

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 64

SPONSOR: Senator Grant

SUBJECT: Citizen Participation in Government Act

DATE: January 12, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	
2.			GO	
3.				
4.				
5.				

I. Summary:

The bill provides immunity from civil liability for any act, regardless of its intent or purpose, by a person in furtherance of his or her constitutional right to petition for redress of grievances, except when the act is not aimed at procuring any governmental or electoral result. Under the bill, a party may file a motion to dispose of a claim on the grounds that the claim relates to or is in response to the moving party’s lawful petitioning activity. The court is to treat the motion as a motion for summary judgment. The responding party has the burden of proof. The court must dismiss the claim unless the responding party has produced clear and convincing evidence that the moving party is not immune from civil liability under the act. The bill provides the prevailing moving party with a court award of costs, attorney’s fees, expert witness fees, and such additional sanctions against the responding party sufficient to deter repetition of similar conduct in the future. Additionally, a person injured by such a claim in violation of his or her lawful petitioning activity is entitled to seek actual damages, punitive damages, attorney’s fees, and costs.

The bill creates yet unnumbered sections of the Florida Statutes.

II. Present Situation:

Under the state and federal constitutions, citizens have the right to petition the government for redress of their grievances. *See* Art. I, § 5, Fla. Const., U.S. Const., amend. 1. Lawsuits aimed at deterring this type of public participation in government are coined “strategic lawsuits against public participation” or SLAPPs. Although these lawsuits are frequently dismissed, the costly and time-consuming consequences of litigation or threat thereof have had a chilling effect on individual citizens or citizen groups wanting to or attempting to exercise this First Amendment right.

According to the Office of the Attorney General, the cost of defending against such lawsuits ranged from \$500 to \$106,000 based on 21 SLAPP lawsuits reported in Florida for the period 1985-1993. *See* Strategic Lawsuits Against Public Participation in Florida: Survey and Report,

July 1993. Over 90% of the SLAPP lawsuits were filed by private individuals or entities, the rest were filed by government entities. Even in cases where the citizen won, the litigation effectively stopped any further activity. Based on that survey, most of the lawsuits were initiated in response to informal citizen activities such as speaking at public meetings and letter campaigns to local governmental entities or electorate. The remainder of the lawsuits were filed in response to formal citizen activities such as legal challenges to local, regional, state or federal agency decisions, including the water management districts.

Since the 1993 survey, there has been no ongoing systematic program or effort to track the number of SLAPP lawsuits in Florida. The difficulty is due in part to the fact that SLAPP lawsuits are not easily identifiable. SLAPP lawsuits may be filed under a variety of claims including, but not limited to, interference with a business relationship, slander, conspiracy, libel, abuse of process, slander of title, trespass, nuisance, and harassment. Existing Florida law offers the following options to citizens to address SLAPP lawsuits:

■ *An Action for Malicious Prosecution*

If a defendant in a SLAPP successfully has the action dismissed or wins the case, a malicious prosecution action may be filed against the former plaintiff on the theory that the original action was filed with malice. Under Florida case law, six separate elements must be proven in a malicious prosecution claim or the case may be dismissed:

1. An original action has been commenced;
2. The original action was filed by the defendant in the new malicious prosecution action;
3. The original action ended with a ruling in favor of the plaintiff who is bringing 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 person bringing the malicious prosecution action. See *Scozari v. Barone*, 546 So.2d 750 (Fla. 3rd DCA 1989); *Kalt v. Dollar Rent-A-Car*, 422 So.2d 1031 (Fla. 3rd DCA 1982).

Actions for malicious prosecution may not serve to deter SLAPP suits because the malicious prosecution action cannot be brought until the resolution of the original SLAPP suit. Thus, the SLAPP suit may still serve the intended purpose of discouraging public participation.

■ *Motion to Strike Sham Pleadings*

In a civil lawsuit, a party may move to strike a sham pleading. Rule 1.150, Florida Rules of Civil Procedure. The moving party must prove that the pleading in question is plainly fictitious. *Reif Development, Inc. v. Wachovia Mortgage Co.*, 340 So.2d 1267 (Fla. 4th DCA 1976). The court must resolve any doubts in favor of the party opposing the motion to strike the sham pleading. *Bay Colony Office Building v. Wachovia Mortgage*, 342 So.2d 1005 (Fla. 4th DCA 1977). Because this standard is difficult to meet, filing such a motion will not only require legal expenditures by the plaintiff, but may not slow down or eliminate the suit. If the court finds in favor of the moving party, the effect will be only to strike the pleading. Such an action may not serve as an effective deterrent to SLAPP lawsuits.

■ *Motion to Dismiss and Motion for Summary Judgment*

In a civil lawsuit, a party may move to have the case dismissed. Rule 1.140, Florida Rules of Civil Procedure. The burden is on the moving party to show that even if the allegations in the complaint were true, the complaint fails to state a cause of action. Another option available to a party is filing a motion for summary judgment. Rule 1.510, Florida Rules of Civil Procedure. The moving party must show that there is a complete absence of any issue of material fact. *Id.* Under both rules, the burdens may be so great that such procedures would not make effective deterrents for SLAPP suits.

■ *Other Remedies*

Other remedies may be available to a defendant in a SLAPP lawsuit, such as an award of attorney's fees, but those remedies are after the litigation has progressed and the desired intent to discourage the defendant from public participation has been achieved.

Other States

Many SLAPP lawsuits are filed nationwide and other states have either enacted or proposed SLAPP legislation. In at least one state, the issue of SLAPP lawsuits has been dealt with in a judicial manner rather than a legislative manner. The Colorado Supreme Court has adopted a judicial procedure for cases involving allegations that judicial claims were brought to interfere with the right to petition. *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984). In balancing the competing concerns of the chilling effect on the right to petition, and the damage to other persons and society which can be done under the pretext of such rights, the court requires that the plaintiff demonstrate the constitutional viability of his or her claim. *Id.* at 1368. The claim is dismissed unless the plaintiff makes a sufficient showing to support the conclusion that the defendant's petitioning activities should not be immunized under the constitution because:

1. The defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion;
2. The primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and
3. The defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff. *Id.* at 1369.

III. Effect of Proposed Changes:

The bill provides a number of whereas clauses relating to the inalienable right to petition the government for redress under the Florida and United State Constitution and the need to protect that right against costly lawsuits aimed at intimidating or deterring citizen participation in government.

Section 1 provides the act to be cited as the "Citizen Participation in Government Act."

Section 2 sets forth the purposes of the Act to include the protection and encouragement of citizen participation; an equitable balance between the rights of persons to file lawsuits and the

rights of persons to petition the government for redress; the support of representative government in the protection and regulation of public health, safety, and welfare; the expedited summary process for judicial resolution of SLAPP lawsuits; and the recovery of attorney's fees, costs and damages for the prevailing citizen.

Section 3 provides absolute immunity from civil liability for those acts solely aimed at procuring a governmental or electoral action, result or outcome by a petitioning party, regardless of the acts' intent or purpose. No other criteria is provided.

Section 4 provides that a party may file a motion to dispose of a claim in any judicial proceeding brought on the grounds that the claim relates to or is in response to that moving party's lawful petitioning activity.

Section 5 requires the court to rule on the motion allowed in section 4 as a motion for summary judgment under an expedited process. In addition, the moving party has a right of expedited appeal upon the denial of such motion or upon the court's failure to adhere to the expedited process. Discovery is suspended pending decision on the motion and any appeals. The burden of proof, of going forward with the evidence, and of persuasion on the motion, lies with the responding party rather than the moving party. The court must make its determination based on the facts in the pleadings and any affidavits filed. Unless the responding party shows by clear and convincing evidence that the moving party is not immune under section 3, the court must grant the motion as a motion for summary judgment and dismiss the claim, regardless of how the pleading was initially filed. No other criteria is provided for overcoming the burden of proof by the responding party.

Any government entity to which the moving party's initial acts were directed, or the Attorney General, may intervene to defend or otherwise support the moving party. The prevailing moving party is entitled, without regard to current limits under the law, to costs, reasonable attorney's fees and expert witness fees, and additional sanctions the court finds sufficient to deter future SLAPP actions. Additionally, a person injured by reason of a claim filed in violation of his or her right to engage in petitioning activity may seek relief in the form of a claim for actual damages, punitive damages, attorney's fees, and costs. No provisions are provided for recovery by a prevailing responding party should he or she successfully prove that the moving party improperly alleged that the lawsuit infringed on his or her right to petition. Existing law does provide for recovery of costs and reasonable attorney's fees to a prevailing party.

Section 6 provides definitions for "government," "state," "judicial claim or claim," "motion," "moving party", and "responding party." Specifically, "judicial claim or claim" means any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief. "Motion" is defined as any motion to dismiss, for summary judgment, for judgment on the pleadings, to strike, demurrer, or any other judicial pleading filed to dispose of a judicial claim.

Section 7 provides that the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill's provisions for the summary procedure and expedited resolution of SLAPP lawsuits may be subject to constitutional challenge as violative of the separation of powers provision of the Florida Constitution. Art. II, s. 3, Fla. Const. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate rules of practice and procedure. *See* art. V, s.2(a), Fla. Const. However, the Legislature can repeal the court rules by a 2/3 vote. The Legislature cannot enact law that amends or supersedes existing court rules, it can only repeal them. *See Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978).

With few exceptions, it is not entirely clear or definitive as to what constitutes practice and procedure versus substantive law. Generally, substantive laws create, define and regulate rights whereas court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress. *See Haven Federal Savings & Loan Assoc v. Kirian* 579 So.2d 730 (Fla. 1991). Deciding the matter on a case-by-case basis, the courts have tended to find certain provisions consistently constitutionally infirm. *See Ash v. Singletary*, 687 So.2d 968 (Fla. 1st DCA 1997) and *Military Park Fire Control Tax District N.4 v. De Marois*, 407 So.2d 1020 (Fla. 4th DCA 1981)(creating priorities among types of civil matters to be processed or appealed); *Knealing v. Puelo*, 674 So.2d 593 (Fla. 1996) (timing and sequence of court procedures such as offer and acceptance of judgment); *State v. D.H.W.*, 668 So.2d 1331 (Fla. 1996), and *Watson v. First Florida Leasing, Inc.* 537 So.2d 1370 (Fla. 1989)(attempting to supersede or modify existing rules of court).

Over the years, the courts have shown some willingness to adopt a "procedural" statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the judicial system. In these situations, the court will typically invalidate the procedural statute as constitutionally infirm and then adopt the substance of the invalid section as a court rule. *See TGI Friday's Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995). Under Florida Rules of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the public policy.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The proposed legislation may deter the filing of SLAPP suits and thus reduce legal fees possibly incurred by citizens acting on their constitutionally mandated right to petition the government.

C. Government Sector Impact:

According to the Office of State Courts Administrator, the bill's summary and expedited procedure to dispose of SLAPP lawsuits will initially result in an additional burden on the court arising from: new court filings, post-judgment motions for costs, attorney's fees and damages; litigation to interpret "aimed at procuring any governmental or electoral action", minimal appeals, and hearings thereon. However, this burden may be offset by the time and costs saved from the automatic suspension of discovery pending resolution of a motion, the expedited resolution of a SLAPP lawsuit in the early pre-trial stages, and the reduction of these types of lawsuits over time, presuming the deterrent impact of this Act.

This bill may impact some governmental agencies (e.g., the Department of Revenue and the Department of Environmental Protection), which become involved in these lawsuits. According to the Department of Revenue, there is concern that without a more strict standard for immunity, agencies would be unable or reluctant to enforce its authority based on the broad immunity afforded a person or entity under the bill. For example, DOR would have difficulty initiating and defending a legal action to collect unpaid taxes based on that person's or entity's assertion that the failure or refusal to pay taxes is an act which attempts to procure a governmental change of position with regard to taxes, i.e., the abolishment or reduction of taxes. A determination as to the impact, if any, of this bill upon the Department of Environmental Protection is not yet available.

VI. Technical Deficiencies:

An amendment is needed to correct the language in subsection (7) relating to the award of costs and attorney's fees and expert witness fees "to a moving party who is dismissed" since the moving party is the person who filed the motion seeking dismissal of the judicial claim by the responding party.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
