



2009 SENATE BILL 628

March 18, 2010 – Introduced by Senator SULLIVAN, cosponsored by Representatives RICHARDS, PASCH, TURNER, SOLETSKI, POPE-ROBERTS and A. WILLIAMS. Referred to Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing.

1 **AN ACT** *to renumber and amend* 804.10 (1); *to amend* 804.10 (2), 804.10 (3)
2 (a) and 905.04 (4) (c); and *to create* 804.10 (1) (b), 804.10 (2m) and 804.10 (6)
3 of the statutes; **relating to:** physical examinations and discovery of patients'
4 records in civil actions.

Analysis by the Legislative Reference Bureau

This bill makes changes to the scope of, and procedure for, discovery in civil cases where the mental or physical condition of a party is in issue. Under current law, if a claimant raises an issue involving his or her mental or physical condition, the court may, upon a motion and notice from the defending party, order the claimant to undergo a physical, mental, or vocational examination. Under current law, the court order specifies the time, place, manner, conditions, and scope of the examination.

Current law requires the court to order a claimant who seeks damages for personal injuries to give the defending party, and any physician named in the order, permission to inspect the claimant's X-rays and hospital or medical records and reports, unless the X-rays, records, or reports are beyond the scope of general discovery in the case. Under current law, the defending party must give a copy of any report he or she receives from the person who conducted the examination of the claimant or the inspection of the claimant's X-rays, records, or reports to the claimant. If the defending party does not give a copy of the report to the claimant within ten days after he or she receives it, the defending party may not introduce at

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trial any evidence that the defending party obtained from the examination or inspection.

Under this bill, if a claimant raises an issue involving his or her mental or physical condition, the court may order the claimant to undergo one physical, mental, or vocational examination, unless the defending party shows good cause for the claimant to undergo more than one examination. Under the bill, the order for the examination must do all of the following: 1) specify the time, place, manner, conditions, and scope of the examination, and identify who will conduct the examination; 2) prohibit the person who is conducting the examination from inquiring into any issue relating to liability in the underlying action; 3) allow the claimant to record the examination electronically and have one or more witnesses present at the examination; 4) require the examination to be conducted within 100 miles of where the claimant lives, is employed, or transacts business, 5) require the defending party to pay the claimant’s expenses relating to the examination, including travel expenses, child care expenses, and a minimum of \$30 per hour.

Under the bill, if a claimant seeks damages for personal injuries, a court may order the claimant to give the defending party, and any physician named in the order, permission to inspect any X-rays or hospital or medical records and reports that were taken in the course of diagnosing or treating the injuries for which the claimant seeks damages. If the defending party seeks additional discovery, the bill requires the defending party to prove, by clear, satisfactory, and convincing evidence to a reasonable certainty, that the additional discovery is essential to the defense relating to the cause of the claimant’s injuries and that the discovery relates to a pre-existing condition that is at least substantially similar to the injuries for which the claimant seeks damages.

Under the bill, the defending party must give a copy of any report that is made pursuant to an examination or inspection within 15 days after the examination or inspection takes place to the claimant. If a defending party fails to do so, the defending party may not introduce at trial any evidence that the defending party obtained from the examination or inspection. Under the bill, a claimant may introduce evidence obtained from the examination or inspection, regardless of whether the defending party seeks to introduce the evidence.

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

1 **SECTION 1.** 804.10 (1) of the statutes is renumbered 804.10 (1) (a) and amended
2 to read:

3 804.10 (1) (a) When the mental or physical condition, including the blood group
4 or the ability to pursue a vocation, of a party is in issue, the court in which the action
5 is pending may order the party to submit to a single physical, mental, or vocational

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1 examination. ~~The order may be made on motion for cause shown and upon motion~~
2 ~~and notice to all parties and by the moving party or parties united in interest, unless~~
3 ~~good cause is shown to order an additional examination. The order shall specify the~~
4 ~~time, place, manner, conditions, and scope of the examination and the person or~~
5 ~~persons by whom it is to be made who will conduct the examination.~~

6 **SECTION 2.** 804.10 (1) (b) of the statutes is created to read:

7 804.10 (1) (b) Any order issued under par. (a) shall:

8 1. Allow the party being examined to record the examination electronically and
9 have one or more witnesses present at the examination.

10 2. Prohibit the person conducting the examination from inquiring into any
11 issue bearing on any party's liability in the underlying action.

12 3. Require the examination be conducted at any place within 100 miles of the
13 place where the party being examined resides, is employed, or transacts business in
14 person.

15 4. Require the adverse party or parties united in interest who request the
16 examination to pay the reasonable expenses of the person being examined, including
17 travelling expenses at the rate established by 26 USC 162; an hourly wage
18 reimbursement of \$30 or the person's actual hourly wage, whichever is greater; and
19 reimbursement for child care expenses.

20 **SECTION 3.** 804.10 (2) of the statutes is amended to read:

21 804.10 (2) In any action brought to recover damages for personal injuries, the
22 court ~~shall also~~ may order the claimant, upon such terms as are just, to give to the
23 other party or any physician named in the order, within a specified time, consent and
24 the right to inspect any X-ray or photograph or hospital, medical, or other record
25 taken in the course of the diagnosis or treatment of the claimant. ~~The court shall also~~

SENATE BILL 628**SECTION 3**

1 ~~order the claimant to give consent and the right to inspect and copy any hospital,~~
2 ~~medical or other records and reports that are within the scope of discovery under s.~~
3 ~~804.01 (2) for the injuries for which the claimant seeks damages.~~

4 **SECTION 4.** 804.10 (2m) of the statutes is created to read:

5 804.10 **(2m)** If a party seeks discovery for physical, psychological, or
6 psychiatric injuries that is beyond the scope of sub. (2), the court shall hold a hearing
7 to determine whether to allow the additional discovery. The party seeking discovery
8 bears the burden of establishing by clear, satisfactory, and convincing evidence to a
9 reasonable certainty that the discovery relates to a pre-existing condition that is
10 identical to or substantially similar to the injury for which the claimant seeks
11 damages and that predates the injury for which the claimant seeks damages, and
12 disclosure is essential to the defense relating to the cause of the injury.

13 **SECTION 5.** 804.10 (3) (a) of the statutes is amended to read:

14 804.10 **(3)** (a) ~~No~~ Within 15 days after a court-ordered examination under sub.
15 (1) or an inspection under sub. (2) or (2m) takes place, the party adverse to the
16 claimant shall deliver a true copy of any oral or written report made pursuant to the
17 examination or inspection. No party adverse to the claimant may introduce evidence
18 obtained by an ~~the~~ adverse party by a court-ordered examination under sub. (1) or
19 inspection under sub. (2) shall be admitted upon the trial by reference or otherwise
20 or (2m) unless true copies of all reports prepared pursuant to such examination or
21 inspection and received by such adverse party have been delivered to the other party
22 claimant or to his or her attorney not later than 10 15 days after the reports are
23 received by the adverse party. The party claiming damages shall deliver to the
24 adverse party, in return for copies of reports based on court-ordered examination or
25 inspection, a true copy of all reports of each person who has examined or treated the

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1 claimant with respect to the injuries for which damages are claimed examination or
2 inspection takes place. The claimant may introduce evidence obtained by the
3 examination under sub. (1) or inspection under sub. (2) or (2m) regardless of whether
4 the adverse party seeks to introduce the evidence.

5 **SECTION 6.** 804.10 (6) of the statutes is created to read:

6 804.10 (6) Any X-ray or photograph or hospital, medical, or other record that
7 is not discoverable under sub. (2), (2m), or (4) remains privileged under s. 905.04.

8 **SECTION 7.** 905.04 (4) (c) of the statutes is amended to read:

9 905.04 (4) (c) *Condition an element of claim or defense.* There is no privilege
10 under this section as to communications relevant to or within the scope of discovery
11 examination allowed under s. 804.10 of an issue of the physical, mental, or emotional
12 condition of a patient in any proceedings in which the patient relies upon the
13 condition as an element of the patient's claim or defense, or, after the patient's death,
14 in any proceeding in which any party relies upon the condition as an element of the
15 party's claim or defense.

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(END)