COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 10, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0052

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

DONALD DREIER, JANA DREIER and RURAL SECURITY LIFE INSURANCE COMPANY,

Plaintiffs,

v.

WISCONSIN CENTRAL LTD.,

Defendant-Third Party Plaintiff-Appellant,

v.

TOWN OF HERMAN, WISCONSIN and MILWAUKEE GUARDIAN INSURANCE INC.,

Defendants-Third Party Defendants-Third Party Plaintiffs,

PHILLIP TRINKO,

Defendant-Third Party Defendant-Third Party Plaintiff-Co-Appellant,

PHILLIP TRINKO, JANET TRINKO and EMPLOYERS HEALTH INSURANCE COMPANY,

Counter Claimants,

WISCONSIN CENTRAL LIMITED,

Counter Defendant,

WILLIAM OVANS and PELLA FARMERS MUTUAL INSURANCE COMPANY,

Third Party Defendants-Respondents.

APPEAL from orders and a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Wisconsin Central Ltd. and Phillip Trinko appeal a summary judgment that dismissed their third-party complaint against William Ovans and his liability insurer, Pella Farmers Mutual Insurance Company. A passenger in Trinko's car sued Trinko and Wisconsin Central for the injuries he suffered when Trinko's car collided with a Wisconsin Central freight train. Trinko filed a third-party claim against Ovans asserting that he negligently failed to cut trees, shrubs, and other vegetation on his land and that the vegetation obstructed motorists' views of the railroad crossing. Wisconsin Central later filed a cross-claim against Ovans making the same basic charges.

On summary judgment, the trial court ruled that the highway-obstructing vegetation constituted a natural condition and that landowners like Ovans had no common law duty to rectify such natural conditions. The trial court granted Ovans a time extension for answering Trinko's third-party complaint. The trial court refused, however, to permit Trinko to later amend his third-party complaint against Ovans to allege that a fence on Ovans' land amidst the vegetation transformed the highway obstructing vegetation from a liability free natural condition into a liability carrying unnatural condition. The trial court considered the amendment futile, holding that Ovans' capacity as fence owner would not have transformed the vegetation from a natural condition into an unnatural one.

The trial court correctly granted summary judgment if Ovans showed no dispute of material fact and a right to judgment as a matter of law. *See* ***Powalka v. State Mut. Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). On appeal, Trinko and Wisconsin Central together raise four basic arguments: (1) private landowners like Ovans have a common law duty to cut highway obstructing vegetation; (2) the trial court improperly granted Ovans a time extension for filing his answer to the third-party complaint; (3) Ovans' status as fence owner made the vegetation a liability carrying unnatural condition; and (4) the trial court should have permitted amendment of Trinko's third-party complaint. We reject these arguments and therefore affirm the trial court's orders.

We first conclude that Ovans enjoyed common law immunity from civil liability. We read ***Wells v. Chicago & North Western Transp. Co.***, 98 Wis.2d 328, 296 N.W.2d 559 (1980), to acknowledge such immunity in the context of interpreting § 195.29(6), STATS. Although the statute requires landowners to cut brush, the Wisconsin Supreme Court ruled that the statute imposed no civil liability. The court also stated that the common law at the statute's enactment had exempted landowners from civil liability for the natural condition of the land. ***Id***. at 337-39, 296 N.W.2d at 563-64. Taken together, these statements seem to endorse continued common law immunity. Although the ***Wells*** court later seemed to retreat from this position, reserving a decision on whether uncut brush was common law negligence, *see* ***id***. at 344, 296 N.W.2d at 567, we read ***Wells*** as leaving common law immunity intact. As a result, Ovans' common law immunity against landowner liability continued unabated against Trinko's third-party complaint. We note that the RESTATEMENT and other states continue to apply the same principle of common law immunity. *See, e.g.*, ***Nichols v. Sitko***, 510 N.E.2d 971 (Ill. App. 1987); ***Fritz v. Parkison***, 397 N.W.2d 714 (Iowa 1986); ***Stevens v. Drekich***, 443 N.W.2d 401 (Mich. App. 1989); *see also* RESTATEMENT (SECOND) OF TORTS § 363 at 258 (1964). Further clarification must come from the Wisconsin Supreme Court.

We also conclude that the trial court correctly extended the time for Ovans to answer the third-party complaint. Trial courts have wide ranging discretion to deny or vacate default judgments that impose liability on extralegal causes of action. ***Davis v. City of Elkhorn***, 132 Wis.2d 394, 399, 393 N.W.2d 95, 97 (Ct. App. 1986). The legislature never intended default judgments to impose liability on nonexistent causes of action. This casts in a different light the degree of excusable neglect some default judgment litigants

must show in order to set aside such judgments. Here, common law immunity stood as an absolute bar to Ovans' civil liability. Under the circumstances, the trial court properly withheld a default judgment that would have imposed real legal liability on an extralegal cause of action. We also see no countervailing factors that might conceivably justify some other outcome. Trial courts should not grant default judgments that they know they must ultimately vacate. *See* ***Johns v. County of Oneida***, 201 Wis.2d 600, 608-09, 549 N.W.2d 269, 271 (Ct. App. 1996).

Last, the trial court had a solid discretionary basis to bar Trinko from amending his third-party complaint. Trinko wanted to claim that Ovans created a hazardous condition by maintaining a fence in the municipality's right-of-way. The trial court's decision was discretionary. ***Village of Sister Bay v. Hockers***, 106 Wis.2d 474, 481-82, 317 N.W.2d 505, 508-09 (Ct. App. 1982). Here, the trial court correctly exercised its discretion over its own case docket. Trinko's motion fell outside the trial court's scheduling order deadlines by seven months. It also sought a nine-month extension. Litigants have a duty to meet scheduling orders, and the trial court could rationally rule that Trinko supplied no good cause for a nine-month extension. Moreover, the amendment did not provide a bona fide cause of action. Its focus on fence ownership would not have defeated Ovans' common law immunity. The fence did not cause the vegetation or prevent its removal. Under such circumstances, Ovans' fence owner capacity did not transform the site into a liability carrying unnatural condition. In sum, Ovans' common law immunity continued unabated despite his fence ownership.

By the Court.—Orders and judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.