

Semons Department Store v. ILHR Department, 50 Wis. 2d 518.

Furthermore, an employee's predisposition to injury does not relieve the present employer from liability for workmen's compensation. In *Green Bay Warehouse Operators, Inc. v. Industrial Comm.* (1963), 19 Wis. 2d 11, 119 N. W. 2d 435, this court rejected a contention that a pre-existing tendency to instability of the shoulder joint, with a tendency to dislocate, relieved the employer of the consequence of liability for medical payments. The court quoted the following from *M. & M. Realty Co. v. Industrial Comm.*, *supra*, page 63:

" . . . [A]n employer takes an employee 'as is' and the fact that he may be susceptible to injury by reason of a pre-existing physical condition does not relieve the last employer from being held liable for workmen's compensation benefits if the employee becomes injured due to his employment, even though the injury may not have been such as to have caused disability in a normal individual . . . "

The 1967 incident necessitated the surgery. Although there was testimony given by Dr. Coles that other factors, dating back to the 1963 incident, contributed to the disability, it was not specific as to the factors that contributed to the disability or as to the manner or amount of contribution. Dr. McDevitt testified that it was the limitation of motion caused by the surgery which caused the 10 percent disability. The department was justified in rejecting the testimony of Dr. Coles and accepting the testimony of Dr. McDevitt as to the cause of the disability.

In evaluating medical testimony, the department is the sole judge of the weight and credibility of the witnesses. *Carr v. Industrial Comm.* (1964), 25 Wis. 2d 536, 131 N. W. 2d 328. In *Rico v. Industrial Comm.* (1960), 9 Wis. 2d 382, 385, 101 N. W. 2d 99, this court stated:

"It is a well-established rule that the commission's finding on disputed medical testimony is conclusive. . . ."

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"As we have said so often, the evaluation of the testimony of the medical experts lies with the Industrial Commission. . . ."

*By the Court.*—Judgment affirmed.

INTERNATIONAL PAPER COMPANY and others, Respondents, v. CITY OF FOND DU LAC, Appellant.\*

No. 100. Argued March 2, 1971.—Decided March 30, 1971.  
(Also reported in 184 N. W. 2d 834.)

1. Municipal corporations—Annexation—Calculating ownership of contiguous territory—Computation not to be based upon inclusion of public streets and highways.

In ascertaining whether a petition for annexation pursuant to the statute, sec. 66.021 (1) (a), has been signed by the "owners of one half of the land" in the proposed area of attachment, acreage within the territory constituting public streets and alleys is not to be taken into account in determining the sufficiency of the petition, no matter how owned or by whom, whether in fee simple, right-of-way, or easement for public benefit or reverter. [Language in *Town of Menasha v. City of Menasha*, 42 Wis. 2d 719, to the contrary is withdrawn.] pp. 532, 533.

2. Municipal corporations—Annexation—Calculating ownership of contiguous territory—Computation not to be based upon inclusion of public streets and highways.

Where a city, after adopting an ordinance pursuant to sec. 66.021, Stats., and as sole signer of a petition, annexed territory based on its claim to ownership of one half thereof, nonsigners (a town and other property owners) could not successfully challenge the validity of the ordinance as applied to them based on a computation of acreage which included public streets and highways, the result of which would refute one-half ownership in the city, whereas exclusion of the streets would qualify the city as one-half owner of the territory. pp. 531-533.

\* Motion for rehearing denied, with costs, on June 2, 1971.

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3. Municipal corporations—Annexation—Calculating ownership of contiguous territory—Assessed value test as not permitting public streets and highways to be included in computation. Propriety of inclusion of public streets and highways in making the computation could not be predicated upon sec. 66.021 (2) (a) 2 b, Stats.—which, as an alternative test for qualifying owners for annexation provides for the owner of one half of the real estate in assessed value—for under this test public highways and easements do not have any assessed value when owned by a municipality and cannot be counted, for the legislature did not intend to place the burden on the ownership of usable land to compete with public streets and highways whether the highways and streets are used for or against the annexation. p. 533.

APPEAL from a judgment of the circuit court for Fond du Lac county: JEROLD E. MURPHY, Circuit Judge. *Reversed, with declaration.*

This is an appeal from a declaratory judgment adjudging the city of Fond du Lac's annexation ordinance 705 invalid as applied to property owned by International Paper Company, Ralston-Purina Company, town of Fond du Lac, and Town Sanitary District No. 1 of the town of Fond du Lac, the plaintiffs, but valid as applied to property owned by the city of Fond du Lac, the defendant. The ordinance in question was adopted July 11, 1968, pursuant to sec. 66.021, Stats.,<sup>1</sup> which allows annexation by petition signed by the owners of one half of the land in area proposed for annexation. The city was the only signer of the petition for annexation and this was done on the basis it owned one half of the land in area. This is correct if the public streets and high-

<sup>1</sup> Sec. 66.021, Stats., provides in relevant part: "(2) METHODS OF ANNEXATION. . . . (a) *Direct annexation.* A petition for direct annexation may be filed with the city or village clerk signed by: . . .

"2. If no electors reside in such territory, by a. the owners of one-half of the land in area within such territory, or b. the owners of one-half of the real property in assessed value within such territory."

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ways are not counted as area for the purpose of determining the ownership of one half of the land. But the trial court included the public rights of ways and streets, made a determination of their ownership, and found the city of Fond du Lac was not the owner of one half of the land in area. The city of Fond du Lac appeals.

For the appellant there was a brief and oral argument by *Henry B. Buslee*, city attorney.

For the respondents there was a brief by *Whyte, Hirschboeck, Minahan, Harding & Harland*, attorneys, and *Richard C. Ninneman* of counsel, all of Milwaukee, for the International Paper Company; and by *Edgarton & Hobbs*, attorneys, and *Thomas L. Massey* of counsel, all of Fond du Lac, for the Ralston-Purina Company; and by *St. Peter & Hauer*, attorneys, and *George M. St. Peter* of counsel, all of Fond du Lac, for the town of Fond du Lac and Town Sanitary District No. 1, and oral argument by *Mr. Ninneman, Mr. Massey, and Mr. Albert J. Hauer*.

HALLOWS, C. J. The validity of the annexation turns on whether the ownership of public streets should be included or excluded in determining whether the petition is signed by the owners of one half of the land in the area.

The property sought to be annexed is situated generally along the southwestern boundary of the city of Fond du Lac and is composed of 91.091 acres, of which 5.687 acres constitute streets. Of these streets, the city owns 1.875 acres and the nonsigners 3.812 acres. During the trial, computations were made, both including and excluding the streets in the aggregate figures. When the streets are excluded from consideration, the city owns 43.166 acres and the nonsigners 42.238 acres; but when the streets are included the city of Fond du Lac is not the owner of one half the land in area. While this case

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was pending in the trial court, this court decided *Town of Menasha v. City of Menasha* (1969), 42 Wis. 2d 719, 168 N. W. 2d 161, and on the basis of that case the trial court adopted the view the public streets should be included.

In the *Town of Menasha Case* we relied on *Town of Madison v. City of Madison* (1960), 12 Wis. 2d 100, 106 N. W. 2d 264, wherein we stated sec. 66.021 (1) (a), Stats., defining who may be an owner to sign a petition for annexation, did not limit or exclude a municipality. In that case the municipality's ownership was of usable acreage and not of public highways or rights therein. Without observing this distinction in the *Town of Menasha Case*, we stated a municipality, which was the owner of highway land, could qualify as an owner under this section.

*Town of Menasha* distinguished *Denver v. Holmes* (1965), 156 Colo. 586, 590, 400 Pac. 2d 901, which held a municipality which owned highways in the proposed annexation area was not a landowner for that purpose. In reaching its conclusion, the Colorado court stated it was not reasonable to assume or hold the legislature intended to impose an additional burden or requirement upon the landowners desiring annexation by requiring them to overcome in their petition the area which constituted public streets, alleys, and roads in the territory sought to be annexed.

While our statute seems broader than that involved in the *Denver Case*, we think our holding in *Town of Menasha* went too far in allowing a municipality to qualify as an owner under sec. 66.021, Stats., in respect to its ownership in streets, alleys, and roads. While the legislature intended a municipality should be counted as an owner like a private owner of land, the ownership of public streets and alleys stands in a different category in respect to annexation. A municipality may own a street in fee simple or it may have only a right of way

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or an easement for the benefit of the public. In the former case the abutting owner has no greater right to the highway than the public; while in the latter case it is often said he owns to the middle of the road and if the road is vacated the land will revert to him. But this interest is not sufficient to qualify him as an owner.

Under sec. 66.021 (2) (a) 2 b, Stats., an alternative test for qualifying owners for annexation provides for the owner of one half of the real estate in assessed value. Under this test, public highways and easements do not have any assessed value when owned by a municipality and cannot be counted. While it can be argued because this test by operation excludes roads the implication is highways may be counted under the other alternative, we do not think such a result logically follows. We consider the legislature did not intend to place the burden on the ownership of usable land to compete with public streets and highways whether the highways and streets are used for or against the annexation. Consequently, we hold the area constituting public streets and alleys are not to be taken into account in determining the sufficiency of a petition for annexation, no matter how owned. Much litigation and problems will be avoided in these cases by the exclusion of the ownership of roads and public highways in determining the validity of the petition.

Since the city of Fond du Lac owns over one half of the acreage which may be counted for annexation purposes, it follows the trial court must be reversed and the ordinance declared valid.

*By the Court.*—Judgment reversed, and the city of Fond du Lac's annexation ordinance 705 is hereby declared valid.