



1997 ASSEMBLY BILL 778

February 10, 1998 – Introduced by Representatives HANSON, LADWIG, F. LASEE and JOHNSRUD, cosponsored by Senators ROSENZWEIG and FARROW, by request of Department of Administration, Department of Employee Trust Funds and Department of Justice. Referred to Committee on Judiciary.

1 **AN ACT** *to repeal* 45.72 (4), 46.017, 101.02 (2) and 301.04; *to renumber* 40.07
2 (1) (a) to (d) and 893.82 (2) (d); *to renumber and amend* 40.07 (1) (intro.) and
3 40.07 (2); *to amend* 25.15 (1), 25.17 (intro.), 25.18 (1) (e), 36.07 (1), 44.01 (1),
4 45.356 (4), 195.03 (28), 196.02 (12), 775.01, 893.82 (6) and 893.82 (7); and *to*
5 **create** 16.865 (9), 40.07 (1m) (intro.), 40.07 (2) (c), 40.07 (2) (d), 893.82 (2) (d)
6 2., 895.45 and 895.46 (1) (at) of the statutes; **relating to:** a restatement of the
7 doctrine of sovereign immunity, suits against the state and state agencies and
8 powers and attributes of certain state agencies; limits on damages for wrongful
9 death in actions against state officials, employees or agents; travel within the
10 scope of employment or agency of a public official, employee or agent; and release
11 of individual personal information by the department of employee trust funds.

Analysis by the Legislative Reference Bureau

Under a portion of the common law, which pursuant to the state constitution is in effect in this state unless modified by the constitution or by act of the legislature, the state has “sovereign immunity”. In other words, it is generally not possible to sue the state in state court unless a statute or constitutional provision authorizes the suit to be brought. The state constitution (article IV, section 27) directs the legislature to provide by law the manner in which suits may be brought against the state. There are a number of judicial interpretations which define the boundaries of the sovereign immunity doctrine.

In *Bahr v. Investment Board*, 186 Wis. 2d 379 (Ct. App. 1994), the state court of appeals held that the state investment board could be sued, notwithstanding

sovereign immunity, in part because the statutes provide that it is a “body corporate with power to sue and be sued” and because it is an “independent agency of the state” and its operations are not funded with general purpose revenue.

This bill creates a statute which reasserts the state’s right not to be sued unless suit is expressly authorized to be brought by law or by the constitution. The bill further provides that no powers, functions or source of funding provided by law to any instrumentality of this state which is engaged in a governmental function constitute a waiver of the state’s sovereign immunity to suit. The bill also deletes statutory provisions which provide that certain state agencies may “sue and be sued” and that certain state agencies are a “body corporate” or a “body corporate and politic”. Under judicial interpretations, when suits are otherwise permitted to be brought, an agency may be sued notwithstanding the absence of this language. The bill further deletes a provision that the investment board is an “independent agency of the state”. (The statutes contain numerous references to independent agencies, including the investment board, in an apparent attempt to distinguish these agencies from the state departments and the agencies that are attached to the departments, but the bill does not affect these references.)

The bill clarifies, in accordance with judicial interpretations, that if the legislature refuses to allow a claim against the state, suit may be brought only if suit is authorized to be brought (i.e., sovereign immunity does not apply).

In addition, the bill provides that the reassertion of sovereign immunity by the state is intended as a restatement of existing law.

Under current law, individual personal information in the records of the department of employe trust funds (DETF) may not be disclosed except under one of the following conditions:

1. The information is requested by the person whose record contains the information or by the duly authorized representative of the person.
2. The information is requested by a public employe for use in the discharge of his or her official duties.
3. The information is required to be disclosed under a court order duly obtained upon a showing to the court that the information is relevant to a pending court action.
4. The information is required to be disclosed for the proper administration of DETF or to assist in locating participants or beneficiaries DETF is otherwise unable to contact.

In addition, with respect to individual medical information in the records of DETF, current law provides that DETF may disclose this information only when a disability application denial is appealed or under a court order duly obtained upon a showing to the court that the information is relevant to a pending court action or when the medical information is gathered for any of the benefit plans administered by DETF and may be used by another such benefit plan.

This bill provides that the current conditions under which individual personal information in the records of DETF may be disclosed do not apply to individual medical records in the records of DETF. Instead, the bill specifies that individual

medical records in the records of DETF may only be disclosed under one of the following conditions:

1. When a disability application or health insurance claim denial is appealed.
2. Under a court order or an order of a hearing examiner duly obtained after notice to the department and upon a showing to the court or the hearing examiner that the information is relevant to a pending court or administrative action.
3. Upon written request, to the employer of a person who applies for a disability annuity or duty disability benefit or who files a claim for income continuation insurance or, if the person is a state employe, to the department of administration for the purpose of managing the state employes' worker's compensation program. Any documentation submitted to DETF pursuant to certain applications for disability benefits may also be disclosed to the employer.
4. Upon written request, to a participant in the Wisconsin retirement system or his or her duly authorized representative, but only if the individual medical records are those of the participant and if the participant's or his or her duly recognized representative's access to the individual medical records is not otherwise restricted by law. The only individual medical records that may be disclosed by DETF are those specifically identified in the written request.

Currently, if a public officer, employe or agent is proceeded against for acts committed while carrying out his or her duties or within his or her agency, any judgment as to damages and costs entered against the officer, employe or agent are paid by the state or political subdivision of which the defendant is an officer, employe or agent. The state or political subdivision is also required by current law to provide legal counsel or pay the reasonable attorney fees and costs of defending the action, unless the officer, employe or agent was not acting within the scope of his or her employment or agency.

This bill provides that a public officer, employe or agent who is required to travel as part of his or her duties or agency shall be considered to be carrying out his or her official duties and within the scope of his or her employment or agency while traveling on official duties, except when he or she deviates for a private or personal purpose. The bill also provides that travel to pick up or return a motor vehicle used in the official travel is part of the person's official duties and within the scope of his or her employment or agency.

Under current law, the amount that a person may recover in a civil action against a state officer, employe or agent, or against a museum under a lease agreement with the state historical society, is limited to \$250,000. State law also limits the amount that may be recovered for the loss of society and companionship in a wrongful death action to \$150,000. This bill clarifies that the \$150,000 limit for the loss of society and companionship applies to wrongful death actions against a state officer, employe or agent, and against a museum under a lease agreement with the state historical society.

For further information see the *state and local* 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.** 16.865 (9) of the statutes is created to read:

2 16.865 (9) Have the authority to disclose individual medical records obtained
3 under s. 40.07 (2) to the department of workforce development for any worker's
4 compensation proceeding under ch. 102.

5 **SECTION 2.** 25.15 (1) of the statutes is amended to read:

6 25.15 (1) **PURPOSE.** The purpose of the board is to provide professional
7 investment management of trusts, operating funds and capital funds established by
8 law. ~~It is the intent of the legislature that the~~ The board be an independent agency
9 of the state which is to shall manage money and property for the state, its agencies
10 and trust funds. The goal of board management shall be towards accomplishing the
11 purpose of each trust or fund.

12 **SECTION 3.** 25.17 (intro.) of the statutes is amended to read:

13 **25.17 Powers and duties of board.** (intro.) ~~The "State of Wisconsin~~
14 ~~Investment Board" shall be a body corporate with power to sue and be sued in said~~
15 ~~name.~~ The investment board shall have a seal with the words, "State of Wisconsin
16 Investment Board". Subject to s. 25.183, the board shall:

17 **SECTION 4.** 25.18 (1) (e) of the statutes is amended to read:

18 25.18 (1) (e) Take such action as may be necessary to make investments in
19 mortgage loans or in the purchase of interests in real estate in any other state or in
20 Canada, including but not excluding because of enumeration, qualifying to do

1 business, filing reports, paying franchise, license or other fees and taxes, designating
2 agents, and designating an office ~~and subjecting itself to suit.~~

3 **SECTION 5.** 36.07 (1) of the statutes is amended to read:

4 36.07 (1) (title) ~~CORPORATE STATUS AND TITLE~~ TITLE. The board ~~and their~~
5 ~~successors in office shall constitute a body corporate by~~ shall bear the name of “Board
6 of Regents of the University of Wisconsin System”.

7 **SECTION 6.** 40.07 (1) (intro.) of the statutes is renumbered 40.07 (1) and
8 amended to read:

9 40.07 (1) Notwithstanding any other statutory provision, individual personal
10 information in the records of the department is not a public record and shall not be
11 disclosed, ~~unless:~~ except as provided in this section.

12 **SECTION 7.** 40.07 (1) (a) to (d) of the statutes are renumbered 40.07 (1m) (a) to
13 (d).

14 **SECTION 8.** 40.07 (1m) (intro.) of the statutes is created to read:

15 40.07 (1m) (intro.) Individual personal information in the records of the
16 department, other than individual medical records identified in sub. (2), may be
17 disclosed by the department only under one of the following conditions:

18 **SECTION 9.** 40.07 (2) of the statutes is renumbered 40.07 (2) (intro.) and
19 amended to read:

20 40.07 (2) (intro.) ~~Notwithstanding sub. (1) medical~~ Individual medical records,
21 as defined by rule, may be disclosed by the department only when under one of the
22 following conditions:

23 (a) When a disability application or health insurance claim denial is appealed
24 or under s. 40.03 (1) (j), (6) (i), (7) (f) or (8) (f) or 40.65 (2) (b) 3.

1 **(b) Under a court order or an order of a hearing examiner** duly obtained **after**
2 **notice to the department and** upon a showing to the court **or the hearing examiner**
3 that the information is relevant to a pending court **or administrative** action **but**
4 **medical information.**

5 **(2m) Individual medical records, as defined by rule,** gathered for any one of the
6 benefit plans established under this chapter may be used by any other benefit plan
7 established under this chapter.

8 **SECTION 10.** 40.07 (2) (c) of the statutes is created to read:

9 40.07 **(2)** (c) Upon written request, to the employer of a person who applies for
10 a disability annuity or duty disability benefit or who files a claim for income
11 continuation insurance under subch. V or, if the person is a state employee, to the
12 department of administration for the purpose of managing the state employees'
13 worker's compensation program under s. 16.865 (4). Any attached documentation
14 submitted to the department pursuant to a specific application for benefits related
15 to a disability for which the employer is requested by the department to make a
16 certification may also be disclosed to the employer under this paragraph.

17 **SECTION 11.** 40.07 (2) (d) of the statutes is created to read:

18 40.07 **(2)** (d) Upon written request, to a participant or his or her duly authorized
19 representative, but only if the individual medical records are those of the participant
20 and if the participant's or his or her duly authorized representative's access to the
21 individual medical records is not otherwise restricted by law. The department may
22 only disclose individual medical records under this paragraph that are specifically
23 identified in the written request.

24 **SECTION 12.** 44.01 (1) of the statutes is amended to read:

1 44.01 (1) The historical society shall ~~constitute a body politic and incorporate by~~
2 ~~bear~~ the name of "The State Historical Society of Wisconsin," and shall possess all
3 the powers necessary to accomplish the objects and perform the duties prescribed by
4 law. The historical society shall be an official agency and the trustee of the state.

5 **SECTION 13.** 45.356 (4) of the statutes, as affected by 1997 Wisconsin Act 27,
6 is amended to read:

7 45.356 (4) The department may execute necessary instruments, collect interest
8 and principal, compromise indebtedness, ~~sue and be sued~~, post bonds and write off
9 indebtedness that it considers uncollectible. If a loan under this section is secured
10 by a real estate mortgage, the department may exercise the rights of owners and
11 mortgagees generally and the rights and powers set forth in s. 45.72. The
12 department shall pay all interest and principal repaid on the loan into the veterans
13 trust fund.

14 **SECTION 14.** 45.72 (4) of the statutes is repealed.

15 **SECTION 15.** 46.017 of the statutes is repealed.

16 **SECTION 16.** 101.02 (2) of the statutes is repealed.

17 **SECTION 17.** 195.03 (28) of the statutes is amended to read:

18 195.03 (28) ~~TITLE.~~ The office may ~~sue and be sued in that name~~, and may confer
19 with or participate in any proceedings before any regulatory agency of any other
20 state or of the federal government.

21 **SECTION 18.** 196.02 (12) of the statutes is amended to read:

22 196.02 (12) (title) ~~SUE; BE SUED~~ PARTICIPATION IN PROCEEDINGS. The commission
23 may ~~sue and be sued in its own name~~, and may confer with or participate in any
24 proceedings before any regulatory agency of any other state or of the federal
25 government.

1 **SECTION 19.** 301.04 of the statutes is repealed.

2 **SECTION 20.** 775.01 of the statutes is amended to read:

3 **775.01 Actions against state; bond.** Upon the refusal of the legislature to
4 allow a claim against the state, if suit is authorized to be brought against the state,
5 the claimant may commence an action against the state. The action may be
6 commenced by service as provided in s. 801.11 (3) and by filing with the clerk of court
7 a bond, not exceeding \$1,000, with 2 or more sureties, to be approved by the attorney
8 general, to the effect that the claimant will indemnify the state against all costs that
9 may accrue in such action and pay to the clerk of court all costs, in case the claimant
10 fails to obtain judgment against the state.

11 **SECTION 21.** 893.82 (2) (d) of the statutes is renumbered 893.82 (2) (d) 1.

12 **SECTION 22.** 893.82 (2) (d) 2. of the statutes is created to read:

13 893.82 (2) (d) 2. "State agent" does not include an independent contractor, even
14 if the independent contractor is entitled to the common law defense of official or
15 discretionary immunity.

16 **SECTION 23.** 893.82 (6) of the statutes is amended to read:

17 893.82 (6) The total amount recoverable by any person or entity for any
18 damages, injuries or death in any civil action or civil proceeding against a state
19 officer, employe or agent, or against a nonprofit corporation operating a museum
20 under a lease agreement with the state historical society, including any such action
21 or proceeding based on contribution or indemnification, shall not exceed \$250,000.
22 The amount recoverable by any person for loss of society and companionship in any
23 civil action or civil proceeding for wrongful death brought against a state officer,
24 employe or agent, or against a nonprofit corporation operating a museum under a
25 lease agreement with the state historical society, shall not exceed the amount

1 specified under s. 895.04 (4). No punitive damages may be allowed or recoverable
2 in any such action.

3 **SECTION 24.** 893.82 (7) of the statutes is amended to read:

4 893.82 (7) With respect to a state officer, employe or agent described in sub. (2)
5 (d) 3 l.c., this section applies to an event causing the injury, damage or death giving
6 rise to an action against the state officer, employe or agent, which occurs before, on
7 or after April 25, 1990.

8 **SECTION 25.** 895.45 of the statutes is created to read:

9 **895.45 Sovereign immunity waived only by express provision.** The
10 sovereign immunity of this state from suit is waived and consent to suit is given only
11 in those cases where suit is expressly authorized by law or is authorized by the
12 constitution to be brought against the state. No powers, functions or source of
13 funding provided by law to any instrumentality of this state which is engaged in a
14 governmental function constitute such a waiver.

15 **SECTION 26.** 895.46 (1) (at) of the statutes is created to read:

16 895.46 (1) (at) Any public officer, employe or agent who is required to travel as
17 part of his or her official duties or within the scope of his or her agency, shall be
18 considered, for purposes of this section, to be carrying out his or her official duties
19 and within the scope of his or her agency or employment while traveling on official
20 business, except when he or she deviates from the trip for a private or personal
21 purpose. Any act reasonably necessary for or incidental to living shall not be
22 regarded as a deviation for a private or personal purpose. A person's travel to pick
23 up or return an employer-owned motor vehicle used in official travel shall be
24 considered, for purposes of this section, to be carrying out the person's official duties
25 and within the scope of his or agency or employment.

