COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 21, 1995

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(1), STATS.

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

Nos. 95-0090
95-0474

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III
No. 95-0090

MICHAEL W. HILGER,
and JUDY HILGER,

Plaintiffs,

v.

WISCONSIN CENTRAL, LTD.,
a Foreign Corporation,

Defendant-Appellant,

COUNTY OF DOUGLAS,
a Municipal Corporation,

Defendant-Respondent,

WISCONSIN COUNTY MUTUAL
INSURANCE CORPORATION,
a Domestic Corporation,
TOWN OF PARKLAND, WISCONSIN,
a Municipal Corporation, and

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Foreign Corporation,

Defendants.

No. 95-0474

MICHAEL W. HILGER, and JUDY HILGER,

Plaintiffs-Appellants,

v.

WISCONSIN CENTRAL, LTD., a Foreign Corporation,

Defendant-Respondent,

COUNTY OF DOUGLAS, a Municipal Corporation, WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION, a Domestic Corporation, TOWN OF PARKLAND, WISCONSIN, a Municipal Corporation, and ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Foreign Corporation,

Defendants.

APPEALS from judgments of the circuit court for Douglas County: JOSEPH A. MC DONALD, Judge. *Affirmed*.

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

PER CURIAM. Michael and Judy Hilger, the parents of William Hilger, appeal a judgment dismissing their wrongful death action against Wisconsin Central, Ltd.[1] The trial court dismissed the action based on the jury's finding that William Hilger was sixty-five percent responsible for the accident. The Hilgers argue that the trial court erred when it did not allow them to call a rebuttal witness and when it granted the railroad's motion *in limine* regarding the adequacy of warning devices. They also argue that the court should have informed the jury of the effect of its verdict.[2] We reject these arguments and affirm the judgment.

William Hilger was killed in a car/train accident that occurred shortly before 8:00 a.m. An issue developed at trial regarding the time Hilger was supposed to report to work that morning. The railroad contended that Hilger's starting time was 8:00 a.m. and the accident occurred at approximately a thirty-minute drive from his worksite, implying that his rush to get to work contributed to the accident. The Hilgers attempted to call a rebuttal witness, Pete Nelson, who would have testified that William told him the night before the accident that he did not have to get to work until 8:30 or 9:00 the next day.[3] The trial court disallowed Nelson's testimony because Nelson was not disclosed as a witness, and because his proffered testimony was hearsay and cumulative.

The trial court properly exercised its discretion when it disallowed Nelson's testimony. Whether testimony should be admitted is a question for the trial court's discretion and its decision will be upheld if the trial court has examined the relevant facts, applied a proper standard of law, and used a reasonable process to reach a conclusion that a rational judge could reach. ***State***

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[1] In appeal no. 95-0090, Wisconsin Central also appeals a summary judgment dismissing Douglas County from this action. We conclude that the issues between Wisconsin Central and Douglas County were rendered moot by the jury's finding that William Hilger was sixty-five percent responsible for the accident.

[2] Because we uphold the verdict as to liability, we need not address the issues relating to damages.

[3] The Hilgers also argue that the court disallowed rebuttal testimony from Rodney Anderson regarding the time Hilger was to report for work. The trial court overruled the objection to Anderson's testimony and the transcript does not support the argument that the trial court limited Anderson's testimony in that regard.

v. Peters, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct. App. 1993). Nelson was not disclosed as a witness and was not subject to discovery. The trial court noted that Nelson had a criminal record that might affect his credibility. He was called primarily to rebut the testimony of another rebuttal witness, not a defense witness. His testimony would have been hearsay except to the extent it told of William Hilger's state of mind on the night prior to the accident. *See* ***Doern v. Crawford***, 36 Wis.2d 470, 478, 153 N.W.2d 581, 585 (1967). Hilger's state of mind at that time has little probative value. Because the court allowed similar testimony from another witness, Nelson's testimony would have been cumulative. We conclude that the trial court reasonably exercised its discretion when it refused to allow a surprise witness to present cumulative, marginally relevant testimony.

Nelson would also have testified that he did not hear the train blow its whistle before the accident. Several other witnesses had contradicted the railroad employees' testimony that they blew the whistle. The trial court appropriately disallowed Nelson's testimony because Nelson was not disclosed as a witness, the issue of whether the train whistle sounded was known before the trial began, and Nelson's testimony would not be properly characterized as rebuttal and would be cumulative.

Before trial, the court granted the railroad's motion *in limine* regarding the adequacy of warning devices. Before the accident, the commissioner of transportation had reviewed the warning devices and determined that they were adequate to protect public safety. The railroad fully complied with the commissioner's April 3, 1991 order regarding the warning devices required at that intersection. Therefore, as a matter of law, the railroad was immunized from any challenge to the adequacy of the warning devices at that crossing. When the commission directs a crossing to be guarded in a particular manner and the railroad has done as directed, it is not required to go further to satisfy a jury's idea of adequate protection. ***Schulz v. Chicago M., St. P. & P. Ry. Co.***, 260 Wis. 541, 544-45, 51 N.W.2d 542, 544-45 (1952). When the commissioner of transportation makes a determination regarding the adequacy of protective devices at a crossing, that office obtains exclusive jurisdiction over the crossing. *See* ***Verrette v. Chicago Northwestern Ry. Co.***, 40 Wis.2d 20, 28, 161 N.W.2d 264, 268 (1968); § 195.28(1), STATS.

The trial court properly refused to instruct the jury on the effect of its verdict. *See* ***Delvaux v. Langenberg***, 130 Wis.2d 464, 480-81, 387 N.W.2d 751, 758 (1986). This court has no authority to ignore supreme court precedent. *See* ***State v. Lossman***, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984).

By the Court.—Judgments affirmed.

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