COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1360-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DEAN OSCHMANN AND ROBIN OSCHMANN,

PLAINTIFFS-APPELLANTS,

V.

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Dean and Robin Oschmann appeal a summary judgment dismissing their claim against Secura Insurance.[1] The dispute arose when Secura refused to defend the Oschmanns, their auto insureds, in a

[1] This is an expedited appeal under RULE 809.17, STATS.

bankruptcy court action. Here the Oschmanns sought recovery of their losses and legal expenses in that proceeding. We conclude the trial court properly granted summary judgment to Secura on that issue, and therefore affirm.

The material facts are not disputed. The Oschmanns owned an insured car that they voluntarily left with a dealer, James Larson, for consignment sale or as a trade-in. Larson sold the car and several weeks later paid the Oschmanns $24,500 as their share of the proceeds. Two months later Larson became the subject of an involuntary bankruptcy proceeding.

The bankruptcy trustee subsequently sued the Oschmanns for return of the $24,500. The trustee alleged that Larson's payment of that amount was an antecedent debt he owed the Oschmanns, and that he paid them within ninety days of the bankruptcy filing and while he was insolvent. Therefore, under bankruptcy law, the trustee claimed authority to void the transfer. *See* 11 U.S.C. § 547(b).

Secura refused to defend the action because it concluded that the Oschmanns' potential loss was not one covered under their auto insurance policy. The bankruptcy court proceeding ultimately resulted in judgment against the Oschmanns for the $24,500 plus costs. They then commenced suit against Secura seeking recovery of that amount and the costs incurred in defending themselves against the trustee's claim. This appeal results from the trial court's decision that under the policy's plan manual Secura had no duty to defend the Oschmanns in the bankruptcy court proceeding.

An insurance company's duty to defend a lawsuit against its insured depends on whether the allegations in the complaint, if proven, would require coverage under the policy. ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 231-32, 522 N.W.2d 261, 266 (Ct. App. 1994). The duty to defend is therefore broader than

the duty to indemnify because the former is triggered if there is arguable, or fairly debatable coverage, as opposed to actual coverage. ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis.2d 39, 44, 577 N.W.2d 366, 369 (Ct. App. 1998), *review denied*, 219 Wis.2d 923, 584 N.W.2d 123 (1998). Resolving this issue is a question of law which we review de novo. ***Kenefick***, 187 Wis.2d at 231, 522 N.W.2d at 266. Here it is properly resolved on summary judgment because the material facts are not disputed. ***Heck and Paetow Claim Serv., Inc. v. Heck***, 93 Wis.2d 349, 355-56, 286 N.W.2d 831, 834 (1980).

Secura had no duty to defend because the allegations of the trustee's complaint did not create a fairly debatable duty to provide liability coverage. The applicable liability provisions in the Oschmanns' policy provided:

> We will pay for *loss* to *your insured car*:
>
> (1) Caused by Collision (Coverage D-1) or
> (2) Not caused by Collision (Coverage D-2)
> less any applicable deductibles.…
>
> ….
>
> 2. "*Loss*" means **direct** and **accidental** loss of or damage to *your insured car*, including its equipment.

(Bold emphasis added.) The policy also provided that Secura did not cover losses "[c]aused intentionally by or at the direction of you.…"

If no ambiguity appears in an insurance contract, its plain meaning controls the result. ***Estate of Logan v. Northwestern Nat. Cas. Co.***, 144 Wis.2d 318, 336, 424 N.W.2d 179, 185 (1988). Here the provisions of the Oschmanns' policy plainly provided coverage for the direct, unintentional loss of the insured

car by whatever means. No reasonable interpretation of that provision can extend coverage to the loss of proceeds after the voluntary sale of the car.

By the Court.—Judgment affirmed.

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