COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1262 **Cir. Ct. No. 2015SC914**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LAKELAND COMMUNICATIONS GROUP LLC,

PLAINTIFF-APPELLANT,

V.

POLK COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: JEFFERY L. ANDERSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Lakeland Communications Group LLC (Lakeland) appeals an order, entered following a bench trial, dismissing two consolidated

small claims actions it brought against Polk County.[1] The actions stemmed from two separate incidents where County maintenance crews damaged Lakeland's roadside transmission facilities while they were mowing vegetation. Lakeland contends the circuit court erred in determining the County was not negligent per se under WIS. STAT. § 182.0175, the Digger's Hotline statute,[2] because the County failed to call the Hotline before conducting mowing operations. Lakeland also contends the court erred in concluding the County had no common law liability for negligence in this case. We reject Lakeland's arguments and affirm.

BACKGROUND

¶2 The facts presented at trial are undisputed. Lakeland is a communications company that provides telecommunications, cable and internet services through buried and aerial facilities. Some years ago, Lakeland's predecessors obtained permits from the Wisconsin Department of Transportation and the County to construct and operate underground telecommunications transmission lines and facilities within the right-of-way of that section of State Highway 35 located in Polk County and within the right-of-way of County Highway I. Lakeland's predecessors installed underground transmission lines and above-ground pedestals in the rights-of-way of those highways. The pedestals were above-ground transmission facilities that housed telecommunications lines

[1] This appeal was converted from a one-judge appeal to a three-judge appeal by the June 12, 2018 order of the Chief Judge. *See* WIS. STAT. § 752.31(3) (2015-16); WIS. STAT. RULE 809.41(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The supreme court generally referred to WIS. STAT. § 182.0175, entitled "Damage to transmission facilities," as the "Digger's Hotline statute" in ***Melchert v. Pro Electric Contractors***, 2017 WI 30, ¶4, 374 Wis. 2d 439, 892 N.W.2d 710. We will do the same.

and other network cables. The light-green-colored pedestals were approximately two-and-a-half to three feet high. Those pedestals at issue in this case include the County Highway I pedestal with a rectangular base of six-by-eight inches, and the State Highway 35 pedestal with a rectangular base of four-by-six inches. Lakeland did not place a marker near either pedestal.

¶3 The Polk County highway department maintains both the county highways of Polk County and state highways within its borders; the latter highways are maintained pursuant to a routine maintenance agreement with the Wisconsin Department of Transportation. The County periodically mows the vegetation within the right-of-way when conducting maintenance on county and state highways. On separate occasions, County maintenance crews struck and damaged the two Lakeland utility pedestals while mowing vegetation on the sides of both highways at issue. The County did not contact the Digger's Hotline "one-call" system before it mowed the vegetation on the sides of either highway.

¶4 Lakeland repaired the damage to both pedestals. It then filed two small claims complaints in which it sought money judgments of $682.50 and $1108.71 from the County, stemming from the repair costs. The circuit court consolidated the small claims cases for trial.

¶5 In an oral ruling after the trial, the circuit court first considered Lakeland's argument that the Digger's Hotline statute was applicable to the County's mowing vegetation on the sides of the highways at issue and that the County was negligent per se when it did not contact Digger's Hotline before mowing. WISCONSIN STAT. § 182.0175(1)(b) of the Digger's Hotline statute defines "excavation." The court interpreted "excavation" under that statute as not being "directed at the mowing of grass, the trimming of trees or the like," but,

instead, as only including the movement of dirt, earth and rocks. As so defined, the court concluded that the County was not performing "excavation" and therefore the County was not required to contact Digger's Hotline before the mowing operation.

¶6 The circuit court then addressed the County's arguments that its liability for common law negligence was barred on public policy grounds. The court initially acknowledged that the County had asserted common law negligence "was not argued or brought up" by Lakeland. However, the court stated that "rather than potentially making a decision and having the case refiled and saying there's a different cause of common law negligence, the Court decided to go further and finish its analysis." In doing so, the court first observed there did not "seem to be any question" that a causal connection existed between Lakeland's damages and the County's conduct. However, the court concluded that it "appeared to be bound by" ***Estate of Wagoner v. City of Milwaukee***, 2001 WI App 292, 249 Wis. 2d 306, 638 N.W.2d 382, which the court interpreted as precluding it from reaching "the issue of duty" in all cases involving a "mowing situation." The court therefore "[found] no common law negligence because [it] [found] no duty" on the part of the County.

¶7 The circuit court entered an order dismissing both of Lakeland's cases on the merits. Lakeland now appeals.

DISCUSSION

I. Negligence per se and the Digger's Hotline statute

¶8 We first address Lakeland's argument that the County was negligent per se when it failed to call Digger's Hotline before it mowed the sides of the

highways and damaged the utility pedestals. This was its principal argument in the circuit court. A violation of a statute may constitute negligence per se if: (1) the harm inflicted is the type that the statute was designed to prevent; (2) the person injured is within the class of persons sought to be protected; and (3) there is an expression of legislative intent that the statute is a basis for the imposition of civil liability.[3] ***Tatur v. Solsrud***, 174 Wis. 2d 735, 743, 498 N.W.2d 232 (1993).

¶9 WISCONSIN STAT. § 182.0175(1m) establishes the "one-call" system to Digger's Hotline in this state. Generally speaking, the Digger's Hotline statute "requires an excavator to contact Digger's Hotline at least three days before beginning any [nonemergency] excavation. Under the statute, Digger's Hotline is then responsible for contacting the owners of transmission facilities in the area, and the owners are responsible for ensuring that such facilities are marked." ***Melchert v. Pro Elec. Contractors***, 2017 WI 30, ¶9, 374 Wis. 2d 439, 892 N.W.2d 710 (citations and footnotes omitted). It is undisputed that Lakeland's above-ground utility pedestals were "transmission facilities." *See* § 182.0175(1)(c). As noted, it is also undisputed that the County did not contact Digger's Hotline at least three days before mowing the sides of both highways.

¶10 The issue Lakeland raises is whether the County engaged in "excavation" during its "mowing operations," such that the County was required

[3] Despite framing this issue as negligence per se in the circuit court, Lakeland does not develop any argument on appeal as to why negligence per se exists under its interpretation of the Digger's Hotline statute. Notably, the Digger's Hotline statute also provides that "[t]his section shall not affect any right of action or penalty which this state or person may have." WIS. STAT. § 182.0175(4). As we reject Lakeland's interpretation of the Digger's Hotline statute, we assume without deciding for the purpose of this decision that a violation of the statute constitutes negligence per se. *Cf.* ***Melchert***, 374 Wis. 2d 439, ¶38 (assuming without deciding that the general duty of care was "coextensive with the requirements" of provisions in the Digger's Hotline statute).

to call Digger's Hotline prior to engaging in any such operations. We agree with the County and the circuit court that the County was not so required.

¶11 "Excavator" is defined in the statute as "a person who engages in excavation." WIS. STAT. § 182.0175(1)(bm). "Excavation," in turn, is defined in § 182.0175(1)(b) to mean:

> any operation in which *earth, rock or other material in or on the ground is moved, removed or otherwise displaced* by means of any tools, equipment or explosives and includes grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, cable or pipe plowing and driving and means any operation by which a structure or mass of material is wrecked, razed, rended, moved or removed.

(Emphasis added.)

¶12 We must interpret WIS. STAT. § 182.0175(1)(b) to resolve the validity of Lakeland's negligence per se claim. Statutory interpretation is a question of law that this court reviews de novo. ***Mueller v. Edwards***, 2017 WI App 79, ¶5, 378 Wis. 2d 689, 904 N.W.2d 392. Interpreting a statute requires us to begin with its plain language. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language must be interpreted based upon its common, ordinary and accepted meaning, unless a word or phrase is given a technical or special definitional meaning. ***Id.*** We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶13 Lakeland contends that mowing operations constitute "excavation" within the scope of WIS. STAT. § 182.0175(1)(b). According to Lakeland, because "*other material* in or on the ground [was] moved, removed or otherwise displaced" when the County mowed vegetation on the sides of the highways, the

County was involved in "excavation." *See* ***id.*** (Emphasis added.) In other words, Lakeland argues that vegetation is "other material in or on the ground."

¶14 We conclude the plain language of WIS. STAT. § 182.0175(1)(b) does not support Lakeland's interpretation. Even if we construe § 182.0175(1)(b) broadly, the statute fails to make any reference to vegetation as a type of material that "is moved, removed or otherwise displaced" thereby implicating an exercise of "excavation" under the statute when vegetation is mowed. "According to the rule of *ejusdem generis*, the general word is construed to embrace only items similar in nature to the enumerated items." ***State v. Popenhagen***, 2008 WI 55, ¶47, 309 Wis. 2d 601, 749 N.W.2d 611. Here, the general term—"other material in or on the ground" under this statute—does not mean *all types* of material on the ground. It instead refers only to material similar to "earth" or "rock," i.e., clay or minerals.[4] Had the legislature intended to include vegetation in this definition, it could have easily done so. In similar contexts, the legislature has specifically referred to "vegetation" or "plant life" regarding roadside maintenance. *See, e.g.*, WIS. STAT. § 84.07(1) (defining "maintenance activities" regarding state trunk highways as "including the care and protection of trees and other roadside vegetation").

¶15 Furthermore, County workers did not materially move, remove or otherwise displace any earth, rock, or similar materials in or on the ground during the mowing operations. While de-rooting plants, sod removal, or scraping the earth's surface to remove both vegetation and dirt might constitute excavation,

[4] Lakeland does not argue mowing operations are "operation[s] by which a structure or mass of material is wrecked, razed, rended, moved or removed" under WIS. STAT. § 182.0175(1)(b).

simply mowing surface vegetation does not involve materially moving, removing or displacing anything in or on the ground. In fact, mowing keeps vegetation at the ground level largely unchanged. Instead, mowing removes a portion of the top layer of vegetation that is above the ground, not on it or below it.

¶16 Lakeland also fails to take into account the additional terms in WIS. STAT. § 182.0175(1)(b) describing what constitutes an excavation operation. The statute provides that excavation "includes grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, cable or pipe plowing and driving." ***Id.*** "While use of the word 'includes' indicates that what follows are examples rather than an exhaustive list, the associated-words canon instructs that associated words bear on one another's meaning." ***CED Props., LLC v. City of Oshkosh***, 2018 WI 24, ¶40, 380 Wis. 2d 399, 909 N.W.2d 136 (footnote omitted). We cannot discern any reason why the list of digging-related terms in the statute would permit an inference that the mowing of vegetation is an "operation" intended to be included under § 182.0175(1)(b).

¶17 Lakeland's interpretation of WIS. STAT. § 182.0175(1)(b) would additionally lead to absurd results, which we must avoid where possible. *See* ***Kalal***, 271 Wis. 2d 633, ¶46. Rather than bring clarity to the statute, Lakeland's expansive interpretation would create ambiguity and impose wide-ranging consequences if adopted. For instance, if any "material … on the ground" being "moved" or "removed" is all it takes to engage in an "excavation" operation under the statute, as Lakeland contends, then anyone planning to rake leaves or mow a lawn would be required to call Digger's Hotline. As the Wisconsin Counties Association points out in its amicus curiae brief, Lakeland's interpretation "would result in a flood of inquiries" to Digger's Hotline, impose "an additional utility tax

on Wisconsin's citizens," and would cause "significant changes to the operation of highway maintenance and mowing activities by requiring three-days notice."

¶18 Perhaps mindful of these implications, Lakeland attempts to qualify its interpretation of "excavation." It suggests the County was required to call Digger's Hotline because the County "was using equipment much more sophisticated and much more powerful than a standard push mower." Aside from the fact that Lakeland cites nothing in the record regarding the sophistication of the County's equipment, this limitation does not exist in WIS. STAT. § 182.0175(1)(b). Instead, the statute describes moving, removing, or displacing material as occurring "by means of *any* tools, equipment or explosives." ***Id.*** (emphasis added). In all, Lakeland reads most of the text of § 182.0175(1)(b) out of existence to reach an absurd result, and we therefore must reject its interpretation. *See* ***Kalal***, 271 Wis. 2d 633, ¶¶45-46.

¶19 Accordingly, we conclude that the County's highway vegetation mowing operations do not fall within the definition of "excavation" in the Digger's Hotline statute, and the County was not required to contact Digger's Hotline prior to mowing the sides of roadways. We therefore agree with the circuit court that the County's failure to call Digger's Hotline before the mowing operation did not render the County negligent per se.

II. Common law negligence and public policy

¶20 Lakeland also argues the circuit court erred when it concluded common law negligence liability could not be imposed upon the County in this

case.[5] A plaintiff must establish four elements for a negligence claim to succeed: (1) the existence of a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the breach and the plaintiff's injury; and (4) actual losses or damages resulting from the breach. ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. A duty of care exists whenever it is foreseeable to a defendant that his or her act or omission may cause harm to some other person. ***Id.***, ¶20. But even if a duty of care exists on the part of the defendant and negligence has been established, liability may be limited on the basis of public policy considerations. ***Id.***, ¶24; *see also* ***Smaxwell v. Bayard***, 2004 WI 101, ¶33, 274 Wis. 2d 278, 682 N.W.2d 923 (observing "negligence is a distinct concept from liability" in Wisconsin).

¶21 Whether public policy considerations preclude liability is a question of law that this court reviews independently. *See* ***Kidd v. Allaway***, 2011 WI App 161, ¶10, 338 Wis. 2d 129, 807 N.W.2d 700. When determining whether public policy bars liability for negligence, we must consider whether: (1) the injury is too remote from the negligence; (2) the injury is disproportionate to the negligent tortfeasor's culpability; (3) it appears too highly extraordinary, in retrospect, that the negligence should have brought about the harm; (4) allowing recovery would place an unreasonable burden on the tortfeasor; (5) allowing recovery would tend to open the door to fraudulent claims; and (6) allowing recovery would open a field having no sensible or just stopping point. ***Gritzner***, 235 Wis. 2d 781, ¶27.

[5] The County initially contends we should not reach this issue. Its argument seems to be that Lakeland did not adequately plead a common law negligence claim in the small claims proceedings. The County's argument is somewhat unclear, however, because it frames the issue in terms of forfeiture despite the issue being raised, argued and addressed below. Because we reject Lakeland's argument on the merits, we assume without deciding in Lakeland's favor that it adequately raised and pled common law negligence in the circuit court.

These public policy considerations are addressed on a case-by-case basis, and the presence of any one of these factors is enough to bar recovery. ***Alwin v. State Farm Fire & Cas. Co.***, 2000 WI App 92, ¶12, 234 Wis. 2d 441, 610 N.W.2d 218.

¶22 The circuit court based its decision on a lack of duty on the part of the County with regard to any mowing operations and did not expressly consider the six public policy factors in reaching that conclusion. On appeal, the parties instead frame the issue in terms of public policy considerations. We agree with the parties that public policy, rather than duty, is the appropriate issue here.[6]

¶23 To explain why public policy is the appropriate issue here, we first summarize the cases relevant to a municipality's common law liability regarding roadside maintenance. In ***Walker v. Bignell***, 100 Wis. 2d 256, 258, 301 N.W.2d 447 (1981), the plaintiffs were injured in a two-automobile accident at a rural intersection. They alleged the county was negligent because it failed to trim overgrown weeds that obstructed the driver's view of the intersection. The supreme court declined to declare the existence of a common law affirmative duty of municipalities to cut roadside vegetation. ***Id.*** at 266. Rather, the court concluded the county's liability for failure to tend roadside vegetation was barred on public policy grounds. ***Id.*** at 265-66. Citing the above policy factors, the court determined that imposing liability would "place an unreasonable and unmanageable burden upon municipalities" to keep areas adjacent to highway intersections "clear of visual obstructions" at uncertain intervals. ***Id.*** at 266. The court also anticipated the "potential for significant financial liability" stemming

[6] We may affirm on different legal grounds than those used by the circuit court. *See* ***State v. Chew***, 2014 WI App 116, ¶7, 358 Wis. 2d 368, 856 N.W.2d 541.

from this burden because of "the unfortunate propensity of motorists to have intersection accidents." ***Id.*** Finally, the court observed that "because the height and density of vegetation would become a factor in nearly every intersection accident case, municipalities would inevitably be drawn into considerably more litigation." ***Id.***

¶24 The supreme court considered the ***Walker*** holding in a similar context in ***Sanem v. Home Insurance Co.***, 119 Wis. 2d 530, 350 N.W.2d 89 (1984). There, the plaintiff alleged that county plowing created piles of snow and ice which obstructed the view of an intersection where her vehicle was involved in an accident. ***Id.*** at 532. On appeal, the plaintiff argued the county "assume[d] the obligation of removing snow from the highways" and was thus required do so with reasonable care. ***Id.*** at 535. Relying on ***Walker***, the court concluded public policy factors barred liability because: (1) a finding of liability "would impose a virtually unworkable task upon the county" to clear snow from all intersections and medians; and (2) snow mounds "would become a significant factor in numerous intersection cases," regardless of whether a municipality created them, thus imposing additional costs on municipalities to defend lawsuits. ***Id.*** at 540.

¶25 This court has addressed ***Walker*** and ***Sanem*** in two other cases involving municipal maintenance of vegetation. In ***Estridge v. City of Eau Claire***, 166 Wis. 2d 684, 685, 480 N.W.2d 513 (Ct. App. 1991), the plaintiff, while bicycling, was injured when she struck thorny branches that had overgrown a city sidewalk. We rejected her argument that ***Walker*** and ***Sanem*** were distinguishable on public policy grounds because "the accident here was caused by physical contact with the growth as opposed to a mere obstruction to vision." ***Estridge***, 166 Wis. 2d at 686. We stated—without mentioning the six public policy factors—

that "[w]e fail to see the significance of such a distinction in terms of the public policy underlying the ***Walker*** decision." ***Id.*** at 686-87.

¶26 In ***Wagoner***, we considered another intersection accident where the plaintiff alleged that overgrown vegetation in a road median was a cause in fact of the decedent's injuries. ***Wagoner***, 249 Wis. 2d 306, ¶¶2-3. The difference in ***Wagoner*** from ***Walker***, however, was that the plaintiff alleged the city "was negligent for mowing all of the vegetation in the median except for the vegetation within the guardrail." ***Wagoner***, 249 Wis. 2d 306, ¶3. On appeal, the plaintiff argued that ***Walker*** was distinguishable because the city, instead of failing to act, "voluntarily undertook" to maintain the vegetation but did so negligently. ***Wagoner***, 249 Wis. 2d 306, ¶7. Echoing the policy espoused in ***Walker***, we concluded that substantial costs "would cascade upon governmental authorities if they were dragged into every lawsuit where overgrown vegetation might possibly be a contributing factor to an accident." ***Wagoner***, 249 Wis. 2d 306, ¶10.

¶27 Lakeland and the County disagree over whether public policy precludes liability when, as here, a municipality directly damages a plaintiff's property in the course of maintaining roadside vegetation. Lakeland argues that the above cases are confined only to factual scenarios where a municipality has played a role in causing an accident due to the obstructed views from its failure to mow, negligent mowing, or negligent snow-removal activities. It further contends that none of the six public policy factors justify absolving the County of liability. The County responds that ***Wagoner*** eliminates common law liability whenever a municipality is alleged to have negligently mowed roadside vegetation, but it also

specifically contends public policy precludes liability under the circumstances of this case.[7]

¶28 We need not address the County's assertion that ***Wagoner*** and ***Estridge*** bar liability for all acts that "concern the maintenance of vegetation" because we decide that public policy precludes the County's liability under the facts of this case. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate court need not address every issue raised by the parties when one is dispositive). Indeed, court decisions not to impose negligence liability on public policy grounds must be made on a case-by-case basis. *See* ***Alwin***, 234 Wis. 2d 441, ¶12.

¶29 Because ***Walker*** and its progeny are factually distinguishable from this case, we consider whether any public policy factor precludes liability under these circumstances. In doing so, we focus on the fourth factor in considering the County's liability for any negligence on its part. *See* ***Gritzner***, 235 Wis. 2d 781, ¶27; ***Walker***, 100 Wis. 2d at 265. That is, the question becomes whether allowing recovery here would place an unreasonable burden on counties and other municipalities.

[7] We observe that none of the cases we have cited regarding public policy have addressed governmental immunity pursuant to WIS. STAT. § 893.80(4). That statute confers "broad immunity from suit on municipalities and their officers and employees" when they perform "any act that involves the exercise of discretion and judgment." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314. While the Wisconsin Counties Association discusses § 893.80(4) in its amicus curiae brief and requests that we affirm on those grounds, neither the County nor Lakeland have raised this issue at any point in this case. Because only the Wisconsin Counties Association argues governmental immunity pursuant to § 893.80(4) applies in this case, we decline to reach that issue. *See* ***County of Barron v. LIRC***, 2010 WI App 149, ¶30, 330 Wis. 2d 203, 792 N.W.2d 584 ("courts need not consider arguments raised only by amici").

¶30 The County is charged with maintaining vegetation on the sides of its roadways within its borders. *See* WIS. STAT. § 66.1037(1); WIS. STAT. § 83.01(7). We conclude that requiring governmental agencies to scour miles of roadsides for objects lurking in vegetation, alongside all roadways prior to any mowing operations, "would impose a virtually unworkable task" upon the counties. *See* ***Sanem***, 119 Wis. 2d at 540. Objects of similar size to Lakeland's pedestals could be easily concealed by vegetation, thus making efforts to search for them prior to mowing (and to remove or mark any concealments) an unreasonable burden for counties and other municipalities.

¶31 Lakeland contends our conclusion that liability does not exist here would "deter communication companies from expanding their vast network of underground cables." However, we are persuaded by the County's arguments that, in such cases, the communication companies are in the best position to know the exact location of their pedestals and to take appropriate measures, such as marking the structure, to best avoid accidental damage. Indeed, a municipality may impose marking requirements for a pedestal as part of its power to regulate construction of transmission lines in a right-of-way. *See* WIS. STAT. § 182.017(1r) (permitting a company to "construct or maintain" transmission lines in a right-of-way "subject to … reasonable regulations made by any municipality"). While precluding an otherwise valid common law claim may seem to be harsh, it is appropriate under the specific facts of this case. Public policy dictates that the burden of protecting against accidental damage to the pedestals is better placed upon the communication company than on counties and municipalities.

¶32 In summary, the County is not liable under either negligence per se or common law negligence theories for the damages caused to Lakeland's

transmission facilities by the County's mowing operations. The circuit court therefore properly dismissed the cases with prejudice.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.