



State of Wisconsin
2023 - 2024 LEGISLATURE

LRB-4165/1
SWB:cdc

2023 BILL

1 **AN ACT** *to create* 802.065 of the statutes; **relating to:** special motions to strike
2 strategic lawsuits against public participation.

Analysis by the Legislative Reference Bureau

This bill allows a person to file a special motion to strike in a strategic lawsuit against public participation which, if successful, results in dismissal of the claim subject to the motion. Under the bill, a cause of action brought against a person arising from that person's acts in furtherance of his or her right of petition or free speech under the United States or Wisconsin Constitution in connection with a public issue is subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of prevailing on the claim.

The bill provides that an act in furtherance of a person's constitutional right of petition or free speech in connection with a public issue includes any written or oral statement or writing made a) before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; b) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or c) in a place open to the public or a public forum in connection with an issue of public interest. The bill also provides that any other conduct might also be considered to be an act in furtherance of a person's constitutional right of petition or free speech in connection with a public issue. No special motion to strike may be brought in any enforcement action brought in the name of the people of Wisconsin by the attorney general, a district attorney, or a city attorney, acting as a public prosecutor.

In making a determination on a special motion to strike, the court must consider the pleadings and supporting and opposing affidavits stating the facts upon

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which the liability or defense is based. If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination are admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable is affected by that determination in that case or any subsequent proceeding. Under the bill, except in certain circumstances, a defendant who prevails on a special motion to strike is entitled to recover attorney fees and costs. If, however, the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court must award costs and reasonable attorney fees to the prevailing plaintiff. The bill allows a person to appeal as a matter of right an order granting or denying a special motion to strike.

The bill requires that a special motion be filed within 60 days of the service of the complaint or later if the court permits. The motion must be scheduled for a hearing not more than 30 days after the service of the motion unless the court's schedule does not allow for a hearing in that timeframe. Unless the court determines otherwise, when a notice of a special motion is filed, all discovery proceedings in the action are stayed until a ruling is made on the motion.

Any party who files a special motion to strike, and any party who files an opposition to a special motion to strike must provide the director of state courts with a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice or appeal or petition for a writ, and a conformed copy of any order issued, including any order granting or denying a special motion to strike, discovery, or fees. Under the bill, the director of state courts must keep a public record of the information for at least three years.

For further information see the state fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 802.065 of the statutes is created to read:

2 **802.065 Special motion to strike strategic lawsuits against public**
3 **participation. (1)** In this section:

4 (a) "Complaint" includes a complaint, cross-complaint, or petition.

5 (b) "Plaintiff" includes a plaintiff, cross-complainant, or petitioner.

6 (c) "Defendant" includes a defendant, cross-defendant, or respondent.

7 **(2)** (a) A cause of action against a person arising from any act of that person
8 in furtherance of the person's right of petition or free speech under the U.S.

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1 Constitution or the constitution of this state in connection with a public issue shall
2 be subject to a special motion to strike, unless the court determines that the plaintiff
3 has established that there is a probability that the plaintiff will prevail on the claim.

4 (b) In making its determination, the court shall consider the pleadings and
5 supporting and opposing affidavits stating the facts upon which the liability or
6 defense is based.

7 (c) If the court determines that the plaintiff has established a probability that
8 the plaintiff will prevail on the claim, neither that determination nor the fact of that
9 determination shall be admissible in evidence at any later stage of the case, or in any
10 subsequent action, and no burden of proof or degree of proof otherwise applicable
11 shall be affected by that determination in any later stage of the case or in any
12 subsequent proceeding.

13 **(3)** (a) Except as provided in par. (b), in any action subject to sub. (2), a
14 prevailing defendant on a special motion to strike shall be entitled to recover his or
15 her attorney fees and costs. If the court finds that a special motion to strike is
16 frivolous or is solely intended to cause unnecessary delay, the court shall award costs
17 and reasonable attorney fees to a plaintiff prevailing on the motion.

18 (b) A defendant who prevails on a special motion to strike in an action subject
19 to par. (a) may not be awarded attorney fees under par. (a) if that cause of action is
20 brought under s. 19.37 or 19.97. Nothing in this paragraph shall be construed to
21 prevent a prevailing party from recovering attorney fees and costs under s. 19.37 or
22 19.97.

23 **(4)** This section does not apply to any enforcement action brought in the name
24 of the people of this state by the attorney general, a district attorney, or a city
25 attorney, acting as a public prosecutor.

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1 **(5)** As used in this section, an act in furtherance of a person's right of petition
2 or free speech under the U.S. Constitution or the constitution of this state in
3 connection with a public issue includes any of the following:

4 (a) Any written or oral statement or writing made before a legislative,
5 executive, or judicial proceeding, or any other official proceeding authorized by law.

6 (b) Any written or oral statement or writing made in connection with an issue
7 under consideration or review by a legislative, executive, or judicial body, or any
8 other official proceeding authorized by law.

9 (c) Any written or oral statement or writing made in a place open to the public
10 or a public forum in connection with an issue of public interest.

11 (d) Any other conduct in furtherance of the exercise of the constitutional right
12 of petition or the constitutional right of free speech in connection with a public issue
13 or an issue of public interest.

14 **(6)** A special motion to strike under this section may be filed within 60 days of
15 the service of the complaint or, in the court's discretion, at any later time upon terms
16 it determines are proper. The motion shall be scheduled for a hearing not more than
17 30 days after the service of the motion unless the court's schedule does not allow for
18 a hearing within the 30-day timeframe.

19 **(7)** (a) All discovery proceedings in the action shall be stayed upon the filing
20 of a notice of motion made under this section. The stay of discovery shall remain in
21 effect until notice of entry of the order ruling on the motion.

22 (b) Notwithstanding par. (a), the court may, for good cause shown, order that
23 specified discovery be conducted.

24 **(8)** Notwithstanding s. 808.03 (1), an order granting or denying a special
25 motion to strike shall be appealable as a matter of right.

