

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP1517

Cir. Ct. No. 2004CV2185

STATE OF WISCONSIN

**IN 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.

APPEAL from an order of the circuit court for Dane County:
MORIA KRUEGER, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Samuels Recycling Company appeals an order dismissing its complaint against Continental Casualty Company, Continental

Insurance Company, Transcontinental Insurance Company, and Transportation Insurance Company. The issues are whether claim preclusion bars the primary coverage claim in this action, and whether Samuels' complaint stated a claim for bad faith apart from the precluded coverage claim. We affirm on both issues.

¶2 Samuels, a scrap processing and recycling company, incurred government-imposed environmental cleanup costs for which it sought coverage under policies with the respondents. Samuels sued them in 1993 when they denied coverage. While its lawsuit was pending, the supreme court held that under the policy language in question, insurers were not liable for the type of cleanup costs for which Samuels sought coverage. *See City of Edgerton v. General Cas. Co. of Wis.*, 184 Wis. 2d 750, 786, 517 N.W.2d 463 (1994). Based on *Edgerton*, the circuit court dismissed Samuels' coverage claim. Samuels subsequently appealed on other issues but did not raise the issue resolved by *Edgerton*.

¶3 In 2003 the supreme court overruled its *Edgerton* decision in *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, ¶¶3-5, 264 Wis. 2d 60, 665 N.W.2d 257, and declared the holding in *Edgerton* to be in error. *Id.*, ¶119.

¶4 In this proceeding, Samuels seeks to relitigate the claims dismissed in the prior litigation, using the *Johnson Controls* holding to establish coverage. It also seeks recovery on a claim of bad faith based on the insurers' continued denial of coverage after *Johnson Controls* overruled *Edgerton*. Samuels readily acknowledged the respondents' claim preclusion defense, but argued in the circuit court, and now here, for an exception to the doctrine based on the intervening change in the law. The trial court refused to apply an exception to claim

preclusion and also concluded that the complaint did not state a claim for bad faith.

¶5 Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties as to all matters that were litigated or could have been litigated in the former proceeding. *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). However, in certain cases “[t]he policy reasons for allowing an exception [to claim preclusion] override the policy reasons for applying the general rule.” *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 235-36, 601 N.W.2d 627 (1999) (quoting *Patzer v. Board of Regents*, 763 F.2d 851, 856 (7th Cir. 1985)). Here, Samuels asks this court to create an exception to claim preclusion where an intervening change in the law would likely, if not undisputedly, create a different result than in the prior litigation.

¶6 We decline to create the exception Samuels seeks. Exceptions to the doctrine of claim preclusion are rare. *Kruckenbergh v. Harvey*, 2005 WI 43, ¶37, 279 Wis. 2d 520, 694 N.W.2d 879. Fairness is not an element of claim preclusion. *Id.*, ¶54. “An ad hoc exception to the doctrine of claim preclusion cannot be justified simply by concluding that it is too harsh to deny an apparently valid claim by balancing the values of claim preclusion against the desire for a correct outcome in a particular case.” *Id.*, ¶55. Consequently, claim preclusion is strictly applied, primarily to promote the certainty and finality of judgments. *See id.*, ¶53.

¶7 The United States Supreme Court concurs with the foregoing reasoning. “[T]he [claim preclusion] consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”

Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981). The circumstances here, where Samuels could have directly challenged the *Edgerton* ruling by appeal, do not provide a compelling reason to create an exception to the rule.

¶8 The circuit court properly dismissed Samuels' bad faith claim. Prevailing on a bad faith claim against an insurer requires proof that the insurer lacked a reasonable basis for denying a claim and knew or recklessly disregarded that there was no reasonable basis for denying benefits. *Brown v. LIRC*, 2003 WI 142, ¶23, 267 Wis. 2d 31, 671 N.W.2d 279. However, in this case, under any reasonable view, the insurers reasonably relied on well-established legal principles concerning the finality of judgments, notwithstanding subsequent changes in the law. See *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶12, 282 Wis. 2d 46, 698 N.W.2d 610 (courts provide relief based on intervening changes in the law only in unique and extraordinary circumstances).

¶9 Finally, Samuels contends that we should permit it to pursue its claim using the "Blackstonian Doctrine," under which a decision that overrules or repudiates an earlier decision has retroactive application. See *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 574, 157 N.W.2d 595 (1968). Samuels cites no authority for the proposition that the Blackstonian Doctrine negates the rule of claim preclusion, and we are aware of none.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

