

STORAGE NAME: h3549s1a.go

DATE: April 7, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 3549

RELATING TO: Citizen Participation in Government Act

SPONSOR(S): Committee on Civil Justice & Claims, Representative Littlefield and others

COMPANION BILL(S): CS/SB 272(s)

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

- (1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS YEAS 5 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

This bill creates the "Citizen Participation in Government Act." It sets forth a number of whereas clauses supporting the provisions contained in the body 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." This bill provides for expedited motions to dispose of claims, brought by governmental entities, for the purpose of opposing the exercise of the right to petition. This bill provides for sanctions against parties who bring such claims. Finally, this bill states that actual and punitive damages may be awarded to a person who is injured by the filing of a Strategic Lawsuit Against Public Participation (SLAPP) by a government entity.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

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

Generally, SLAPPs are filed as a response to some communication made to a government entity or to the electorate. SLAPPs are a legal device which aim at discouragement and restraint of public debate, by consuming the time and resources of a person or group opposed to the goals of the government entity filing the lawsuit.

According to a 1993 survey conducted by the Office of the Attorney General, SLAPPs often prevent public participation in government decision making. Although the public participant or activist may eventually win a SLAPP, the costs of defending against such an action are significant. The Office of the Attorney General reported that among the 21 SLAPPs 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 SLAPPs.
 - a. **Action for Malicious Prosecution** - If a defendant in a SLAPP 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. However, actions for malicious prosecution can only be initiated after the original SLAPP has been resolved, and thus may not prevent or deter the SLAPP. 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. 3d 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's 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 standard for the assessment of attorney's 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 two significant changes in current law with respect to SLAPPs filed by governmental entities.
 - a. **Expedited Resolution of SLAPPs** - This bill provides for expedited motions to dispose of claims filed in opposition to public participation in government. Such motions are treated as motions for summary judgment and function to suspend discovery pending resolution. This bill directs, "The court must grant the motion and dismiss the judicial claim" unless certain criteria are met.
 - b. **Damages and Sanctions** - This bill directs the court to award, "without regard to any limits under state law:"
 - (a) Costs of litigation, including attorney's fees and expert witness fees incurred in connection with the motion; and
 - (b) Additional sanctions upon the responding party, its attorneys, or law firms sufficient to deter repetition.

In addition, this bill provides that actual and punitive damages may be awarded to a person who is injured by the filing of a claim.

2. Constitutional Issue

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). In Salvador v. Fennelly, 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.

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 SLAPPs. 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 SLAPPs. However, it may also alleviate some burdens on the courts associated with the filing of SLAPPs.

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

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

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

An agency or program is not 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?

No

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. This bill would encourage participation in government by increasing the risk of launching SLAPPs. 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:

This bill does not purport 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?

No.

- 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:

This bill does not create or change a program providing services to families or children.

(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. Provides definitions.

Section 4. Provides a procedure for expedited review of claims brought for the purpose of limiting lawful petitioning activity; provides for sanctions and damages.

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 SLAPPs 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 SLAPPs 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:

N/A

2. Direct Private Sector Benefits:

This bill could encourage participation in government and could reduce the threat posed by SLAPPs. 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 bill under review.

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

2. **Other Policy Considerations:**

- a. How frequently are SLAPPs instituted? Do such lawsuits actually discourage participation in public debate? Are lawsuits aimed at persons or groups seeking to participate in government ever warranted?
- b. How effective would this measure be at restraining SLAPPs?
- c. Could the provisions in this bill trespass upon the constitutional rights of government entities 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:

At the March 11, 1998, meeting of the Committee on Civil Justice and Claims, the committee adopted one amendment. The amendment specifies that only SLAPPs instituted by a government entity would be subject to the bill's provisions. The bill, as originally filed, would have imposed limitations on any claim instituted to thwart public participation. In addition, the amendment removed portions of the bill which offered immunity from liability for persons engaged in petitioning activities. The bill, as amended, was made a committee substitute.

STORAGE NAME: h3549s1a.go

DATE: April 7, 1998

PAGE 10

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

Legislative Research Director:

Charles R. Boning

Richard Hixson

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Legislative Research Director:

J. Marleen Ahearn, Ph.D., J.D.

Jimmy O. Helms