

No. 42360-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

RELIABLE CREDIT ASSOCIATION, INC. (WA), a Washington
corporation, Appellant,

v.

PROGRESSIVE DIRECT INSURANCE COMPANY, an Ohio
corporation, Respondent.

APPELLANT'S OPENING BRIEF

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I. Introduction

Reliable Credit Association, Inc. (WA) (“Reliable”) appeals the trial court’s decision denying its Motion for Partial Summary Judgment, and granting Progressive Direct Insurance Company’s (“Progressive’s”) Motion for Summary Judgment. Reliable assigns error to the trial court’s decision that Reliable is not entitled to recover – as lienholder – under a policy of insurance issued by Progressive. The questions presented by this appeal are questions of law and relate only to the proper construction and interpretation of the policy language at issue.

Rather than actually analyzing and addressing the contract language in question, the trial court found that it would be unjust to “reward civilly for which the actor was criminally punished,” and granted Progressive’s Motion for Summary Judgment. However, it has always been Reliable, and not the “actor [who] was criminally punished,” that was seeking to collect on its insurance policy. Neither Reliable nor Progressive was “the actor” here, yet each had a contractual relationship with that actor. It might very well be unjust to allow an individual who intentionally destroyed his own automobile to collect benefits payable under his insurance policy for its loss; however, that is not the issue presented by this case.

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In *this* case, Reliable's policy of insurance with Progressive expressly provides coverage against *any* act by the owner of the automobile – including intentional acts of destruction – other than “conversion,” “secretion,” or “embezzlement.” This policy language was specifically developed by insurers like Progressive to protect lienholders against the exact type of loss that occurred here, in hopes of encouraging lenders like Reliable to make loans so that people would then buy automobiles that they would then need to insure. The trial court's decision is akin to saying that a homeowner who bought an insurance policy to protect against a break-in and theft should not be awarded his or her benefits under that policy because the burglar was criminally punished for breaking into the policy holder's home and stealing his or her property. The homeowner purchases insurance to protect against loss resulting from the wrongdoing of others; Reliable similarly procured the insurance coverage here at issue to protect it against, among other things, wrongdoing by the borrower. Denying coverage to the homeowner would not be just; denying Reliable's claim is no different.

Reliable did not act wrongfully or criminally; it does not come to this Court with unclean hands. Progressive sold an insurance policy that expressly covered Reliable against the type of risk here presented. There can, therefore, be no injustice in awarding Reliable the benefits

recoverable under that policy. Finding in favor of Reliable would not reward criminal activity, as the trial court somehow seemed to fear; rather, it would award Reliable – who had no part in any criminal activity or wrongdoing of any sort – the benefit of the insurance coverage to which it is entitled. The actual wrongdoer – Chad Grauel (“Grauel”) – will receive nothing, and will not be rewarded in any way for his criminal activity. He will, in fact, remain fully liable for all amounts paid to Reliable by Progressive, which will, in turn, be legally subrogated to or assigned all of Reliable’s rights against him.

The trial court was simply wrong and never actually addressed the legal issues put before it. Reliable is entitled to summary judgment on its breach of contract and declaratory relief claims, and its motion should have been granted.

II. Assignments of Error

A. *Assignments of Error*

1. The trial court erred in denying Reliable’s Motion for Partial Summary Judgment on the breach of contract and declaratory relief claims;

2. The trial court erred in granting Progressive’s Motion for Summary Judgment on the breach of contract and declaratory relief claims.

B. *Issue Pertaining to Assignments of Error*

The consideration of this appeal involves the determination of a single issue: Does a policy of insurance issued to Reliable, as lienholder, and providing that:

“[t]his insurance as to the interest of [Reliable] will not be invalidated by any act or neglect of [the individual insured or his] agents, employees or representatives, nor by any change in the title or ownership of [the vehicle in question]; PROVIDED, HOWEVER, that the conversion, embezzlement, or secretion by [the individual insured or his] agents, employees or representatives is not covered under said policy unless specifically insured against and premiums paid therefore”

unambiguously, and as a matter of law, exclude coverage to Reliable where the individual insured intentionally destroyed his own vehicle? (Assignments 1 and 2).

III. *Statement of the Case*

In or around August of 2009, Grauel purchased a used 2000 BMW 328CI (“BMW”), then valued at more than \$12,000, through a combination of personal funds and financing obtained from Reliable in the amount of \$10,729.82. Affidavit of Scott Callahan in Support of Motion for Partial Summary Judgment (hereafter, “Callahan Aff.”), ¶ 3 (CP 38). At or around the same time, Grauel purchased a policy of automobile insurance from Progressive, naming Reliable as a lienholder, and providing coverage to Reliable as an additional insured/loss payee, subject

to the language and terms of the Lienholder Agreement provisions attached to and made a part of the policy. Callahan Aff., ¶ 5 (CP 38). A true copy of the applicable policy is attached to Reliable's Complaint as Exhibit A (the "Policy") (CP 10-26).

The Policy provides comprehensive coverage to both Grauel, as owner, and Reliable, as lienholder, against damage or destruction to the BMW caused by any number of factors, including fire. *See generally*, Policy, p. 15 (CP 18). With respect to the coverage afforded the lienholder, the Policy provides:

*"This insurance as to the interest of the secured party will not be invalidated by any act or neglect of **you** or **your** agents, employees or representatives, nor by any change in the title or ownership of **your covered auto**; PROVIDED, HOWEVER, that the conversion, embezzlement, or secretion by **you** or **your** agent employees or representatives is not covered under said policy unless specifically insured against and premiums paid therefore."*

See Policy, p. 21 (bold in original, italics added) (CP 21). The foregoing provision is among those required by Washington law. *See* RCW 48.18.125, WAC 284-21-010, and WAC 284-21-990 Appendix – Form – Loss Payable Endorsement. The Policy does not define the terms "conversion," "secretion," or "embezzlement."

The policy further provides that where coverage for a particular loss or damage event is not owed to the individual insured for one reason

or another, but remains valid, enforceable, and owed to the secured party, and where payment for such loss is made to the secured party as a result, Progressive will

“be thereupon legally subrogated to all the rights of the secured party to whom such payment was made, under all collateral held to secure the debt, or may, at its option, pay the secured party the whole principal due or to grow due on the mortgage or other security agreement, with interest, and will thereupon receive a full assignment and transfer of the mortgage or other security agreement and of all collateral held to secure it; but no subrogation will impair the right of the secured party to recover the full amount due it.”

See Policy, p. 22 (CP 22).

On or about November 16, 2009, the BMW owned by Grauel and insured by Progressive was irreparably damaged and destroyed by a fire started by Grauel or someone acting on his behalf or upon his instruction. *See* Statement of Defendant on Plea of Guilty to Non-Sex Offense, attached as Exhibit E to the Declaration of Douglas F. Foley in Support of Defendant Progressive Direct Insurance Company’s Motion for Summary Judgment (hereafter “Foley Decl.”) (CP 89-100). Shortly afterwards, Reliable tendered a claim for coverage and reimbursement under the Policy. Callahan Aff., ¶ 7 (CP 38). Progressive denied Reliable’s claim for coverage, invoking and citing an exclusion from coverage that actually does not exist within the Policy, but which purportedly excluded coverage for Reliable in the event the claimed damage was the result of Grauel’s

intentional acts. Callahan Aff., ¶ 8 (CP 38). A true copy of Progressive’s denial letter is attached as Exhibit B to Reliable’s Complaint (CP 27-28).

In subsequent communications between Progressive and Reliable, and again in the Answer filed on its behalf in this matter, Progressive clarified its position and specified that Reliable’s loss, as lienholder, was not covered as it allegedly arose out of the “conversion, embezzlement, or secretion” of the BMW by Grauel. Callahan Aff., ¶ 9 (CP 38-39); Defendant’s Answer and Affirmative Defenses to Plaintiff’s Amended [sic] Complaint, ¶¶ 4, 7, and 19 (CP 31-36).

Reliable filed a Complaint against Progressive in Clark County Superior Court on or about July 12, 2010. Reliable later filed a Motion for Partial Summary Judgment, seeking an order granting summary judgment on its breach of contract and declaratory relief claims, on the grounds that the Policy’s exclusion from lienholder coverage for losses resulting from “conversion” or “secretion” did not apply here, or at least did not unambiguously do so, where the individual insured intentionally or recklessly destroyed his own vehicle.

Progressive then filed its own Motion for Summary Judgment, arguing that the Policy plainly and unambiguously excluded coverage

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otherwise afforded to Reliable, as lienholder, for the loss here at issue, as the same was inarguably and definitively the result of Grauel's "conversion" or "secretion" of the BMW.

The trial court, having reviewed the pleadings, motions, and argument of counsel, side-stepped the issues presented by the parties' arguments, and found that it would be unjust to "reward civilly for which the actor was criminally punished." As a result, the trial court denied Reliable's Motion for Partial Summary Judgment, and granted the Motion for Summary Judgment filed by Progressive. This appeal followed.

IV. Summary of Argument

Reliable is entitled to coverage – as the lienholder -- for the destruction and total loss of the BMW unless such is unambiguously and inarguably excluded from the ambit of the lienholder coverage actually afforded. Grauel's negligent, reckless, or intentional destruction of his own property does not, as a matter of law, amount to "conversion" or "secretion," and is precisely the sort of loss- or damage-producing conduct against which Reliable was insured.

Progressive would have this court construe the term "conversion" to include *any* reckless or intentional destruction, by the individual insured, of his own vehicle. However, such an interpretation not only flies in the face of traditional concepts and definitions of "conversion," but also

would serve to totally eviscerate the Policy's promise that lienholder coverage would "not be invalidated by *any act or neglect*" of or by the individual insured.

No court from any other jurisdiction that has ever addressed whether an insured's intentional destruction of his or her own property amounted to "conversion" in this context has ever answered that question in the affirmative. Absent a finding that all of these courts were not just wrong, but remarkably so and, as a matter of law, unreasonable in so holding, the exclusion within the Policy is – at a minimum – ambiguous, and therefore incapable of denying the coverage sought by Reliable.

V. Argument

A. Summary Judgment Standard

Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

The interpretation of an insurance policy is a question of law. *PUD No. 1 v. International Ins. Co.*, 124 Wash.2d 789, 797, 881 P.2d 1020 (1994). Whether an insurance policy contains an ambiguity is also a question of law properly resolved by the court. *Baehmer v. Viking Ins. Co. of Wisconsin*, 65 Wn. App. 301, 303-04, 827 P.2d 1113 (1992).

Summary judgment in insurance contract actions is proper when the only dispute relates to the legal effects of language in the written contract. *Murray v. Western Pac. Ins. Co.*, 2 Wn. App. 985, 992-93, 472 P.2d 611 (1970). Unless there is an unresolvable ambiguity in the terms of a contract *and* contradictory extrinsic evidence is introduced to clarify the ambiguity, summary judgment is proper, despite a difference between the parties as to the legal effect of provision in question. *Hallauer v. Certain*, 19 Wn. App. 372, 375-76, 575 P.2d 732 (1978). Finally, “exclusionary clauses in insurance policies are construed most strongly against the insurer[, and where] there is room for two constructions—one favorable to the insured and the other in favor of the insurer, [courts] *must* adopt the construction favorable to the insured.” *Murray v. Western Pac. Ins. Co.*, 2 Wn. App. at 992 (emphasis added).

B. *The Standard Applied And Legal Argument*

1. *There Are No Genuine Issues Of Material Fact*

There are no factual disputes on the matters at issue. Reliable financed Grauel’s purchase of the BMW. Grauel still owed roughly \$11,000 to Reliable at the time of the loss in question. Progressive issued the Policy to Grauel, naming Reliable as the lienholder and affording it the coverage set forth therein. Grauel or someone acting on his behalf later set fire to and destroyed the BMW, causing Reliable to lose the security

backing repayment of the loan in question. There are no material disputes about any of these facts, and the only issue presented by this motion is a legal one: Does the exclusion in the Policy for “conversion . . . or secretion” bar Reliable’s recovery – as lienholder – where and when Grauel intentionally or recklessly destroys his own vehicle?

“Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.” *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990). An insurance policy must be interpreted in accord with the way it would be understood by the average person, *see National Union Fire Ins. Co. v. Zuveri*, 110 Wash.2d 207, 210, 750 P.2d 1247 (1988), and should be interpreted so as to give effect to each provision. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash.2d 724, 734, 837 P.2d 1000 (1992); *Fiscus Motor Freight, Inc. v. Universal Sec. Ins. Co.*, 53 Wn. App. 777, 787, 770 P.2d 679, *review denied*, 113 Wash.2d 1003, 777 P.2d 1052 (1989). Finally, in conducting an interpretive analysis into the meaning of an insurance policy, “[e]xclusionary clauses are to be construed most strictly against the insurer.” *National Union Fire Ins. Co. v. Zuveri*, 110 Wash.2d at 210; *see also Murray v. Western Pac. Ins. Co.*, 2 Wn. App. at 992.

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2. The Policy Does Not Exclude Lienholder Coverage For Intentional Destruction

On its face, the Policy purports to exclude lienholder coverage for losses occasioned by the individual insured's "conversion," "secretion," or "embezzlement," but it does nothing to define or explain those terms. How, for example, does one convert property in which only she has an actual ownership and possessory (as opposed to a security) interest? What amounts to the sort of concealment or hiding sufficient to trigger the "secretion" exclusion, or from whom must the automobile be hidden?

Progressive contends that Grauel's reckless or intentional act of destroying the BMW by fire unambiguously constitutes "conversion" and/or "secretion," and that as a result, Progressive does not owe coverage to Reliable under the Policy. The language of the Lienholder Agreement (also referred to by statute and administrative rule as the "loss payee endorsement") is plain, clear, and unambiguous in providing that a lienholder's interest and right to coverage is not invalidated by *any act or neglect*, of or by the individual insured, except for losses caused by the individual insured's conversion, embezzlement, or secretion. Grauel's

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destruction of the BMW – whether reckless, intentional, or simply negligent – simply does not amount to conduct falling within any one of the enumerated acts.¹

a. Grauel did not “convert” the BMW

Grauel’s burning of his own vehicle is not a “conversion” thereof. As referenced above, “conversion” is not defined in the Policy, but according to Webster’s, “conversion” – so far as may arguably be relevant here – means: “unlawful appropriation and use *of another’s property*.”² Webster’s New Universal Unabridged Dictionary, Deluxe Second Ed. (Dorset & Baber, 1983) (emphasis added). Black’s Law Dictionary, in turn, defines “conversion” as “[t]he wrongful possession or disposition *of another’s property* as if it were one’s own; an act or series of acts of willful interference, without lawful justification, with an item of property

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¹ Progressive does not argue that Grauel’s act amounts to “embezzlement.” See Defendant’s Answer and Affirmative Defenses to Plaintiff’s Amended [sic] Complaint, ¶ 4. Even if it did, however, the analysis set forth herein would be the same.

² Washington law provides that undefined terms in insurance contracts should be given their plain, ordinary, and popular meaning, and that courts may look to the dictionary to determine the common meaning. See *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869 (1990).

in a manner inconsistent with another's right, whereby *that other person* is deprived of the use and possession of the property."³ Black's Law Dictionary, 9th Ed. (emphasis added).

Here, the only party with a contemporaneous ownership or possessory interest in the BMW at the time of its destruction was Grauel, and one simply cannot convert one's own property. As such, nothing Grauel could have done to the BMW at that particular moment in time could have, as a matter of law, resulted in its "conversion." It follows that, as a matter of law, Grauel did not "convert" the BMW.

b. Grauel did not "secret" the BMW

Nor was there any "secretion" of the subject vehicle. Like "conversion," the term "secretion" is not defined in the Policy. As such, the court must define the term in the way it would be understood by the average person. *See National Union Fire Ins. Co. v. Zuveri*, 110 Wash.2d at 210. Black's Law Dictionary states that "to secret" is "[t]o conceal or secretly transfer (property, etc.), especially to hinder or prevent officials or creditors from finding it." Black's Law Dictionary, 9th Ed. It further defines "secretion of assets" as "[t]he hiding of property, usually for the purpose of defrauding an adversary in litigation or a creditor." *Id.*

³ Black's has additional definitions for conversion, but all are just variations on this theme.

Further clarifying these definitions, the United States District Court for the Eastern District of Virginia recently addressed the meaning of the term “secretion” as used in Progressive’s policy, and noted that the use and inclusion of the term “secretion” along with its neighbors, “conversion” and “embezzlement,” connotes criminal activity pertinent to recovery for theft, and suggests that the exclusion in question precludes recovery by the secured party only where the borrowing buyer “absconds with the automobile.” *Wells Fargo Equipment Finance, Inc. v. State Farm Fire and Cas. Co.*, --- F.Supp.2d ---, 2011 WL 1326954, *7 (USDC – ED Va., April 6, 2011). In this case, the BMW was not concealed, hidden, or secretly transferred; nor did Grauel attempt to avoid his creditors by disappearing with his car. Rather, the BMW was plainly and openly – albeit not in Grauel’s own driveway – destroyed by fire. That fact was made known and “publicized” by Grauel. Destruction by fire – or any other means for that matter – is clearly different than concealing the vehicle from being found, notwithstanding the fact that the destruction occurs somewhere other than the individual insured’s residence. Grauel did not “secret” the subject vehicle, and Progressive is liable to Reliable under the loss payee endorsement for the full amount claimed.

Progressive’s interpretation and reliance on the “conversion . . . or secretion” exclusion is limitless, and would effectively apply to *any*

intentional destruction, by an insured, of his or her own property, thereby negating the precise type of protection afforded lienholders by statute, administrative rule, and the Lienholder Agreement provisions in the Policy. The plain and ordinary meanings of “conversion” or “secretion” do not pertain to Grauel’s burning of his own property, whether performed in his own driveway or elsewhere, and the exclusion does not apply to this case as a matter of law.

3. No Appellate Authority Has Ever Agreed With Progressive’s Interpretation

Other courts addressing this specific question (i.e., whether an insured/borrower’s intentional destruction of her own vehicle amounts to a conversion or secretion thereof) have unanimously⁴ answered it in the negative. *See, e.g., Gibraltar Financial Corp. v. Lumberman’s Mut. Cas. Co.*, 513 N.E.2d 681, 683 (Mass. 1987) (insured’s intentional burning of motor home did not amount to an interference with property to which another had an ownership interest, and was thus not a conversion); *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 606 (Mich. 1992) (insured’s intentional destruction of vehicle not a conversion, as conversion relates to property itself, and not simply mortgagor’s interest in property, and because a person cannot convert one’s own property);

⁴ Reliable is unaware of *any* contrary holdings on point, and none have been brought to its attention by Progressive.

Nationwide Mut. Ins. Co. v. Dempsey, 495 S.E.2d 914, 916 (N.C.App. 1998), *review denied*, 502 S.E.2d 847 (N.C. 1998) (automobile policy's loss payable clause which invalidated lienholder's interest only upon insured's conversion or secretion of vehicle did not apply to destruction caused by fire allegedly set by named insured since the vehicle was not changed from one purpose to another); *Pittsburgh Nat'l Bank v. Motorists Mut. Ins. Co.*, 621 N.E.2d 875, 879 (Ohio App. 1993) (insured's intentional burning of automobile not "conversion," as policy silent as to definition of "conversion," leaving ambiguity as to types of activity encompassed); *Wells Fargo Equipment Finance, Inc. v. State Farm Fire and Cas. Co.*, --- F.Supp.2d ---, 2011 WL 1326954 (USDC – ED Va., April 6, 2011) (“[T]erm ‘conversion’ in the loss payable clause is ambiguous. [Insurer’s] proposed construction of that term is contrary to Virginia rules of construction, contrary to the historical intent of standard mortgage clauses and conversion exclusions, and contrary to nearly every court decision on point. Construing the conversion exclusion strictly, this Court concludes that the exclusion does not apply to the intentional burning of the vehicles by the insured.”); *National Cas. Co. v. General Motors Acceptance Corp.*, 161 So.2d 848 (Fla. App. 1964) (mortgagee could recover under standard insurance clause where individual insured intentionally ran automobile off of a bridge into a bay); and *Bennett Motor*

Co. v. Lyon, 14 Utah 2d 161, 380 P.2d 69 (1963) (mortgagee could recover for intentional destruction, by individual insured/borrower, of auto notwithstanding conversion, secretion, or embezzlement exclusion). *See also, generally, Home Savings of America, FSB v. Continental Ins. Co.*, 87 Cal.App.4th 835, 104 Cal.Rptr.2d 790 (2001); *Union State Bank v. St. Paul Fire and Marine Ins. Co.*, 18 Kan.App.2d 466, 856 P.2d 174 (1993); *Cherokee Ins. Co. v. First Nat'l. Bank of Dalton*, 181 Ga.App. 146, 351 S.E.2d 473 (1986); *Talman Federal Svgs. & Loan Ass'n v. American States Ins. Co.*, 468 So.2d 868 (Miss 1985).

In each of the above cases, the reviewing court found that an intentional act of destruction of the insured property by the property owner did not prevent the lienholder from recovering as mortgagee. None of them found that such an outcome was unjust. Instead, each of these courts applied the law and the pertinent policy language to the facts there at hand, and found that the lienholder was entitled to its coverage. Progressive's position that Grauel converted the subject vehicle and that Reliable is not entitled to lienholder coverage as a result is untenable, unsupported, and contrary to the overwhelming majority – and potentially unanimous line – of cases on the same subject.⁵

⁵ Again, Reliable is unaware of any holdings to the contrary.

4. The Historical Development Of The Policy Language At Issue Supports Reliable's Position

Any court concerned about the correctness of Reliable's position need only review the historical development of the language found in the Policy, as such reveals that the language in question was specifically intended to provide coverage to the lienholder in situations like the one presented here. The court in *Wells Fargo Equipment Finance, Inc.*, cited *supra*, summarized the historical development and the purpose of the type of lienholder coverage here at issue as follows:

The second clause ("Clause B") of the Endorsement provides that, in addition to the standard insurance coverage, the interest of Wells Fargo is covered unless the loss results from conversion, secretion, or embezzlement on Miriam Trucking's part. Wells Fargo contends that Clause B functions as a "standard mortgage" or "union mortgage" clause, entitling them to recovery irrespective of Miriam Trucking's acts or omissions.

The standard mortgage clause is best understood by reference to its predecessor: the open mortgage clause. An open mortgage clause typically provides that loss, if any, be payable to the mortgagee, "as his interest may appear." *Syndicate Ins. Co. v. Bohn*, 65 F. 165, 173 (8th Cir.1894). In effect, the clause directs an insurer to pay policy proceeds to the lienholder before paying proceeds to the insured party. *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 602 (Mich.1992). The lienholder is an appointee of the mortgagor, and his right to recover under the policy is coterminous with that of the insured. *Id.*; *Syndicate*, 65 F. at 173. **The problem with this arrangement, from the perspective of mortgagees, is that indemnity is precarious—"liable to be destroyed by**

the ignorance, carelessness, or fraud of the mortgagors.”
Syndicate, 65 F. at 173.

Standard mortgage clauses began to appear over a century ago in order to address this deficiency. In *Hastings v. Westchester Fire Ins. Co.*, the New York Court of Appeals considered language annexed to an open mortgage clause stating, “[i]t is hereby specially agreed that this insurance, as to the interest of the mortgagee . . . shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured. . . .” 73 N.Y. 141, 143 (1878). Judge Rapallo's concurrence explained the purpose behind the addition:

“I think the intent of the clause was to make the policy operate as an insurance of the mortgagors and the mortgagees separately, and **to give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts.** . . . This provision, in case the policy were [sic] invalidated as to the mortgagors, made it, in substance, an insurance solely of the interest of the mortgagees, by direct contract with them, unaffected by any questions which might exist between the company and the mortgagors.” *Id.* at 154.

The Virginia Supreme Court echoed this interpretation in *New Brunswick Fire Insurance Co. v. Morris Plan Bank*, observing that the standard mortgage clause “**acts as a separate and independent insurance of the mortgagee's interest,**” and “that no act or omission on the part of the owner which occurs after the issuance of the policy shall affect the mortgagee's right to recover.” 118 S.E. 236, 237–238 (Va.1923); *Provident Fire Ins. Co. v. Union Trust Corp.*, 78 S.E.2d 584, 586 (1953). **Modern legal authorities substantially agree that a standard mortgage clause constitutes an independent contract between insurer and lienholder, which cannot be negated by the wrongful or negligent acts of the insured party.** *National Bank of Fredericksburg v. Virginia Farm Bureau Fire and Cas. Ins. Co.*, 606 S.E.2d 832, 834 (Va.2005); *see also*

Gibraltar Fin. Corp. v. Lumbermens Mut. Cas. Co., 513 N.E.2d 681, 682 (Mass.1987) (“To better secure lenders . . . the open mortgage clause more recently is customarily modified to provide that the lender's coverage could not be forfeited by the act or default of any other person.”); 4 LEE R. RUSS & THOMAS F. SEGALA, COUCH ON INSURANCE § 65:32 (3d ed. 2010) (“Where the policy contains this form of mortgage clause, the mortgagee has an independent contract with the insurer which cannot be defeated by improper or negligent acts of the mortgagor.”). Moreover, Virginia law makes clear that, where a standard mortgage clause is in effect, an act of intentional arson by an insured does not defeat recovery by the lienholder from the insurer. See *Wagner v. Peters*, 128 S.E. 445, 446 (Va.1925) (holding that insurer may be liable to creditor under mortgage clause where owners of property destroyed property by arson).

The value to lenders of a standard mortgage clause is manifest. By requiring borrowers to obtain an insurance policy that includes a standard mortgage clause, the lender protects its interests against defenses that an insurer could raise against a negligent, or even arsonist, borrower. *Foremost*, 486 N.W.2d at 603. The incorporation of the clause assures the lender that it will not be required to assess a borrower's insurance claim history when considering whether to extend a loan. *Id.*

Wells Fargo Equipment Finance, Inc., *supra* at *4-*5 (emphasis added).

As this discussion makes clear, the standard mortgage clause, like the one found in the Policy, was developed specifically to provide protection to the lienholder against the acts – whether intentional or negligent – of the mortgagor/owner. The State of Washington specifically

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adopted the standard mortgage clause by administrative rule and now statutorily requires that lienholders be afforded this protection. RCW 48.18.125; WAC 284-21-990.

The intent and purpose of the standard mortgage clause is clear from this discussion. It “creates” a separate policy of insurance between the lienholder and insurer that protects against all loss except those resulting from the mortgagor’s “conversion,” “secretion,” or “embezzlement.” The mere fact that the mortgagor is not covered if he commits certain acts simply does not preclude recovery by the mortgagee. Progressive’s argument (i.e., that *any* intentional destruction of one’s own property is either a conversion or – if conducted anywhere other than the individual insured’s own residence address – secretion) would obliterate this evolved distinction by providing coverage to the secured party only in the case of loss caused by third parties and the negligent conduct of the insured-mortgagor. The trial court’s decision – which apparently accepted Progressive’s argument (or at least adopted Progressive’s urged result) – is fundamentally at odds with the purpose and intent of this clause and should be reversed.

VI. Conclusion

The question of importance in this case is not whether the Policy excludes lienholder coverage for losses resulting from the individual

insured's conversion or secretion of a vehicle in which the lienholder has an interest; arguably, at least, it does. Rather, the question here is whether the "conversion, secretion, or embezzlement" exclusion found in the Policy clearly and unambiguously applies to *any* given set of facts or circumstances, and even more particularly, those facts and circumstances presented by this case.

The Policy does not define any of these terms, and the reader is left to discern their meaning by reference to their plain meanings or dictionary definitions. *See Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869 (1990). Doing so, as has every court known to Reliable that has done so before, leads to the conclusion that an individual insured's intentional destruction of his own vehicle – by any means – may well be wrongful, dishonest, and an overall immoral thing to do (which is why coverage for the wrongdoer is not owed), but is not "conversion," "secretion," or "embezzlement." *See cases cited supra.*

Progressive's argument on this issue would result in an exclusion that almost completely swallows the coverage intended to be granted by the lienholder provisions. *Any* intentional destruction by the named insured of her own property would amount to a conversion thereof, and

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the precise type of protection afforded lienholders by statute, administrative rule, and the Lienholder Agreement provisions in the Policy would, in the end, prove non-existent.

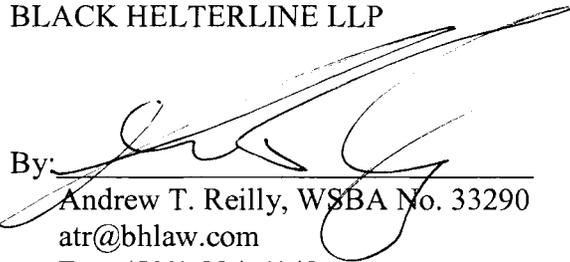
Similarly, Progressive's argument as to the meaning or applicability of the "secretion" exclusion is overbroad and ineffective. Progressive contends that here, Grauel secreted his vehicle by moving it somewhere other than his residence before setting it ablaze. Apparently, according to this argument, intentional destruction of a vehicle might well be covered, insofar as the lienholder is concerned, but *only* if it occurs in the named insured's own driveway. Such an interpretation is contrary to the plain language of the Policy and the obvious intent of the parties and should be rejected.

The trial court's order denying Reliable's Motion for Partial Summary Judgment and granting Progressive's Motion for Summary Judgment should be reversed. Reliable's Motion for Partial Summary Judgment should be granted. Progressive wrongfully denied Reliable the coverage to which it is entitled under the Policy. Progressive denied coverage fully, claiming it had no contractual duty to indemnify Reliable, rather than merely disputing the amount of damages. Progressive is, therefore, liable for Reliable's attorney fees and costs incurred in bringing this action to obtain the coverage to which it is entitled. *Olympic S.S. Co.*,

Inc. v. Centennial Ins. Co., 117 Wash2d 37, 52–53, 811 P2d 673 (1991);
Solnicka v. Safeco Ins. Co. of Illinois, 93 Wash App 531, 533–34, 969 P2d
124 (1999).

DATED this 28th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** upon:

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Attorney for Respondent

by mailing a true copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorneys' addresses as shown above and deposited in the United States Mail at Portland, Oregon on the date set forth below.

by causing a true copy thereof to be hand-delivered to said attorneys' addresses as shown above on the date set forth below.

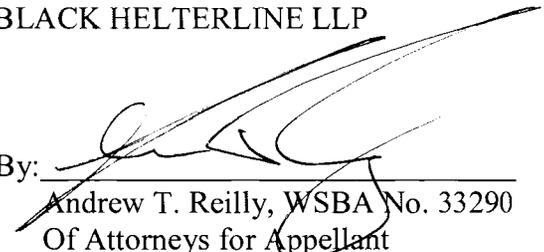
by sending a true copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorneys' address as shown above on the date set forth below.

by faxing a true copy thereof to said attorneys' facsimile numbers as shown above on the date set forth below.

by sending a true copy thereof via electronic mail to said attorney's address as shown above on the date set forth below.

DATED this 28th day of October, 2011.

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