

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2003

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. 02-3138
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-761

**IN COURT OF APPEALS
DISTRICT III**

**MARY SEVCIK, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF SALLY A. PETERS, AND JUSTIN L.
PETERS, BY HIS GUARDIAN AD LITEM GEORGE
BURNETT,**

PLAINTIFFS-APPELLANTS,

V.

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
J. DENNIS MCKAY, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary Sevcik, as personal representative of the Estate of Sally Peters, and Justin Peters (collectively Sevcik) appeal an order denying their motion to vacate a judgment in favor of Secura Insurance. Because

we conclude that the trial court improperly exercised its discretion when it denied the motion, we reverse the order and remand the matter to the trial court for further proceedings. However, we reject Sevcik's argument that we should exercise discretion for the trial court.

¶2 In an earlier appeal *Sevcik v. Secura Ins. Co.*, No. 00-2104, unpublished slip op. (WI App June 19, 2001) this court affirmed the trial court's construction of an insurance policy. We concluded that the policy was not ambiguous and that the underinsured motorist coverage reducing clause did not result in illusory coverage. The supreme court denied review of that decision. The supreme court granted review of *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, but had not yet decided it. Sevcik sought a petition for a supervisory writ to compel the clerk of the trial court to return the record to the supreme court for review, essentially seeking reconsideration of the denial of its petition for review. The supreme court concluded *only* that reconsideration is not an available remedy and noted that the remedy, if any, may lie in a WIS. STAT. § 806.07¹ motion in the circuit court.

¶3 In *Badger Mutual*, 255 Wis. 2d 61, ¶42, the supreme court abrogated *Sukala v. Heritage Mut. Ins. Co.*, 2000 WI App 266, 240 Wis. 2d 65, 622 N.W.2d 457, a case that this court relied on when reaching our previous decision.² Sevcik then filed a motion under WIS. STAT. § 806.07 in the trial court

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Our analysis was further called into question by the holding in *Dowhower v. Marquez*, 2003 WI App 23, No. 01-1347, ordered published Feb. 25, 2003.

seeking relief from the judgment. The trial court denied the motion in an order stating:

This Court is not want to do what the Supreme Court of this State wants not to do. A judgment; an appeal; a decision; a denial. The system has run its course.

It would be an impermissible exercise of trial court discretion to now relegate the system to something less than determinative of outcome.

¶4 It is not clear from the trial court's decision whether it believed that it lacked the authority to reopen the judgment or whether it simply refused to do so. In either case, the court did not properly exercise its discretion. The trial court has authority to vacate a judgment based on a postjudgment change in the controlling law. *Mullen v. Coolong*, 153 Wis. 2d 401, 402, 451 N.W.2d 412 (1990). The law does not bar a motion under WIS. STAT. § 806.07 merely because the judgment has been affirmed on appeal. If the trial court believed that it was not allowed to reopen the judgment because of the previous appeal, the discretionary decision to deny the motion was based on an erroneous view of the law and therefore constitutes an erroneous exercise of discretion. See *Anderson v. Burnett County*, 207 Wis. 2d 587, 598-99, 558 N.W.2d 636 (Ct. App. 1996).

¶5 If the trial court understood that it had the authority to grant relief but merely chose not to, its decision does not reflect an adequate reasoning process. Discretion contemplates a reasoning process that depends on facts of record and one that yields a conclusion based on logic and proper legal principles. See *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 624, 511 N.W.2d 868 (1994). The trial court did not analyze whether changes to the law announced in *Badger Mutual* affected the validity of this court's earlier decision. The court did not acknowledge that subsequent change in the law could constitute

a basis for reopening a judgment and it failed to explain why it would not grant relief in this case.³

¶6 We decline Sevcik’s invitation to exercise discretion for the trial court. This court may not usurp the trial court’s role. *See Barrera v. State*, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980).

By the Court.—Judgment reversed and cause remanded.

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

³ We do not, of course, suggest how the trial court should exercise its discretion on the motion on remand.

