

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 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. 2004AP1730

Cir. Ct. No. 1993CV1480

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:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Samuels Recycling Company appeals an order denying its motion for WIS. STAT. § 806.07 (2003-04)¹ relief from a judgment. The issue is whether the trial court properly exercised its discretion when it denied the motion. We affirm.

¶2 Samuels, a scrap processing and recycling company, incurred government-imposed environmental cleanup costs for which it sought coverage from its liability insurers. It commenced this lawsuit against them when they denied coverage.

¶3 While the lawsuit was pending, the supreme court held that under the policy language in question insurers were not liable for the kind of cleanup costs at issue in this case. See *City of Edgerton v. General Cas. Co. of Wis.*, 184 Wis. 2d 750, 786, 517 N.W.2d 463 (1994). Based on *City of Edgerton* the trial court dismissed Samuels' coverage claim. Samuels appealed on other issues but did not raise the issue resolved by *City of Edgerton*.

¶4 That was the end of the matter until the supreme court overruled its *City of Edgerton* decision in *Johnson Controls, Inc. v. Employer's Ins. of Wausau*, 2003 WI 108, ¶¶3-5, 264 Wis. 2d 60, 665 N.W.2d 257, cert. denied, 541 U.S. 1027 (2004), and declared its prior holding an error that "must be corrected by this court." *Id.*, ¶119.

¶5 The *Johnson Controls* holding prompted Samuels to file its WIS. STAT. § 806.07 motion, asserting it was inequitable to deny it the opportunity to

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

pursue its claim for coverage with the *City of Edgerton* bar removed. The trial court applied the “extraordinary circumstances” test and denied the motion. The court noted that Samuels could have included a direct challenge to *City of Edgerton* in its appeal, especially since the supreme court had already signaled a potential retreat from the *City of Edgerton* holding in *General Casualty Co. of Wisconsin v. Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), which was decided before Samuels appealed. *See id.*, ¶¶26-27 (Abrahamson, C.J., concurring). The trial court concluded:

Therefore, Samuels had the same information that Johnson Controls had. Johnson Controls chose to pursue a non-frivolous appeal. Samuels had it within its power to do the same, but chose to permit the September, 1995 decision of this court to become final. Under Wisconsin case law as it now exists, I find that plaintiff Samuels has failed to demonstrate “extraordinary circumstances” justifying the unusual step of re-opening of a judgment that has now been final for almost nine years.

¶6 The trial court’s decision to grant relief from a judgment under WIS. STAT. § 806.07(1)(h), the applicable provision of § 806.07, is discretionary. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 685 N.W.2d 809. We will affirm a discretionary decision if the circuit court relied on facts of record and the correct legal standards to reach a reasonable, articulated result. *Id.*

¶7 The trial court properly used its discretion to deny Samuels’ motion for relief. WISCONSIN STAT. § 806.07(1)(h) provides relief based on intervening changes in the law only in unique and extraordinary circumstances. *Sukala*, 282 Wis. 2d 46, ¶12. Samuels waited nine years to move for relief and bypassed its opportunity to directly challenge *City of Edgerton* on appeal, despite indications that the supreme court was having second thoughts about its decision. Unique and extraordinary circumstances exist where the sanctity of a final judgment is

outweighed by the incessant command of the court's conscience that justice be done in light of all the facts. *Id.* Under the circumstances here, the trial court reasonably chose not to provide relief under this strict standard.

By the Court.—Order affirmed.

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

