

STORAGE NAME: h3549.cjcl

DATE: March 8, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3549

RELATING TO: Government

SPONSOR(S): Representative Littlefield (co-sponsored by Representative Fasano)

COMPANION BILL(S): SB 272 (identical) by Senator Grant

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE & CLAIMS
 - (2) CRIMINAL JUSTICE APPROPRIATIONS
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

This bill creates the "Citizen Participation in Government Act." This bill sets forth a number of prefatory clauses supporting the provisions of the bill. Justifications cited within the bill include restraining the rising number of lawsuits, protecting citizen participation in government, and preserving free speech rights guaranteed by the First Amendment of the federal constitution.

Specifically, this bill places limitations upon "Strategic Lawsuits against Public Participation," (SLAPPs) and seeks to "create a more equitable balance between the rights of persons to file lawsuits and . . . the rights of persons to petition, speak out, associate and otherwise participate in their governments." The bill provides immunity from civil liability for citizens who exercise their constitutional right to petition the government. It also provides for expedited motions to dispose of claims seeking to oppose the exercise of this right. Under the bill's provisions, actual and punitive damages may be awarded to a person who is injured by the filing of a SLAPP suit. Finally, the bill provides for sanctions against parties who bring such claims.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. **SLAPP Suits** - "Strategic Lawsuits Against Public Participation," or SLAPP suits, are lawsuits designed to silence or retaliate against persons or groups who petition the government. Such suits may also have the effect of deterring others, who are similarly situated, from exercising their right to petition the government.

Generally, SLAPP suits are filed as a response to some communication made to a governmental body or to the electorate. A SLAPP suit is a legal device, which aims to discourage and restrain public debate, by consuming the time and resources of a person or group opposed to the goals of the entity filing the suit.

According to a 1993 survey conducted by the Office of the Attorney General, SLAPP suits often prevent public participation in government decision making. Although the public participant or activist may eventually win a SLAPP suit, the costs of defending against such an action are significant. The Office of the Attorney General reported that among the 21 SLAPP suits reported in Florida, the cost of defending ranged from \$500 to \$106,000.

2. **Options under Current Law** - Florida law currently provides several methods of dealing with SLAPP suits.
 - a. **Action for Malicious Prosecution** - If a defendant in a SLAPP suit succeeds in having the action dismissed or if the defendant eventually wins the case, the defendant may file an action for malicious prosecution against the entity which brought the SLAPP suit. However, actions for malicious prosecution can only be initiated after the original SLAPP suit has been resolved, and thus may not prevent or deter the SLAPP suit. An action for malicious prosecution consists of six elements:
 - (1) An original action was commenced;
 - (2) The original action was filed by the entity which is now a defendant in the malicious prosecution action;
 - (3) The original action ended with a ruling in favor of the party who is now the plaintiff in the malicious prosecution action;
 - (4) The original action was instigated with malice;
 - (5) The original action was instigated without probable cause; and
 - (6) The original action resulted in damages to the party bringing the malicious prosecution action. E.g., Scozari v. Barone, 546 So.2d 750 (Fla. 3rd DCA 1989).
 - b. **Motion to Strike Sham Pleadings** - Rule 1.150 of the Florida Rules of Civil Procedure permits a motion to strike a sham pleading in a civil lawsuit. The movant must demonstrate that the pleading in question is plainly fictitious. Reif Development, Inc. v. Wachovia Mortgage Co., 340 So.2d 1267 (Fla. 4th DCA 1976). In addition, the court may resolve any doubts in favor of the party opposed to the motion. Bay Colony Office Building v. Wachovia Mortgage Co., 342 So.2d 1005 (Fla. 4th DCA 1977). Because this standard is difficult to meet, filing a motion to strike a sham pleading may not result in a dismissal of the suit.

- c. **Motion to Dismiss** - Rule 1.140 of the Florida Rules of Civil Procedure permits a party to move to have a case dismissed. The moving party must show that, even if the allegations in the complaint are true, the complaint fails to state a cause of action.
- d. **Motion for Summary Judgment** - Under Rule 1.510 of the Florida Rules of Civil Procedure, a party seeking summary judgment must show that there is a complete absence of any issue of material fact.
- e. **Attorney Fees** - Section 57.105(1), F.S., states that, "The court shall award a reasonable attorney's fee to be paid by the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party" This provision is recognized as setting a very high standards for the assessment of attorney fees and is seldom invoked by the courts.

B. EFFECT OF PROPOSED CHANGES:

- 1. **Contents** - This bill creates the "Citizen Participation in Government Act." It establishes three significant changes in current law.
 - a. **Immunity for Persons Seeking to Petition the Government** - This bill places limitations upon "Strategic Lawsuits against Public Participation" (SLAPPs), by providing immunity from civil liability for citizens who exercise their constitutional right to petition the government. The bill provides, "An act in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the processes of government, is immune from civil liability, regardless of its intent or purpose, except when not aimed at procuring any governmental or electoral action, result, or outcome." In its present form, the bill appears to extend immunity to persons affected by SLAPP suits filed by either public or private entities.
 - b. **Expedited Resolution of SLAPP Suits** - This bill provides for expedited motions to dispose of claims filed in opposition to the exercise of this right. Such motions are treated as motions for summary judgment and function to suspend discovery pending resolution. The bill directs, "The court must grant the motion and dismiss the judicial claim, unless the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability"
 - c. **Damages and Sanctions** - The bill directs that the court must award, "without regard to any limits under state law:"
 - (a) Costs of litigation, including attorney fees and expert witness fees incurred in connection with the motion; and
 - (b) Additional sanctions sufficient to deter repetition.In addition, the bill provides that actual and punitive damages may be awarded to a person who is injured by the filing of a claim.

2. Constitutional Issues

- a. **Separation of Powers** - The expedited procedural provisions of the bill may raise constitutional concerns related to separation of powers. Article II, Section 3 of the Florida Constitution provides, "The powers of state government shall be divided into legislative, executive and judicial powers. However, the Legislature has provided for expedited review in various other statutory provisions. e.g., s. 119.11, F.S. (public records) and, in Salvador v. Fenelly, 593 So.2d 1091 (Fla. 4th DCA 1991), the Fourth District Court of Appeal held that a statute which required trial courts to conduct expedited review of public records claims did not infringe upon judicial authority to establish rules of procedure.
- b. **Access to the Courts** - The portion of this bill, which grants immunity to all acts in furtherance of the right to petition, also raises a constitutional concern related to the right of access to the courts. Initially, courts would need to determine the scope of acts undertaken in furtherance of free speech rights -- and this would seem to encompass a wide variety of endeavors. Article I, Section 21 of the Florida Constitution provides, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In addition, Article I, Section 22 guarantees the right to a trial by jury.

In Florida Fern Growers Association, Inc. v. Concerned Citizens of Putnam County, 616 So.2d 562 (Fla. 5th DCA 1993), the Fifth District Court of Appeal had occasion to review the interplay of SLAPP suits with the right of access to the courts. A citizen's group had filed various petitions with the St. Johns River Water Management District challenging the issuance of consumptive water use permits to members of the Florida Fern Growers Association. The Association, in turn, filed a complaint for injunctive relief, and sought damages for intentional and malicious interference with advantageous business relationships and conspiracy to intentionally and maliciously interfere with advantageous business relationships. The trial court dismissed the Association's complaint with prejudice. On appeal, the citizens group argued that the Association's lawsuit was a SLAPP suit and that "the very pendency of such lawsuits . . . would have a chilling effect on First Amendment Activity." Id. at 570. The Fifth District Court of Appeal disagreed. It reasoned that extending absolute immunity to activities such as those undertaken by the citizen's group would extend to these activities a broader protection than the constitution itself guarantees. Article I, Section 4 of the constitution provides that persons "shall be responsible for abuse" of their free speech rights. The court concluded that offering absolute immunity to the citizen's group would infringe upon the Association's right of access to the courts.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. This bill directs the court to take certain actions in relation to SLAPP suits. It provides guidelines aimed at protecting those who exercise their right to petition the government.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. This bill places certain obligations and restrictions upon the court in connection with SLAPP suits. However, it may also alleviate some burdens on the courts associated with the filing of SLAPP suits.

(3) any entitlement to a government service or benefit?

By expediting motions related to SLAPP suits, this bill could delay certain other proceedings.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The bill would encourage participation in government by increasing the risk of launching SLAPP suits. It would diminish the "chilling effect" of such suits on free speech. On the other hand, this bill could limit the ability of some entities to initiate actions or defend themselves in court.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. Unless prohibited by a specific provision of current law, a claimant may institute an action against those who seek to petition the government, as long as such an action is instituted to protect judicially-enforceable rights of the claimant.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill creates yet unnumbered sections of the Florida Statutes.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Provides a short title.

Section 2. Provides a declaration of purposes.

Section 3. Establishes that an act in furtherance of the constitutional right to petition is immune from civil liability, "regardless of its intent or purpose," provides an exception.

Section 4. Establishes applicability.

Section 5. Sets forth procedures for making an expedited motion.

Section 6. Provides definitions.

Section 7. Provides that the act shall take effect upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill may slightly reduce the case load of the courts by discouraging SLAPP suits aimed at limiting public discourse. However, some government entities may face increased costs associated with defending against motions filed under the bill.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill may slightly reduce the case load of the courts by discouraging SLAPP suits aimed at limiting public discourse.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

This bill could limit the ability of some entities to initiate actions or defend themselves in court.

2. Direct Private Sector Benefits:

This bill could encourage participation in government and could reduce the threat posed by SLAPP suits. It could reduce the legal fees incurred by citizens attempting to protect their constitutionally-guaranteed right to petition the government.

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Key Issues - This subsection uses a question format to stimulate debate about the joint resolution under review.

1. **Question Presented** - *Whether the Legislature should place limits upon the ability of claimants to bring suits aimed at discouraging public participation in government.*

2. **Other Policy Considerations:**

- a. How frequently are SLAPP suits instituted? Do such suits actually discourage participation in public debate? Are suits aimed at persons or groups seeking to participate in government ever warranted?
- b. How effective would this measure be at restraining SLAPP suits?
- c. Could the provisions in this bill trespass upon the constitutional rights of litigants seeking to sue public participants for reasons other than interference with communication?
- d. Could this bill run afoul of the separation of powers doctrine by regulating the activities of the courts in what are primarily procedural matters?

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

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VII. SIGNATURES:

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