

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: CS/SB 306

SPONSOR: Judiciary and Senator Lee

SUBJECT: Citizen Participation in Government

DATE: December 9, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill creates the “Citizen Participation in Government Act”. Specifically, it provides a declaration of purposes for protecting persons who exercise their constitutional right to petition the government for redress of grievances. It provides an expedited summary procedure for a person to file a motion to dispose of “Strategic Lawsuits Against Public Participation” (SLAPPs) brought by *any governmental entity*. The court must grant the motion unless the responding governmental entity, who has the burden of proof and persuasion, shows by clear and convincing evidence that: a) the moving party’s petitioning activities were not protected expression, b) a purpose of the petitioning activities was harassment, c) the petitioning activity caused actual injury, or d) the responding party’s claim was based on facts or circumstances unrelated to the moving party’s petitioning activity. Any government body or the Attorney General’s Office may intervene in support of the motion. The prevailing moving party is entitled to 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 a 1993 study conducted by 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 brought by private individuals or corporate entities; the remaining lawsuits were brought by government entities. Even in cases where the public won, the litigation effectively stopped any further activity. According to that survey, most of the lawsuits were initiated in response to informal public 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 public 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 lawsuit 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 pursuant to 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 Constitutions and the need to protect that right against costly lawsuits aimed at intimidating or deterring public 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 public 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 party.

Section 3 provides definitions for “governmental entity,” “state,” “judicial claim or claim,” “motion,” “moving party,” “petitioning activity” and “responding party.” Specifically, “governmental entity” means the state, subdivision of the state or other public authority that independently exercises governmental authority, an agency of the state, or a regional or local government created by the constitution or general or special law. “State” is defined as a state, the District of Columbia, Puerto Rico and other territories or possessions of the U.S. “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, motion for summary judgment, motion for judgment on the pleadings, motion to strike, demurrer, or any other judicial pleading filed to dispose of a judicial claim. “Petitioning activity” is defined as the lawful exercise of the constitutional right to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government.

Section 4 provides the procedure for a party to file a motion to dispose of a claim brought by a *governmental entity* in any judicial proceeding on the grounds that the claim relates to or is in response to that moving party’s lawful petitioning activity.

Specifically, subsection (1) suspends discovery, except for discovery related to the motion that is approved by the court, pending decision on the motion and any appeals.

Subsection (2) places the burden of proof, of going forward with the evidence, and of persuasion against the motion to dispose of the claim with the responding party rather than the moving party.

Subsection (3) requires the court to make its determination based on the facts in the pleadings and any affidavits filed.

Subsection (4) requires the court to grant the motion as a summary judgment and dismiss the responding party’s claim, unless the responding party shows by clear and convincing evidence that: a) the moving party’s petitioning activity was expression not protected by law, b) the petitioning activity was harassment of the responding party, c) the petitioning activity caused actual injury, or d) the responding party’s claim was justified and unrelated to the petitioning activity.

Subsection (5) allows any government body to which the moving party’s initial acts were directed, or the Attorney General, to intervene to defend or otherwise support the moving party.

Subsection (6) entitles the prevailing moving party, without regard to current limits under the law, to costs, reasonable attorney's fees and expert witness fees, and any additional sanctions the court finds sufficient to deter future SLAPP actions.

Subsection (7) provides a person who has been injured by reason of a claim filed in violation of his or her right to engage in petitioning activity with a civil cause of action to recover 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, although existing law does provide for recovery of costs and reasonable attorney's fees to any prevailing party.

Section 5 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. 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). The courts may also adopt the substance of an invalid section as an emergency rule *See Florida Rules of Judicial Administration 2.130(a)*.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may deter the filing of SLAPP suits brought by governmental entities and reduce legal fees incurred by citizens acting on their constitutional right to petition the government.

C. Government Sector Impact:

According to the Office of State Courts Administrator, the bill’s summary and expedited process to dispose of SLAPP lawsuits may result in an additional burden on the court arising from: new court filings; post-judgment motions for costs, attorney’s fees and damages; some 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 negatively some governmental agencies (e.g., the Department of Revenue and the Department of Environmental Protection), by virtue of government regulations that affect persons and businesses daily which may be subject to challenge. However, with the ability to show that the governmental suit is unrelated to the petitioning activity the governmental entity should be able to have the motion dismissed relatively fast.

VI. Technical Deficiencies:

None.

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.
