Appeal No. 04-1730 **Cir. Ct. No. 93CV001480**

WISCONSIN COURT OF APPEALS
DISTRICT IV

SAMUELS RECYCLING COMPANY,

PLAINTIFF-APPELLANT,

v.

CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, TRANSCONTINENTAL INSURANCE COMPANY AND TRANSPORTATION INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

FILED

January 27, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Higginbotham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04),[1] we certify this appeal to the Wisconsin Supreme Court. We do so partly because it raises an issue similar to one in a case now pending before that court in which oral argument is scheduled for February 2, 2005, ***Sukala v. Heritage Mut. Ins. Co.***, 2004 WI App 128, 275 Wis. 2d 469, 685 N.W.2d 809, *review granted*, 2004 WI 138, ___ Wis. 2d ___, 689 N.W.2d 55 (No. 03-0173). The common element between the cases is whether a later change in case law is a proper reason to vacate a judgment under WIS. STAT. § 806.07(1)(h), which allows a judgment to be vacated for

---

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

"[a]ny other reasons justifying relief from the operation of the judgment." Relief under this provision generally requires a showing of "extraordinary circumstances." ***Village of Trempeleau v. Mikrut***, 2004 WI 79, ¶36, 273 Wis. 2d 76, 681 N.W.2d 190. The facts of this case are substantially different from ***Sukala*** or other related cases. Resolution of this case by the supreme court will further clarify the parameters of what constitutes "extraordinary circumstances" for the purposes of obtaining relief from a judgment under § 806.07(1)(h) in the situation where the supreme court overrules previously applicable precedent.

In ***Sukala***, we held that the circuit court erred by denying the movant's request to vacate a stipulated dismissal. In the first ***Sukala*** appeal, we had held that an insurance policy was unambiguous as to underinsured motorist coverage. ***Sukala***, 275 Wis. 2d 469, ¶3. The supreme court denied the Sukalas' petition for review. ***Id.*** Approximately seven months after denying that petition, the supreme court granted a petition for review in another case where we relied on our first ***Sukala*** opinion. ***Id.***, ¶5. That case was ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223. The supreme court reversed our decision in ***Schmitz*** and, we later concluded, implicitly overruled our ***Sukala*** opinion. ***Sukala***, 275 Wis. 2d 469, ¶¶5, 12. The Sukalas then moved in the circuit court to reopen their stipulated dismissal under WIS. STAT. § 806.07(1)(h) but the motion was denied. ***Id.***, ¶¶6, 13-14. We concluded the Sukalas were victims of an inequitable circumstance, because the supreme court granted review in ***Schmitz*** seven months after denying review of the same issue in ***Sukala***, and thus fairness required the reopening of the dismissal. ***Id.***, ¶12.

Like ***Sukala***, the case now before us arises from supreme court decisions relating to insurance policies. The policies in question here are for comprehensive general liability (CGL). The supreme court initially held that the

insurer's duty to defend was not triggered by a government letter seeking certain environmental cleanup and remediation costs because, under these policies, it was not a "suit seeking damages." ***City of Edgerton v. General Cas. Co. of Wisconsin***, 184 Wis. 2d 750, 786, 517 N.W.2d 463 (1994). Nine years later the supreme court overruled that decision. ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶¶3-5, 264 Wis. 2d 60, 665 N.W.2d 257 (2003), *cert. denied*, 124 S.Ct. 2070 (2004)

At the time of the ***Edgerton*** decision, our current appellant, Samuels Recycling Company, was in litigation against its insurers, such as Continental Casualty Company. Based on ***Edgerton***, the circuit court dismissed claims against the insurers in September 1995. Samuels amended its complaint and the litigation continued. Samuels later appealed to this court from dismissal of its amended complaint but apparently did not make any argument about the September 1995 dismissals that were based on ***Edgerton***. *See* ***Samuels Recycling Co. v. CNA Ins. Cos.***, 223 Wis. 2d 233, 588 N.W.2d 385 (Ct. App. 1998). We affirmed the dismissal of the amended complaint and Samuels did not petition for review. After ***Johnson Controls***, Samuels moved for relief from the orders dismissing its claims. The circuit court denied the motion and Samuels now appeals.

Samuels presents its arguments in this appeal in the form of several legal theories, including the "Blackstonian Doctrine," but we consider the core of its argument to be that the required "extraordinary circumstances" exist on the facts of this case. Each side has reasonable arguments to make on this point.

In Samuels' favor is the ***Johnson Controls*** opinion itself. In ***Johnson Controls***, the supreme court made statements there that suggest it believed the application of ***Edgerton*** led to inequitable results. For example, the

supreme court stated ***Edgerton*** failed to comport "with the reasonable expectations of the insured." ***Johnson Controls***, 264 Wis. 2d 60, ¶67. In determining whether it was appropriate to disregard stare decisis, the court noted that, because the CGL language at issue in ***Edgerton*** was no longer used after 1985, "the insurers cannot credibly argue that ***Edgerton*** established significant reliance interests, in terms of how insurance contracts have been drafted and bargained for, that will be harmed by its reversal." ***Id.***, ¶117. This statement may be applied equally well to the question of whether an insurer can assert such a reliance interest in opposing the vacating of a judgment based on ***Edgerton***. In addition, Samuels argues there is no equitable reason why insureds who submit claims today, after ***Johnson Controls***, should receive the benefit of the policy while those who submitted claims earlier do not.

In response, Continental argues Samuels should have continued to appeal, as Johnson Controls did. It argues that reopening this judgment after a lengthy delay may prejudice its ability to litigate other fact-based coverage defenses, such as whether the environmental discharge was expected or intended, whether notice was timely and whether the loss was already in progress. Insurers also may have lost the opportunity to participate in settlements that their insureds have reached after coverage was denied. Continental argues Samuels' arguments pose a substantial risk to the finality of judgments because there is little to distinguish the position of Samuels from any other litigant who would like an opportunity to litigate old claims already disposed of based on new case law.

The supreme court has considered similar issues in other cases. The court previously granted relief to litigants, although not necessarily under WIS. STAT. § 806.07, in ***Harmann v. Hadley***, 128 Wis. 2d 371, 382 N.W.2d 673 (1986) and ***Mullen v. Coolong***, 153 Wis. 2d 401, 451 N.W.2d 412 (1990). In ***Harmann***,

the court made an exception from a decision that was to be applied prospectively only, based on the procedural history of the case, including the supreme court's denial of the appellants' petition for bypass. ***Harmann***, 128 Wis. 2d at 386. In ***Mullen***, the supreme court allowed relief under § 806.07 from a settlement because the court had denied the appellant's petition for review, even after accepting certification of an appeal that raised the same issue and in which the court later held in a manner that supported the movant. ***Mullen***, 153 Wis. 2d at 408.

The application of WIS. STAT. § 806.07(1)(h) requires a balancing of finality and fairness to individual litigants. The standard of review usually applied to these decisions provides a further reason for the supreme court to take this appeal and give firm guidance. A § 806.07(1)(h) decision is usually said to be discretionary and we review with deference. However, a discretionary standard has the potential to result in similarly situated movants receiving different answers from different judges, with all such decisions being affirmed on appeal. Given the potential for other movants similarly situated to Samuels to come forward, it seems appropriate that the supreme court should establish one answer or at least one clear set of factors that should be applied.

In summary, we certify this appeal because it raises important issues of finality and fairness, in circumstances that may apply to other insureds and insurers across the state, and the issues are prompted by a decision of the supreme court that overruled previously applicable precedent. In addition, we certify the appeal because the issues it raises are similar to those in a case currently pending before the supreme court and set for oral argument on February 2, 2005.