

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2007

A. John Voelker
Acting 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. 2006AP2362-FT

Cir. Ct. No. 2002CV833

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KRISTIN A. SAWOTKA,

PLAINTIFF-APPELLANT,

V.

MIDWEST SECURITY LIFE INS. CO.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kristin Sawotka appeals a summary judgment dismissing her bad faith action against Midwest Security Life Insurance

Company.¹ She sought coverage under her father's medical insurance policy and contends that Midwest acted in bad faith when it canceled coverage after it learned that she did not return to school in January 2000 because of injuries she suffered in a traffic accident. Sawotka argues that (1) the court should only consider the parts of the policy that Midwest relied on when it initially notified Sawotka of its intent to terminate coverage; and (2) if ambiguities in the policy are construed in favor of coverage, Midwest acted in bad faith because coverage was not "fairly debatable." We reject these arguments and affirm the judgment.

¶2 In December 1999, Sawotka was a nineteen-year-old full time college student. As such, she was insured under her father's health insurance policy as a "dependent." After she was injured in a traffic accident, she did not return to school the following semester while she recuperated from her injuries. Upon being notified that Sawotka was no longer a full time student, Midwest notified Sawotka that coverage under her father's policy would end as of April 1, 2000.

¶3 Section 12 of the policy defines "dependents" to include unmarried dependent children through the calendar month of their twenty-fifth birthday if they are attending an accredited school on a full time basis. Sawotka claimed coverage under Section 6 of the policy which, as required by WIS. STAT. § 632.88, continues coverage for an unmarried child who is "chiefly dependent on [her father] for support and maintenance ..." and is "incapable of self-sustaining employment due to mental retardation or physical handicap." This coverage

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

continues as long as her father remains insured under the policy and “the child remains unmarried, incapacitated and dependent on [her father].” Midwest denied coverage under Section 6, contending that § 632.88 is intended to provide continued dependent status for those who are physically or mentally handicapped on a permanent basis; it was not intended to apply to those who are temporarily recovering from an accident or illness. Sawotka argues that coverage for her temporary disability is not fairly debatable and that Midwest should not be allowed to rely on the Section 12 definition of “dependents,” when determining the reasonableness of its decision to cancel coverage.

¶4 Sawotka’s argument that Midwest should be judicially estopped from utilizing the entire insurance policy to support its argument against coverage is not supported by law and relies on misrepresenting Midwest’s analysis. Judicial estoppel is an equitable remedy that precludes a party from asserting a position in a legal proceeding that is inconsistent with the position previously asserted. *See Coconate v. Schwanz*, 665 Wis. 2d 626, 631, 477 N.W.2d 74 (Ct. App. 1991). There is no inconsistency between the various sections of the insurance policy. Under Section 12, “dependent” coverage is terminated when a student does not enroll for the next semester. The statutorily mandated extension of coverage for retarded and physically handicapped children overrides the policy definition. These provisions must be read together to give effect to the policy and WIS. STAT. § 632.88. There is no equitable reason for restricting consideration to only part of the policy when determining whether Midwest acted in bad faith. Midwest did not change the reason for its denial of coverage. Consistent with the policy, it concluded that Section 6 did not apply and therefore the age/enrollment exclusion under Section 12 applied.

¶5 Sawotka’s bad faith claim fails because coverage under the policy was “fairly debatable.” See *State Farm Fire & Cas. Ins. Co. v. Walker*, 157 Wis. 2d 459, 465, 459 N.W.2d 605 (Ct. App. 1990). It is not bad faith for an insurer to deny a claim based on a fairly debatable policy interpretation even if that interpretation is not subsequently upheld by the courts. *Id.* at 467. Sawotka contends that Section 6 is ambiguous and should be construed against the insurance company. She argues that Midwest acted in bad faith by not construing the allegedly ambiguous language in favor of coverage. We do not apply that rule of contract construction to a bad faith claim because doing so would nullify the “fairly debatable” test.

¶6 Coverage under the policy is fairly debatable because the “Extension of Dependent Child Coverage” in Section 6 is reasonably susceptible to the construction that it does not apply to temporary illness or injury. The first sentence of Section 6 extends the coverage for dependent retarded or handicapped children. The second sentence explains the duration of the coverage. Midwest reasonably argued that Sawotka was not “incapable of self-sustaining employment due to mental retardation or physical handicap.” The term “physical injury” or “incapacitation” would have been more appropriate if the parties had intended to extend coverage to a person recovering from a temporary injury. The second sentence of Section 6 sets the duration of coverage for a dependent, retarded or handicapped child “as long as ... the child remains unmarried, incapacitated and dependent on [her father].” This language does not necessarily suggest coverage for temporary disabilities. It could also reasonably refer to the possibility of reduced dependence of a permanently disabled child. Because coverage for a temporary injury was fairly debatable, Sawotka’s bad faith claim fails.

By the Court.—Judgment affirmed.

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

