

illegal drugs. The law will eventually need to evolve in order to permit testing for prescription medication, along with illicit drugs, if the employer has a reasonable suspicion based on objective evidence that the employee is impaired at work. Until then, employers should focus on monitoring and disciplining employ-

ees for performance and safety issues rather than their misuse or abuse of prescription medication.

If you have any questions about your current policies or would like additional information, please do not hesitate to contact the authors at [jmacy@vonbriesen.com](mailto:jmacy@vonbriesen.com) and [jeiden@vonbriesen.com](mailto:jeiden@vonbriesen.com).



## AMICUS CURIE BRIEF IN SUPPORT OF POLK COUNTY

*Success at court of appeals involving county maintenance operation litigation.*

*—Andrew T. Phillips & Rebecca J. Roeker, von Briesen & Roper, s.c.*

On July 3, 2018, the Wisconsin Court of Appeals District III (Court of Appeals) issued its opinion in the *Lakeland Communications Group, LLC vs. Polk County* case (Wisconsin Court of Appeals District III, Appeal No. 2017-AP-001262). The Wisconsin Counties Association (WCA) was granted permission to file an Amicus Curiae (or “friend of the court”) brief in the *Lakeland* case. WCA sought permission to participate in the *Lakeland* case because the facts raised significant concerns for all counties across the state given the potential implications on the way counties complete routine maintenance activities in rights-of-way. Fortunately, the Court of Appeals agreed with Polk County and WCA by upholding the circuit court’s decision dismissing Lakeland’s claims against Polk County, and held that Polk County was not liable for property damage incurred while it was mowing in the right-of-way.

### FACTUAL BACKGROUND

Lakeland owns telecommunications facilities that are located in highway right-of-way and claimed that Polk County was liable for damages to a Lakeland’s pedestals after two separate incidents. In the first incident, a Polk County Highway Department employee was mowing vegetation in the right-of-way of County Trunk Highway (CTH) I in Polk County. While mowing, the employee struck one of Lakeland’s cable television pedestals located in the right-of-way. Lakeland claimed \$682.00 in damages for the CTH I incident. In the second incident, a Polk County Highway Department employee was again mowing vegetation in the highway right-of-way along WIS 35 (under its obligations under a Routine Maintenance Agreement with the Wisconsin Department of Transportation) and struck one of Lakeland’s pedestals, which was also located in the

right-of-way. Lakeland claimed \$1,108.71 in damages for the WIS 35 incident.

### LEGAL ARGUMENT NO. 1 REJECTED

*Polk County was “Negligent Per Se” Because It Failed to Call Diggers Hotline Prior to Mowing:*

Lakeland based its claim for damages on Polk County’s alleged “negligence per se” for failing to call Diggers Hotline prior to mowing in the right-of-way. To justify its argument, Lakeland argued that mowing qualified as “excavation” in Wis. Stat. § 182.0175, thereby triggering Polk’s County’s obligation to call Diggers Hotline prior to the commencement of mowing. Polk County argued that “excavation” does not include routine maintenance as defined by Wis. Stat. § 84.07(1), and that the Wisconsin Legislature did not intend to include mowing or removal of vegetation (defined as any tree, shrub, hedge, woody plant, or grass) within the activities that require a call to the Diggers Hotline pursuant to Wis. Stat. § 182.0175. Polk County bolstered its position by pointing out that Wis. Stat. § 66.1037 requires an overseeing authority to “remove, cut or trim...any tree, shrub or vegetation in order to provide safety of the highway.” Any conditions on those maintenance obligations, such as having to call Diggers Hotline before commencing the maintenance, should be set forth in Wis. Stat. § 66.1037.

The Court of Appeals agreed with Polk County and WCA. It held that the plain meaning of “excavation” does not include mowing grass and other surface vegetation, particularly in light of the other terms used to describe “excavation” in Wis. Stat. § 182.0175(2), such as grading, trenching, and digging. In referencing those other terms, the Court of Appeals stated “we cannot discern any reason why the list of digging-related items in the statute would permit inference that the mowing of vegetation is

an ‘excavation operation’ pursuant to Wis. Stat. § 182.0175(1)(b). WCA agrees with the Court of Appeals that “excavation” should not include mowing, and therefore a county should not be required to call Diggers Hotline prior to mowing.

### LEGAL ARGUMENT NO. 2 REJECTED

*Polk County Should Be Held Liable on Public Policy Grounds*

Lakeland also argued that Polk County should be liable in its performance of the mowing, and therefore not be entitled to immunity, based on public policy grounds. While a county may incur liability for failure to adhere to its maintenance obligations in limited circumstances, the Wisconsin Court of Appeals ruled in *Estate of Wagoner v. City of Milwaukee*, 2001 WI App 249, Wis.2d 306, 249 N.W.2d 382, that a municipality’s failure to adhere to its obligations in Wis. Stat. § 66.1037 does not give rise to a private cause of action against the municipality. To put it simply, a county’s failure to properly maintain vegetation is generally not enough to abrogate the county’s immunity.

The Court of Appeals agreed with Polk County and WCA in recognizing the “virtually unworkable task” placed on counties if each county was required to “scour miles of roadsides for objects lurking in vegetation” prior to mowing operations. The Court of Appeals acknowledged the “unreasonable burden on counties” if Lakeland was allowed to recover damages in this case.

If you have any questions about the *Lakeland Communications Group, LLC v. Polk County* case, a county’s maintenance obligations, potential liability for performing maintenance, or any other governmental law needs, please contact WCA or any member of the von Briesen & Roper Government Law Group.