AMICUS BRIEF IN POLK COUNTY LITIGATION

Court of Appeals Case May Have a Significant Impact on County Maintenance Operations

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

On November 1, 2017, the Wisconsin Counties Association (WCA) filed a Motion for Leave to file an Amicus Curiae (or "friend of the court") brief in the *Lakeland Communications Group, LLC vs. Polk County* case (Wisconsin Court of Appeals District III, Appeal No. 2017-AP-001262). The *Lakeland* case raises significant concerns for all counties across the state because of the potential implications on the way counties complete routine maintenance activities in rights-of-way.

The facts of the *Lakeland* case are fairly typical: On September 11, 2013, an employee of the Polk County Highway Department 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 a second incident on July 14, 2014, a Polk County Highway Department employee was again mowing vegetation in the highway right-of-way along WIS 35 (via 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. Lakeland sued Polk County in two (2) separate small claims actions to recover the damages. The circuit court consolidated the cases for judicial economy and efficiency. While the claimed damages totaled approximately $1,791.00, Polk County rightly refused to settle the matter given the absurdity of Lakeland's legal claims.

Lakeland based its claim for damages on Polk County's alleged "negligence per se" for failing to call the Digger's Hotline, based on the provisions set forth in Wis. Stats. § 182.0175(2), prior to commencing its mowing activities. Lakeland argued that Polk County had an obligation to contact Digger's Hotline prior to completing its mowing of vegetation in the highway right-of-way.

WCA DETERMINED THAT IT MUST SEEK TO FILE AN AMICUS BRIEF TO ADDRESS THE NEED FOR PROPER RESOLUTION OF THESE ISSUES GIVEN THE POTENTIAL IMPACT ON COUNTIES AND COUNTY HIGHWAY MAINTENANCE DEPARTMENTS ACROSS THE STATE.

Lakeland looked to the definition of "excavation" in Wis. Stat. § 182.0175 to justify its argument that Polk County had an obligation to contact Digger's Hotline before the employee started mowing. However, Lakeland did not present any evidence that "excavation" includes mowing or other surface vegetation removal activities.

Polk County argued that "excavation" does not include routine maintenance as defined by Wis. Stat. § 84.07(1). Polk County also argued 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 Digger's 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 Digger's Hotline before commencing the maintenance, should be set forth in Wis. Stat. § 66.1037.

Lakeland also argued that Polk County should be liable in its performance of the mowing, and therefore not be entitled to government immunity, based on public policy grounds. Lakeland did not provide any other evidence or justification for its argument beyond this public policy argument. While a municipality 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 municipality's failure to properly maintain vegetation is generally not enough to abrogate the municipality's immunity.

The trial court agreed with Polk County and dismissed Lakeland's claims on May 21, 2017, thus ruling that Wis. Stat. § 182.0175 does not apply to mowing activities. The court held Polk County immune to any damages arising out of those mowing activities. Lakeland appealed its case the Wisconsin Court of Appeals, District III.

Upon notice of the appeal, WCA determined that it must seek to file an amicus brief to address the need for proper resolution of these issues given the potential impact on counties and county highway maintenance departments across the state. As of the date of this writing, the Court of Appeals has not ruled on the WCA's motion to file an amicus brief.

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 question, please contact WCA or any member of the von Briesen & Roper Government Law Group.