to the allegations of the defense. It does not reach any factual issues. See Asphalt Paving, Inc. v. Ulrey, 149 So.2d 370 (Fla. 1st DCA 1963); Freeman v. Holland, 122 So.2d 791 (Fla. 1st DCA 1960). If all elements of an avoidance, justification or excuse are alleged, the motion must be denied. Id.

A motion for summary judgment does not address a legal question in the same manner as a motion to strike affirmative defenses under Rule 1.140. While a motion to strike addresses only the facial sufficiency of a pleading without inquiring about the truth of the allegations, a motion for summary judgment tests the sufficiency of the facts to which the substantive legal principles are applied. See Odham v. Foremost Dairies, Inc., 128 So.2d 586 (Fla. 1961) (facial sufficiency of a pleading does not

bar summary judgment where no genuine issue of material fact under that pleading is demonstrated). Where the facts established on a motion for summary judgment demonstrate that there is no genuine issue of material fact, the court may "pierce the 'paper-issues' made by the pleadings and render judgment on the merits . . . ." Warring v. Winn-Dixie Stores, Inc., 105 So.2d 915, 918 (Fla. 3d DCA 1958). For example, a defendant may be able to allege each element of the defense of accord and satisfaction and thereby avoid a motion to strike. An inability to establish material facts to prove that "legally sufficient" defense will not avoid summary judgment, however.

In this case, the legislature asked the court to declare the governor's vetoes of portions of specific appropriations unconstitutional. (R. 235). The governor defended by alleging that he had vetoed detailed legislative work papers which purportedly had been incorporated by reference into the General Appropriations Act. (R. 327). Taking these allegations as true as required by Rule 1.140, the governor stated a legally sufficient defense that was not subject to a motion to strike. The sufficiency of these allegations does not, however, bar summary judgment if the governor is unable to support them with material evidence or facts. To avoid summary judgment, the governor had to demonstrate that the legislative

work papers had been incorporated by reference into the General Appropriations Act as alleged.[6]

He made no such showing, and the legislature's failure to move to strike the governor's affirmative defense was irrelevant. Although the governor may have pled a sufficient defense, without a material factual dispute raised by the defense, summary judgment was inevitable.

3. No issue of material fact was raised by the affirmative defenses.

The governor argues that the legislature failed to come forward with evidence to controvert the allegations of his first affirmative defense. (Initial brief at 13-14). That defense raised no issue of material fact which had to be controverted with evidence.

The seminal issue for determination on any motion for summary judgment is the existence of a material issue of fact. Jones v. Stoutenburgh, 91 So.2d 299 (Fla. 1956); Landers v. Milton, 370 So.2d 368 (Fla. 1979). Summary judgment may be entered where no genuine issue of material fact exists and where one of the parties is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c); Carpineta v. Shields, 70 So.2d 573 (Fla. 1954). Both questions, the existence or non-existence of material facts and legal entitlement to a judgment, are questions

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6/ Under Rule 1.110(e), the governor's defenses automatically were denied. Moore Meats, Inc. v. Strawn, 313 So.2d 660 (Fla. 1975); American Salvage and Jobbing Co., Inc. v. Salomon, 295 So.2d 710 (Fla. 3d DCA 1974).

of law to be determined by the court. Warring, 105 So.2d at 918. In the first instance, the court must compare applicable substantive law with the record showing of facts. If that comparison demonstrates a genuinely disputed material fact, summary judgment must be denied. Id. Where, however, no disputed material facts exist, judgment in one party's favor may be entered. Id.

A comparison of the law applicable to this case and the record showing of facts reveals no genuinely disputed material fact. The legislature claimed in its complaint that under relevant provisions of the Florida Constitution and case law interpreting those provisions (particularly this court's Brown decision), the governor's attempt to veto "portions" of an appropriation are unconstitutional. The governor conceded that proposition. He sought to avoid nullification of his vetoes by claiming (despite his identification of the vetoes in his official veto messages as "portions") that his vetoes were addressed to specific appropriations in intent documents.[7] This avoidance hinged on the sole allegation that the items vetoed,

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7/ The governor's other two defenses raised no substantive or factual issues. The second affirmative defense sought to dismiss the legislature's complaint for failure to allege an essential element of its cause of action, a contention now abandoned in this appeal. (R. 237-38); Weatherford v. Weatherford, 91 So.2d 179 (Fla. 1956). The third affirmative defense only sought to dismiss all named plaintiffs in their official capacities, a contention which would not defeat summary judgment because the governor conceded their standing as citizens and taxpayers. (R. 238).

although not expressly part of the General Appropriations Act, had been incorporated by reference into that act and were subject to veto by virtue of a letter dated June 22, 1988. The governor alleged:

> . . . The D-3A's are a part of the legislative intent document and furthermore were expressly incorporated into the appropriations bill by reference in the letter, dated June 22, 1988, transmitting the intent documents as required by Section 216.181, Florida Statutes, from the Chairmen of the legislative appropriations committees to the Governor, Comptroller, and Audit General. . . . As specific appropriations in a general appropriations bill, the expenditures are subject to the Governor's veto power.

(R. 237).

The governor had earlier conceded that the statement of intent and the D-3A's had not been enacted by the Florida Legislature. (R. 120). Based on his pleadings, the sole issue raised by the governor's defense was, therefore, whether the June 22 letter from two legislative committee chairmen acted to incorporate non-legislative documents into a "general appropriation act." (R. 237).

The power or authority of two individual legislators to enact laws or to amend or modify legislative acts is, of course, a legal issue (as to which, incidentally, the governor offered no factual evidence whatsoever) that may be determined without consideration of any evidence or facts. That issue is resolved completely in article III, section 1 and article III, section 7 of the constitution. There was no disputed issue of fact to be

controverted by evidence or decided. The entire action could be decided as a matter of law.

Although the governor's first affirmative defense raised no factual issue to controvert, the governor consistently suggests otherwise by arguing evidence that supports only his dismissed counterclaim. (Initial brief at 14-15). Yet the issues raised in that counterclaim were not before the court when the legislature's motion for summary judgment was heard.

Under Rule 1.510, the only issues for determination at the December 22 hearing were the legislature's request to declare the governor's concededly partial vetoes unconstitutional and the governor's affirmative defense that legislative work papers had been incorporated vis-a-vis the June 22 letter into the General Appropriations Act. (R. 235-43,327-28); See Redding v. Powell, 452 So.2d 132 (Fla. 2d DCA 1984); Faussner v. Wever, 432 So.2d 100 (Fla. 2d DCA 1983). Those issues have nothing to do with the effect of Chapter 216 on executive departments and government agencies, as alleged in the counterclaim and as purportedly supported by the governor's depositions and affidavits. (R. 331).

The governor makes much of the fact that a court may consider the practical operation and effect of a legislative act in interpreting that act. (Initial brief at 14-15). The practical operation and effect of Chapter 216 on individual government agencies was not raised in the legislature's complaint or in the governor's affirmative defenses. (R. 235-43, 327-28).

That issue was raised solely in the governor's counterclaim, which was not ripe for determination on the legislature's motion for summary judgment on its claim.

The critical question faced by the trial court with regard to summary judgment was whether the affidavits and depositions filed by the governor in opposition to the motion for summary judgment addressed a fact issue raised in the complaint or in the governor's affirmative defense. The governor was never able to explain to the trial court how they did, and he certainly has not made any connection for this court. The existence of a dispute not material to the disposition of a case will not, of course, preclude summary judgment. Armstrong v. Southern Bell Telephone and Telegraph Co., 366 So.2d 88 (Fla. 1st DCA 1979).

An affidavit of no probative force will not bar summary judgment. Enes v. Baker, 58 So.2d 551 (Fla. 1952); Boyer v. Dye, 51 So.2d 727 (Fla. 1951); Johnson v. Studstill, 71 So.2d 251 (Fla. 1954). The affidavits, depositions and record in this case demonstrate no disputed material fact on any issue raised by the complaint and affirmative defenses.

There was no need for the legislature to come forward with evidence to controvert a non-existent issue of fact. Howdeshell v. First National Bank of Clearwater, 369 So.2d 432 (Fla. 2d DCA 1979) (to obtain a summary judgment when the defendant has asserted affirmative defenses, plaintiff must either disprove those defenses by evidence or establish that

there is no disputed issue of material fact); Stewart v. Gore, 314 So.2d 10 (Fla. 2d DCA 1975).

In this case, the record reveals that there were no disputed issues of material fact. The court properly pierced the "paper issues" to enter summary judgment on the merits. Howdeshell, 369 So.2d at 433; Warring, 105 So.2d at 918; Home Federal Savings & Loan Association of Hollywood v. Emile, 216 So.2d 443 (Fla. 1968); Reflex N. V. v. Umet Trust, 336 So.2d 473 (Fla. 3d DCA 1976).

4. **The legislature and the legislators joined in this action had standing to sue and are entitled to a judgment as a matter of law.**

The governor contends that Department Of Education v. Lewis, 416 So.2d 455 (Fla. 1982), and Jones v. Department of Revenue, 523 So.2d 1211 (Fla. 1st DCA 1988), require this court to find that the legislature and its co-plaintiff members lack standing to prosecute this action in their official capacities.[8] Neither case stands for that proposition. In Lewis, the Florida Department of Education and the Commissioner of Education brought suit seeking a declaratory judgment that a particular provision of the 1981 general appropriations bill was unconstitutional. In Jones, the property appraiser for Escambia County filed suit challenging the constitutionality of a statute giving the Department of Revenue's Division of Ad Valorem Tax the power to

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8/ The governor concedes that the plaintiffs in their individual capacities as citizens and taxpayers have standing to prosecute this claim. (R. 328).

estimate the ad valorem tax assessment for each county in the state. In both cases, plaintiffs were denied standing to sue in their official capacities because "state officers and agencies are required to presume that legislation affecting their duties is valid . . . ." Lewis, 416 So.2d at 458; Jones 523 So.2d at 1214.

The rationale behind the decisions in Jones and Lewis is inapplicable to this case. The plaintiffs in Jones and Lewis were state officers and agencies, not the Florida Legislature or its members. This distinction is critical. There is only one Florida legislature and a limited number of Florida legislators. Comparatively, there are thousands of state officers and employees. If every state officer and employee were permitted to challenge legislation affecting their respective responsibilities, the Florida courts would stand the risk of being inundated with multiple lawsuits. Additionally, if state employees had the right to challenge legislation affecting their duties, the legislature's ability to supervise state officers and employees would be greatly diminished.

These concerns are not applicable in this case. First, the Florida Legislature is not supervised by any state officer, agency, or governmental entity. Thus, the policy of maintaining control and authority over state officers is simply inapplicable to the legislature and its members. Second, the Florida Legislature is a singular entity, and its membership is limited in contrast to the number of state officers and employees. Thus,

the legislature and its members simply do not pose the same logistical threat to the Florida courts that state employees and officers do.

The court below was correct in according official and individual standing to the legislature and its co-plaintiff members. A party possesses standing to sue when that party can demonstrate a direct and articulable stake in the outcome of a controversy. See Brown v. Firestone, 382 So.2d 654 (Fla. 1980); see also Jones v. Department of Revenue, 523 So.2d 1211 (Fla. 1st DCA 1988); Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984). The vetoes challenged in this case inflicted distinct and special injury on the Florida Legislature as an entity, and on each of its members.

The legislature possesses the power to enact appropriations and by so doing authorize the expenditure of state monies. See Brown, 382 So.2d at 663. The vetoes at issue in this case challenge the legislature's regulatory authority over its appropriations, that is, the vetoes at issue purport to act on portions of the 1988 General Appropriations Act, rather than on specific appropriations in the act itself. The vetoes, therefore, directly infringe on the legislature's power to appropriate. This assault gives the legislature and its members an articulable and direct stake in the outcome of this suit.

Even if the legislature and its members did not suffer special injury, they would still have standing to sue. The special injury rule was created to prevent multiplicity of

lawsuits. See Florida Wildlife Federation v. State, 390 So.2d 64 (Fla. 1980); see also Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972). A legislative challenge to gubernatorial vetoes does not present a likelihood of multiple lawsuits. The legislature, and its co-plaintiff members, seek to vindicate an interest unique to the Florida Legislature: the power to appropriate funds for the State of Florida. Since the legislature's power to appropriate is the legislature's power alone, there is no possibility that a multitude of parties will litigate questions pertaining to the scope and breadth of the legislature's power and the governor's infringement of that power.

Even if the special injury rule were deemed applicable to this case, the legislature and its members would be exempt from its application because they brought this suit to vindicate the public's interest in assuring that the governor exercises his veto authority in accordance with the Florida Constitution. A party need not prove special injury where he challenges a governmental act on the ground that it was unlawful or unconstitutional. See Brown v. Firestone, 382 So.2d 654 (Fla. 1980) (citizen, without special injury, had standing to challenge veto on the ground that they were unconstitutional); see also Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972) (citizen, without special injury, had standing to challenge certain sections of the 1971 General Appropriations Act on constitutional grounds); Renard v. Dade County, 261 So.2d 832

(Fla. 1972) (any affected citizen has standing to challenge a zoning ordinance which is void because not properly enacted). In Horne, the court explained its reluctance to impose the special injury rule in cases involving constitutional challenges:

> Despite our reluctance to open the door to possible multiple suits by 'ordinary citizens,' nonetheless, it is the 'ordinary citizen' and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause. We would therefore not deny this right of attack by a responsible taxpayer upon allegedly illegal expenditures (appropriations) of public monies, as transcending possible unwarranted litigation that might in some instances ensue.

Horne, 269 So.2d at 663.

The legislature and its members are acting as champions of the people when they challenge the constitutionality of gubernatorial vetoes. They seek, in their capacities as lawmakers, to do exactly what the citizen plaintiffs did in Brown and in Thompson v. Graham, 481 So.2d 1212 (Fla. 1985). They have presumptive standing to sue. Even more than the average taxpayer who may vigilantly guard against unconstitutional expenditures, the Florida Legislature and its members are better suited to know of and to guard against a gubernatorial abuse of veto power.

5. **Dismissal with prejudice was proper because the governor could not amend his counterclaim to state a cause of action against the defendants named.**

The governor counterclaimed against Jon L. Mills, Tom Gustafson, Samuel P. Bell, III, John W. Vogt and Robert (Bob) Crawford, in their capacities as citizens and taxpayers of the

State of Florida, for a declaration regarding the legal significance of the D-3A's, which the governor calls "intent documents." (R. 330). Alternatively, and in the event the court determined that those intent documents were not part of the General Appropriations Act, he asked the court to declare that the intent documents are not binding on the executive departments and agencies of the government. (R. 330-31). That counterclaim failed to state a cause of action because it failed to allege either a definite right that would be directly affected by the requested declaration or that there was a present actual controversy.

The declaratory judgment sought by the governor requires, like all declaratory judgments, that the governor have a definite and concrete right which will be directly affected by the requested declaration. Bowden v. Seaboard Air Line R. R. Co., 47 So.2d 786 (Fla. 1950); Colby v. Colby, 120 So.2d 797 (Fla. 2d DCA 1960). However, the governor has no right or interest to be protected in this case. It is undisputed that the vetoes in question resulted in a diminution of funds to the Department of Education and to the Department of Agriculture.[9] (R. 36, 51, 52). Those two agencies alone have a present, definite interest in the validity of the challenged vetoes.

9/ Specific Appropriation 118 goes to the Department of Agriculture and Consumer Services. Specific Appropriations 528, 529 and 530 go to the Department of Education/Board of Regents. (R. 36, 51, 52).

Neither of those agencies are parties to the counterclaim.[10] The governor himself has no interest in the effect of his vetoes on those agencies. He has no constitutional or statutory right to act on either of these two agencies' behalf.

The governor's action for declaratory judgment is nothing more than a request for an advisory opinion for future reference as to whether he may attempt to exercise the same sort of veto which he has already attempted to exercise. He has no further duties to perform with regard to administering the appropriations which are the subject of his present vetoes. He seeks nothing more than legal advice with regard to a completed transaction. This cannot be accomplished through a declaratory decree. Bryant v. Gray, 70 So. 2d 581 (Fla. 1954); Register v. Pierce, 13 F.L.W. 1958 (Fla. 1st DCA, Aug. 22, 1988); Silvers v. Drake, 188 So.2d 377 (Fla. 1st DCA 1966). Where a complaint fails to properly allege the existence of a present right that will be directly affected by the requested declaration, a motion to dismiss must be granted. Register, supra.

The governor's claim that this case is framed and presented to this court "precisely in the manner directed by the Supreme Court in Brown v. Firestone" is inaccurate. (Initial brief at 18). The issues in Brown were presented on a petition

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10/ The head of the Department of Agriculture and Consumer Services is the Commissioner of Agriculture. Sec.20.14, Fla. Stat. (1987). The head of the Department of Education is the State Board of Education comprised of the governor and the cabinet. Art. IV, sec.4, Fla. Const.; sec.20.15, Fla. Stat. (1987).

for writ of mandamus. Although the court stated in passing that the governor's response "in effect" constituted a counterclaim, the procedural posture of that case and this are critically different.

At the governor's insistence, this case arrives at this court not as an original proceeding in mandamus but on direct appeal from a declaratory proceeding in circuit court. Although the legislature initially sought review using the Brown procedure, the governor demanded a full blown circuit court proceeding. Under the circumstances, the rules of civil procedure governed the proceeding below as opposed to the off hand generalities enunciated in Brown. Those rules doomed the governor's counterclaim.

Obviously, the governor is not precluded from defending an action for declaratory judgment brought by citizens and taxpayers. If the operation of any statute is brought into issue by suit against a state officer, that officer may defensively raise the question of the law's constitutionality. Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); see also City of Pensacola v. King, 47 So.2d 317 (Fla. 1950). In his brief, the governor fails to distinguish a defense from a counterclaim.

A defense is an avoidance of an affirmative claim. Fla. R. Civ. P. 1.110(c). A counterclaim, however, is a claim for affirmative relief against the plaintiffs. It must stand alone and state a cause of action as though it were an original proceeding. Fla. R. Civ. P. 1.110(b). The governor's

counterclaim is not a defense, it is purportedly an independent action against only the named defendants for an interpretation of a portion of the Florida Statutes.

The governor has no authority to seek such relief. He cannot seek a declaratory judgment regarding either the effect of the intent documents on his "continuing statutory duties regarding the state budget" or on the validity of his purported vetoes. (Initial brief at 19). Article IV, section 1 of the Florida Constitution sets forth the governor's responsibilities and duties. With regard to the governor's power to initiate or to participate in litigation, he may only:

> (b) . . . [I]nitiate judicial proceedings in the name of the state against any executive or administrative state, county or municipal employee to enforce compliance with any duty or restrain any unauthorized act.
>
> (c) . . . [R]equest in writing the opinion of the Justices of the [S]upreme [C]ourt after the interpretation of any portion of this constitution upon any question affecting his executive powers and duties.

Like other public officials, the governor may not seek a declaratory judgment relating to his duties unless he "is willing to perform his duties, but is prevented from doing so by others." See Reid v. Kirk, 257 So.2d 3, 4 (Fla. 1972); Graham v. Swift, 480 So.2d 124 (Fla. 3d DCA 1985).

In Graham, a commissioner of the Florida Administrative Commission was held to lack standing to seek a declaratory

judgment relating to the validity of a section of the Florida Administrative Code. The commissioner in that case claimed that his decisions would be substantially affected by a code provision and sought a declaratory judgment. The court ruled that the commissioner had no standing, since a public official can only seek a declaratory judgment where that official has been prevented from performing his duties. Id. at 125.

State officers and agencies are obliged to presume that legislation affecting their duties is valid; they do not have authority to initiate litigation for the purpose of determining otherwise. Department of Education, 416 So.2d at 458; see also Barr v. Watts, 70 So.2d 347 (Fla. 1953); City of Pensacola, supra. In such a situation, the public officer or agency does not have a sufficiently substantial interest or special injury to allow the court to hear the challenge. Department of Education, 416 So.2d at 458. The governor does not claim that he has been prevented from performing his duties. To the contrary, he declares that he has already performed his duty by issuing the vetoes in question and that he has a question about the effect of the intent documents on those vetoes and on his future duties as the state's chief budget officer. Those interests are not enough.

Moreover, the governor failed to join indispensable parties in his counterclaim. The governor's counterclaim was brought against five individuals "in their capacity as citizens and taxpayers of the state of Florida." (R. 328). The

counterclaim did not join an official agency, body or branch of government charged with any legal responsibility for either enacting, regulating or spending money appropriated or subject to elimination by the governor's purported veto power. While citizens and taxpayers have standing to sue government officials in their capacity as officers of the state and to seek declaratory relief relating to the constitutionality of state legislative actions, the converse does not hold true. See Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982). A government official cannot sue an ordinary citizen to test the validity of government action. The governor, for example, has no power to litigate constitutional issues by naming one or more ordinary taxpayers and citizens residing in the state, as by bringing a "friendly" suit against an individual citizen employed in his office. Although he may state a defense to a claim brought by an individual citizen, he cannot initiate an independent claim against a citizen.

The parties named in the governor's cross-claim have no adverse interest regarding the legal significance of the intent documents. (R. 335). The secretary of state is required to keep a record of the legislature's official acts. (R. 331). The comptroller is charged with paying accounts pursuant to enactments. (R. 332). These two individuals have no authority to represent the State of Florida or the legislature in a declaratory judgment action to interpret the legal significance of intent documents under section 261.181. These individuals

were not joined in the counterclaim in their official capacities, in any event.

For tactical reasons relating to his standing argument against the legislature, the governor simply failed to join the real parties in interest to his countersuit. All persons materially interested, legally or beneficially in the subject matter of this action had to be made parties, so that a complete decree would bind them all. Baynard v. City of St. Petersburg, 180 Fla. 407, 178 So.150 (1938). Indispensable parties are parties, so essential to a suit that no final decision can be rendered without their joinder. Hertz Corporation v. Piccolo, 453 So.2d 12 (Fla. 1984).

Finally, the governor faults the trial judge for failing to state his reasons for dismissing the counterclaim. This was not error. There is no requirement that a court state its reasons for ruling on a motion to dismiss. Williams v. Ricou, 143 Fla. 360, 196 So. 667 (1940). Although it may be a better practice to state the grounds upon which a dismissal is granted, there is no general requirement that an order of dismissal state the grounds upon which it is based. May v. Holly, 59 So. 2d 636 (Fla. 1952); Jesek v. Vordemaier, 227 So. 2d 69 (Fla. 4th DCA 1969). (Notably, this court did not state its reasons for dismissing the legislature's mandamus petition on the governor's motion. (R. 1-2).)

In May v. Holly, this court, addressing issues similar to those involved here, indicated that it was perhaps better

practice to state the grounds for dismissing a declaratory judgment action with prejudice, but not essential.[11] May v. Holly, 59 So.2d at 637. The court had long ago recognized that if any ground raised in a motion to dismiss is well founded and fatal to the relief prayed for in the complaint, an order dismissing the complaint with prejudice is sufficient even if it fails to state the grounds upon which it is based. Williams, 196 So. at 669.

Where amendment will not cure a defect, dismissal with prejudice must be granted. Smith v. Jacksonville Terminal Employees Federal Credit Union, 193 So. 2d. 436 (Fla. 1st DCA 1967); Sabema Corp. v. Sunaid Food Products, Inc., 309 So. 2d 620 (Fla. 3d DCA 1975). No matter how many times the governor sought to amend, he could not bring this counterclaim. Fla. Const. Art. IV, sec.1. Dismissal with prejudice was appropriate.

6. The governor's counterclaim is not ripe for determination on this appeal.

This court cannot reach the merits of and adjudicate the governor's counterclaim (or the crossclaim) as he suggests in his brief. (Initial brief at 28). Neither the counter-defendants nor the cross-defendants had filed an answer to those claims. Neither the counter nor cross-defendants have

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11/ Contrary to the May decision, the Third District Court of Appeal has required articulated grounds for orders dismissing declaratory judgment actions, not for orders dismissing other claims. Dynamic Cablevision of Florida, Inc. v. Lennar Corp., 434 So.2d 27 (Fla. 3d DCA 1983). There appears to be no reason for this distinction, and none is advanced in Dynamic Cablevision.

been given an opportunity to create a record on those claims. The record before this court is simply not sufficient for a determination on the merits of the governor's counterclaim (or crossclaim).

Conclusion

When ne issued his official veto message, Governor Martinez knowingly did one of two possible things. Either he was unfamiliar with the constitutional limitation on his veto power with regard to appropriations and thought he could veto "portions" of specific appropriations or he knowingly attempted to circumvent the constitution by a profound shift in the balance of power that the constitution has established. The governor cannot be permitted to undertake constitutional change through this means, without the approval of the people of the State of Florida.

From the commencement of the predecessor mandamus proceeding in this court, the governor has raised a number of procedural smoke screens to avert a declaration that he has overstepped his constitutional bounds by attempting to veto, in his words, a "portion" of a specific appropriation on five separate occasions. The smoke has now cleared, and the governor's purported vetoes have been exposed for what they are --invalid acts which would dramatically alter the constitutional balance between the governor and the legislature of Florida vis-a-vis the appropriations process.

As the legislature earlier noted for this court, the governor can run but he cannot hide from the consequence of his

act. (R. 146). This court must affirm the judgment of the trial court that the governor's purported vetoes are nullities. The trial court's orders should in all respects be affirmed.

Respectfully submitted,

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Certificate of Service

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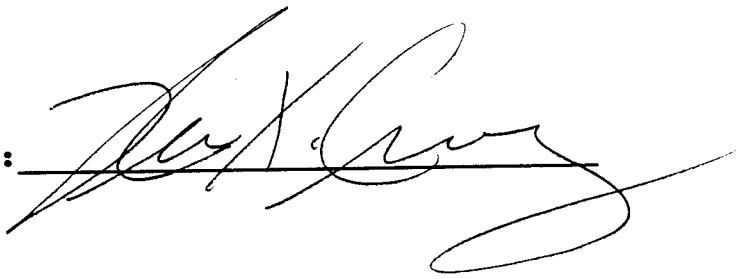
By: 

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