IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ, Governor of the State of Florida, Appellant, vs. THE FLORIDA LEGISLATURE, etc., et al, Appellees.	*	CASE NO. 73,601

REPLY BRIEF OF APPELLANT,
BOB MARTINEZ, GOVERNOR OF THE STATE OF FLORIDA
TO ANSEWR BRIEF OF APPELLEE, THE FLORIDA LEGISLATURE

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ARGUMENT

Contrary to Appellees' assertions, the Governor has never tried to avoid decision in this case. The Governor has, however, consistently tried to have a full and complete explication of the appropriations process while the Legislature has attempted to limit the scope of these proceedings to a narrowly defined issue of its own choosing.

Appellees' contention that "the issues raised by the pleadings and resolved by the trial court are ripe for review on the merits by this court" (Answer Brief, page 3) juxtaposed with their statement that the "court cannot reach the merits of and adjudicate the governor's counterclaim" (Answer Brief, page 43) is indicative of the lengths to which the Legislature will go in attempting to block a review of the issues in this case.

Contrary to Appellees' statements on page 3 of the Answer Brief, however, a complete record was not developed as the Governor requested. The summary judgment was entered only one week before the scheduled date for final hearing. There were depositions taken which are not a part of this record on review of the Final Summary Judgment and there were depositions scheduled, including the Chairmen of the Appropriations Committees, which were not taken because of the entry of this

order. Appellant does contend, however, that in the interest of time, the record is sufficient upon which this Court could determine the merits of the Counterclaim and Cross-claim.

I. The Trial Court Erred in Entering the Final Summary Judgment

Appellees assert that the vetoes at issue here and the Governor's rationale for them "mocks the rationale and teaching" of Brown v. Firestone, 382 So.2d 654 (Fla. 1980) (Answer Brief, page 10). They repeatedly urge that the vetoes affect only a "portion" of an appropriation item set forth in the General Appropriations Act and maintain that Brown and the legislative history surrounding the adoption of Article III, Section 8(a), Florida Constitution, in 1968 makes clear that the Governor may not veto a "portion" of an appropriation set forth in the General Appropriations Act. Furthermore, they contend that Governor Martinez has been guilty of creative exercise of the veto condemned by Brown. Appellees are just wrong on both counts.

First of all, use of the term "portion" is simply semantical. If by that term is meant an amount less than a designated line item in a general appropriations bill, Brown makes clear that such lesser amount is subject to veto. In Brown such lesser sum was itself defined as a specific appropriation:

> Whether seeking to define 'line item' or `specific appropriation', the concept embodied in those terms is essentially the same. A specific appropriation is an identifiable, integrated fund which the legislature has allocated for a specified purpose.

382 So.2d at 668 (emphasis added).

Application of this definition to the vetoes involved in Brown resulted in the validation of four of the six vetoes, each of which applied to a sum set forth in a proviso which was a "portion" of the line item appropriation:

a) Veto No. 2 which vetoed $2,613,142 in each fiscal year of the biennium from line item appropriations "382 Expenses" of $5,291,808 and $5,508,260, respectively, was upheld. 382 So.2d at 658 and 669

b) Veto No. 4 which vetoed $2,020,000 from line item appropriation "6G Fixed Capital Outlay - Park Development" of $8,000,000 was upheld. 382 So.2d at 660 and 670. (For a direct analogy to this case, See Veto 1.Blackwater River State Forest Road, App 1 to Appellee's brief).

c) Veto No. 5 which vetoed $2,500,000 in each fiscal year of the biennium from line item appropriations "OB Fixed Capital Outlay . . ." of $27,192,240 and $2,573,035, respectively, was upheld. 382 So.2d at 660 and 670, 671.

d) Veto No. 6 which vetoed $10,000,000 from line item appropriation "OC Fixed Capital Outlay . . ." of $28,730,637 was upheld. 382 So.2d at 661 and 670, 671.

Hence, it is clear that the Appellees "portion" of a line item appropriation is Brown v. Firestone's "specific appropriation"!

With respect to Appellees' allegation that Governor Martinez has been guilty of creative use of the veto, this assertion is plainly belied by Brown and Appellees' own concession. The "creative use" of the gubernatorial veto decried by Judge Taylor in Green v. Rawls, 122 So.2d 10 (Fla. 1960); addressed by the Constitutional Revision Commission in 1968 when it amended Article III, Section 8(a); and explained by this Court in Brown, has to do with the Governor vetoing the purpose for which a sum is appropriated but then attempting to retain those funds in the budget for expenditure on a different purpose. As explained in Brown:

> But the veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent. For example, when the legislature designates under the Department of Education $5,000,000 for salaries, the governor cannot veto the appropriation for salaries and utilize the money for another purpose; the veto must, in effect, destroy the fund. Otherwise, the governor could legislate by altering the purpose for which the money was allocated. He could 'create' another purpose to which to apply the appropriation.

382 So.2d at 664, 665.

Hence, ". . . section 8(a) requires the governor to make the hard choice whether to give up the appropriation entirely or to follow the legislative direction for its use." 382 So.2d at 667.

Just as Governor Graham was adjudged to have acted properly in Brown by "giving up" the sums identified in the provisos there, Governor Martinez has "given up" the sums identified in the intent documents here. Appellees concede that fact at page 36 of their brief -- "[i]t is undisputed that the vetoes in question resulted in a diminution of funds to the Department of Education and to the Department of Agriculture". Accordingly, Governor Martinez, faithful to the teachings of Brown, used the veto to nullify -- not to 'create' another purpose to which to apply the appropriation". 382 So.2d at 665.

II. Proof of the Allegations of the Affirmative Defense Raised Disputed Issues of Material Fact so as to Defeat the Motion for Summary Judgment

Appellees' entire argument before this Court is predicated on a misstatement of the allegations in Appellant's first affirmative defenses. The first affirmative defense alleges that "The portions of the appropriations bill vetoed by the Governor are specific appropriations within the meaning of Article III, Section 8 of the Florida Constitution. As described

more particularly in the Governor's Counterclaim below, these specific appropriations appear in legislative intent documents and constitute identifiable integrated funds which the Legislature has allocated for a specific purpose" (R: 327).

The term "intent documents" is defined by the Legislature itself to include two documents: the "Summary Statement of Intent and detailed legislative intent documents in the form of computerized workpapers (D-3A's)" (R: 743). The Statement of Intent required to be prepared by Section 216.181, Florida Statutes, is an element of the appropriations bill under the rationale of United Faculty of Florida v. Board of Regents, 365 So.2d 1073 (Fla. 1st DCA 1976). The first affirmative defense states by way of explanation that "The D-3A's are 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 §216.181, F.S. . . ." This sentence clarifies that the summary statement of intent and the more detailed D-3A's are both elements of the appropriations bill and intended to be binding on the executive. Appellees would have this Court look at only one sentence and ignore the remainder of the affirmative defense. No fair reading of the first affirmative defense would

limit that defense as argued by Appellees, to an allegation that the intent documents are an element of the appropriations bill solely by virtue of the June 22, 1988 transmittal letter.

Appellant argued in his Initial Brief that the intent documents are an element of the appropriations bill by virtue of Section 216.181, Florida Statutes, and the decision in United Faculty. Appellant never contended that two members of the Legislature could amend the appropriations bill. Appellant does contend, however, that the entire Lgislature has established a scheme in Section 216.181 to circumvent the veto power of the Governor. Section 216.181, Florida Statutes, requires the preparation of the Statement of Intent and directs its distribution to the executive office of the Governor, the Comptroller, the Auditor General, and the state agencies. While it is true that Section 216.181, Florida Statutes, was amended by the Legislature to provide that the Statement of Intent shall not "allocate or appropriate", that does not make it so.[1] The Legislature cannot enact legislation which characterizes the Statement of Intent, act contrary to that characterization and then hide behind its legislation.

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[1]In the 1987 Special Session, the Governor sought to have Section 216.181, Florida Statutes, amended so that preparation of the Statement of Intent would be discretionary and it would not be binding on the executive (Appendix). That amendment did not prevail.

State ex rel Kurz v. Lee, 163 So. 859 (Fla. 1935), teaches that a court should look at the practical operation of a legislative scheme and the interpretation placed on it by the officials of state government charged with the duty of observing the enactment. This record demonstrates that those persons charged with observing and interpreting the Statement of Intent prepared pursuant to Section 216.181 act as though it "appropriates" and believe its direction is binding on their spending practices (R: 673 et seq.). This Court should not be caught in the Legislature's semantical game. Section 216.181 states that it offers "direction" and "restrictions" with regard to the appropriation categories. How are "directions" and "restrictions" different from appropriations"? The Statement of Intent directs and restricts how the broad appropriations categories are to be specifically spent.

With Section 216.181, Florida Statues, as a backdrop, Appellants first affirmative defense alleges that the items vetoed were "specific appropriations within the meaning of Article III, Section 8 of the Florida Constitution"; that they constitute "identifiable integrated funds which the Legislature has allocated for a specific purpose" and "as specific appropriations in a general appropriations bill, the expenditures are subject to the Governor's veto power." Appellees concede that the first affirmative defense is legally sufficient and

hence a motion to strike would have been unavailing. It is candidly admitted that "[t]aking 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" (Answer Brief, page 25).

Appellees proceed then to argue that the mere allegations in the affirmative defense do not, however, defeat the motion for summary judgment. In contending that summary judgment was appropriate because Appellant came forward with no proof to support the allegations in the affirmative defense, Appellees again mischaracterize the affirmative defense. Appellees contend that the proof which was not forthcoming was evidence of the workpapers' incorporation into the appropriations bill (Answer Brief, page 26). That, however, is a convenient statement supporting Appellees' view of the case, but not at all a correct statement of the issues requiring proof.

The affirmative defense simply paraphrases the constitutional and case law requisites for the exercise of the gubernatorial line item veto. The evidence presented by Appellant in the form of affidavits and depositions proved the allegations of the affirmative defense. Contrary to Appellees' assertion, Appellant's evidence was not directed to the Counterclaim which was not then at issue. The Counterclaim and

the affirmative defense, however, raised the same legal and factual issues and the Counterclaim was incorporated into the affirmative defense.

A "specific appropriation" is an "identifiable, integrated fund which the Legislature has allocated for a specific purpose." Brown v. Firestone, at 668. The affidavits of the budget directors and the depositions of the auditors general trace the smallest identifiable fund from the D-3A's through the Major Issues in the Summary Statement of Intent to the broad appropriations categories. For example, the affidavit of Robert Lankford, budget director of the Department of Commerce states:

> The intent documents identify the specific appropriations which combine to comprise a particular budget category in the General Appropriations Act. For example, Item No. 212B in the General Appropriations Act (attached in pertinent part as Exhibit A) is an appropriation of $1,050,000 from the general revenue fund for 'economic development projects.' However, the General Appropriations Act does not identify any particular economic development project for which these funds are to be used. To determine which projects are to be funded from this budget category, I must examine the intent documents. In this example, the intent documents, consisting of the Summary Statement of Intent (attached in pertinent part as Exhibit B) and the D-3A's (attached in pertinent part as Exhibit C) identify three specific appropriations for economic development projects. Hence, I know from

examining the intent documents that Item 212B in the General Appropriations Act consists of the following specific appropriations:

1.	Space enterprise study	$ 500,000
2.	City of Miami motor sporting event	200,000
3.	Super Bowl promotion - Miami	250,000
	Total	$1,050,000

Indeed, Sam McCall, the Deputy Auditor General, testified by way of deposition that there was no specific appropriation for replacement automobiles for the Department of Transportation in the Appropriations Act and that the only way to discern where there is a specific amount for replacement of motor vehicles for the Department of Transportation is to look at the Major Issues in the Summary Statement of Intent or the D-3A's (R: 503, 504). This is particularly compelling evidence that the intent documents contain specific appropriations since Section 287.14(3), Florida Statutes, makes it "unlawful for any state officer or employee to authorize the purchase or continuous lease of any motor vehicle to be paid for out of funds of the state or any department thereof unless funds therefor have been appropriated by the Legislature."

Section 216.181, Florida Statutes, requires preparation of the intent documents and their transmittal to the Executive Office of the Governor, the Comptroller, the Auditor General and the state agencies. The obvious purpose in requiring such distribution is to ensure compliance. The evidence by way of affidavit demonstrates that the Comptroller considered the intent documents as allocating funds for a specific purpose and required verification by use of the intent document before authorizing an expenditure (R: 673 et seq.). The Auditor General does post-audit review and the deputy auditor general testified that an audit comment would be written for failure to comply with the intent documents (R: 462). Indeed, the evidence in this record shows that the staff of the legislative appropriations committees directed compliance with the intent documents (R: 673 et seq.). The Budget Directors, the Comptroller, the Auditor General and the legislative staff all considered the intent documents as containing "identifiable integrated funds which the legislature has allocated for a specific purpose." Brown v. Firestone at 668. This evidence was material and unrefuted in the record. It established the allegation of the affirmative defense. Comparing the substantive law under State ex rel Kurz v. Lee, and Brown v. Firestone with the record showing of facts recited above

demonstrates a disputed material issue of fact precluding summary judgment. Warring v. Winn-Dixie Stores, Inc., 105 So.2d 915, 918 (Fla. 3d DCA 1959); Landers v. Mitchell, 370 So.2d 268 (Fla. 1978).

III. The Trial Court Erred in Dismissing the Counterclaim with Prejudice

The Counterclaim stated a cause of action for declaratory judgment because the Governor has continuing budgetary responsibilities. He is directed by Section 216.192(1), Florida Statutes, to provide for quarterly releases of appropriations "only in accordance with legislative authorization." Whether the allocations in the intent documents are "legislative authorizations" which are binding on the Governor in releasing funds is a viable issue of continuing concern to the Governor. Because of the Complaint by the Legislature, the Governor is in doubt as to his duties and obligations as the state's chief budget officer and the trial court should have considered the Counterclaim.

Appellees' contention that the Governor lacks authority to initiate suits and therefore the dismissal with prejudice was appropriate is also unavailing. Article IV, Section 1(b) and (c), Constitution of the State of Florida, are not limitations on the Governor's "supreme executive power" provided in Article IV,

Section 1(a). The power to initiate judicial proceedings in the name of the state against any executive or administrative officer is new in the 1968 Constitution and was intended to supplement the suspension power of the Governor described in Article IV, Section 7 of the Constitution. Commentary, 26 Fla.Stat.Ann. 4. This power is to ensure that the Governor could enforce his suspension power and not to limit his authority to bring suit as an individual citizen and taxpayer and as Governor of the State of Florida, State ex rel Fleming v. Crawford, 10 So. 118 (Fla. 1891); Crawford v. Gilchrist, 59 So. 963 (Fla. 1912).

CONCLUSION

What the Legislature seeks to acomplish here would result in a profound shift in the balance of power between the legislative and the executive branches of government. The Legislature's argument, if successful, abolishes the line item veto. The Legislature would be allowed to make broad categories of appropriations in an appropriations bill and then direct the specific manner in which those broad categories are to be spent in a document immuned from the veto. In the extreme, the Legislature could enact a one line appropriations bill -- $22,000,000,000 -- which would be impossible to veto without bringing state government to a halt and then direct how that

money is to be spent in the intent documents. To ensure the proper constitutional balance of power, the gubernatorial veto must reach the intent documents or the intent documents cannot direct the spending practices of the executive branch.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery, to CHARLES L. STUTTS, ESQUIRE, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350; THE HONORABLE ROBERT A. BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida 32399; MITCHELL D. FRANKS, ESQUIRE, Director, General Legal Services, Department of Legal Affairs, The Capitol, Suite 1601, Tallahassee, Florida 32399-1050; KEVIN X. CROWLEY, ESQUIRE, General Counsel, Florida House of Representatives, Suite 420, The Capitol, Tallahassee, Florida 32399-1300; KIMBERLY J. TUCKER, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050; and by Federal Express, to ARTHUR J. ENGLAND, JR., ESQUIRE, of Fine, Jacobson, Schwartz, Nash, Block and England, One CenTrust Financial Center, 100 Southeast Second Street, Miami, Florida 33131, this 22nd day of February, 1989.

Cynthia S. Tunnicliff

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