

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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.

BRIEF OF RESPONDENT

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17-05-21 CM

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A. INTRODUCTION

Respondent Progressive Direct Insurance Company (“Progressive”) prevailed in the trial court on cross-motions for Summary Judgment. The court found that Progressive is not obligated to provide coverage in this matter. The Court denied the Summary Judgment motion brought by Reliable Credit Association, Inc. (“Reliable”) and properly granted the Summary Judgment filed by Progressive. Reliable was the secured lender on the vehicle. Chad Grauel (“Grauel”) was the named insured under the insurance contract and caused the vehicle to be destroyed.

This case involves an exclusion to the comprehensive loss provisions of an automobile insurance policy. The policy contains a loss payable clause that is subject to the exclusion for the conversion, embezzlement or secretion of the vehicle by the insured. Progressive is not liable on the policy to Reliable due to this policy exclusion.

Grauel was charged in the Criminal Information with “Willful Destruction, Injury, Secretion of Insured Property,” pursuant to RCW 48.30.220; Arson in the Second Degree pursuant to RCW 9A.48.030(1), and filing a False Insurance Claim (RCW 48.30.230). Grauel pleaded guilty to Reckless Burning in the First Degree

(RCW 9A.48.040), and Filing a False Insurance Claim or Proof of Loss Where Claim is over \$1,500 (RCW 48.30.230).

Reliable presents no basis for this Court to overturn the trial court's considered decision. The trial court was correct in finding that there was no issue of material fact and that Progressive was entitled to Summary Judgment as a matter of law. The trial court entered its decision by Summary Judgment Orders dated July 8, 2011 and July 22, 2011 (CP 164-165, 170-171).

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Progressive acknowledges Reliable's assignments of error, but believes that the assignments of error should be more appropriately formulated as follows:

(1) Assignments of Error

1. Did the trial court err when it ruled, as a matter of law, that Progressive was entitled to an order of Summary Judgment finding that there was no coverage under the policy by the Orders granting Summary Judgment dated July 8, 2011 and July 22, 2011?

2. Did the trial court err when it denied Reliable's cross-motion for Summary Judgment by the Orders granting Summary Judgment dated July 8, 2011 and July 22, 2011?

(2) Issues Pertaining to Assignments of Error

Progressive acknowledges Reliable' Issues Pertaining to Assignments of Error and designates the following issues:

1. Does a policy of insurance which excludes coverage for the lender for the conversion, embezzlement or secretion of the vehicle by the Insured operate to deny coverage to the lender when the Insured converts or secretes the vehicle? (Assignments of Error 1 – 2)

2. Does the express language of the loss payable clause that is set forth in WAC 284-21-990, pursuant to RCW 48.18.125, render the rule of strict construction against the drafter inapplicable, requiring the loss payable endorsement to the policy to be construed only in accordance with its plain meaning? (Assignments of Error 1 – 2)

C. RESTATEMENT OF THE CASE

(1) Conversion and Secretion of the Vehicle.

Grael purchased a used 2000 BMW 328CI (“BMW”) in August of 2009 and financed the vehicle through Reliable. CP 2. The BMW was insured by Progressive. CP 122. The policy named Reliable as a lienholder, and provided coverage to Reliable as an additional insured/loss payee. *Id.*

On November 16, 2009, Grauel caused the BMW to be destroyed by leaving it at a friend's house with the key attached to the car. *Id.* Grauel reported the car as stolen. CP 123. The car was found stripped of parts and burned. *Id.*

The Clark County Prosecutor's Office's investigation resulted in criminal charges being brought against Grauel. CP 83. Grauel was charged in the Criminal Information with "Willful Destruction, Injury, Secretion of Insured Property," pursuant to RCW 48.30.220; Arson in the Second Degree pursuant to RCW 9A.48.030(1), and filing a False Insurance Claim. *Id.*

Grauel pleaded guilty on September 2, 2010 in Clark County Superior Court Case No. 10-1-00530-7 on charges brought by Arthur Curtis, Prosecuting Attorney for Clark County, for Reckless Burning in the First Degree (RCW 9A.48.040), and Filing a False Insurance Claim or Proof of Loss Where Claim is for over \$1,500 (RCW 48.30.230). CP 89-95.

The Arresting Officer's Declaration of Probable Cause provides a complete recitation of the facts, and key portions are set forth below:

"Vancouver Fire responded to vacant property (2305 E 5th St), following a report of an unknown fire on the premise. The initial

investigation revealed a BMW sedan had been dumped on the driveway, stripped of parts and set on fire...

The following morning, around 0930 hours, Officer T. Smith receives a dispatched call for service related to the BMW being reported stolen by the owner, Chad Grauel. Chad tells Officer Smith he became aware the car was missing on Monday, November 16, 2009, after he received a telephone call from his friend Nicholas Tefs (W1) around 0900 hours telling him the vehicle was gone. Nicholas initially confirms this statement with Officer Smith and with Sgt. Raquer during a follow-up contact. Nicholas later retracts his testimony, telling Sgt. Raquer he provided a false statement on behalf of Chad, explaining instead that Chad had come to his work location, asking him to tell police that he had noticed the BMW was missing and thereby made Chad aware the vehicle had been stolen.

Chad related he had parked his BMW at Nicholas' apartment complex, several days prior to the theft, for the purpose of allowing his friend to use it. Chad claimed he was in the process of moving and had borrowed another vehicle. According to Chad he placed the only ignition key in a magnetic box underneath the BMW, which would enable both he and Nicholas access to the car. Nicholas told investigators he did not know why Chad left him the vehicle, as he could not operate a 5 speed manual transmission and had not requested

to borrow the vehicle. Another witness, Brad Shampine (W2), later told police Chad never left the key under the BMW, citing it was a ruse related to a pre-planned fraudulent insurance claim.”

CP 86-87.

Grael financed more than the BMW was worth, and purchased “GAP” coverage in which he financed \$10,000 for the purchase price when the car was valued at \$8,900.” *Id.* Grael was experiencing financial difficulties at the time the car was destroyed, as shown below:

“Follow –up investigation with several associates of Chad’s yielded information he was experiencing financial instability, since his separation from the military. Bob Mathenia reported Chad had talked about having money problems and made complaints about having the ability to make his car payments. ...Chad’s family friend, Brad Shampine, added that Chad had discussed with him his intention to report the car as stolen, dumping it off somewhere in the hills outside of Vancouver, and collecting the insurance money from the false claim. Bard also reported Chad had been “looking around” for someone with experience in vehicle theft to assist him in this endeavor. Additionally, it was determined Chad had purchased “GAP” coverage for the BMW, as he had financed \$10,000 for the purchase, though the car was only valued at \$8,900.” *Id.*

(2) Loss Payable Clause in the Insurance Policy.

Progressive issued a Washington Auto Policy No. 70670764 which was effective from September 14, 2009 to March 14, 2010 for the BMW. CP 125. The Policy includes the following relevant insuring language:

“PART IV – DAMAGE TO A VEHICLE
INSURING AGREEMENT –
COMPREHENSIVE COVERAGE

If you pay the premium for this coverage, we will pay for sudden, direct, and accidental loss to a:

1. covered auto, including an attached trailer; or
2. non-owned auto; and its custom parts or equipment, that is not caused by collision.”

The “Lienholder Agreement” section of the policy is commonly referred to as a loss payable clause. The pertinent text of the “Lienholder Agreement” section is set forth below:

“Lienholder Agreement

2. 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 agents, employees or representatives is not covered under said policy unless specifically insured against and premiums paid therefore. *Id.*

7. All notices sent to the secured party will be sent to its last reported address.

Coverage under this Part IV, with respect to the interest of the lienholder, will not become invalid because of your fraudulent acts or omissions unless the loss results from your conversion, secretion, or embezzlement of a covered auto. The lienholder's interest will not be protected where the loss is otherwise not covered under the terms of this policy.

If this policy is cancelled or nonrenewed, the interest of any lienholder under this agreement will also terminate.”

The following definitions are applicable:

“12. ‘You’ and ‘your’ mean:

- a. a person shown as a named insured on the declarations page; and
- b. the spouse of a named insured if residing in the same household.”

CP 125-126.

(3) Claim by Reliable under the Progressive Policy.

Reliable made a claim under the policy. CP 2. Progressive responded by stating that the claim was denied because the loss arose out of Grauel's conversion or secretion of the vehicle. CP 3. Reliable subsequently filed a complaint against Progressive in Clark County Superior Court on July 12, 2010. CP 1.

(4) Entry of the Orders for Summary Judgment.

Both parties promptly filed cross-motions for Summary Judgment. Progressive moved for Summary Judgment on the basis that Grauel converted or secreted the vehicle under the exclusion set forth in the loss payable clause. CP 119. Reliable moved for Summary Judgment to establish coverage under the policy. CP 41.

The trial court entered its decision for the cross-motions for Summary Judgment by Orders dated July 8, 2011 and July 22, 2011 granting Progressive's motion for Summary Judgment and denying Reliable's motion. CP 164-165, 170-171.

D. SUMMARY OF ARGUMENT

This insurance coverage dispute is between Reliable, a secured lender on a loan for a used BMW, and Progressive which insured the vehicle. The BMW was reported as being stolen by Grauel and was later found on a vacant lot stripped of parts and burned. The trial court correctly decided by granting Summary Judgment in favor of Progressive that there was no coverage for Reliable under the policy.

At issue in this appeal is whether the Progressive loss payable clause, which is a standard form endorsement required in every automotive policy by statute and administrative rule, applies under the

facts of this case to deny coverage to Reliable. The loss payable clause contains an exclusion that excludes coverage for the conversion, embezzlement, or secretion of the vehicle by the insured. The required language in this endorsement is set forth in WAC 284-21-990 and is authorized by RCW 48.18.125.

The facts are undisputed that the BMW was left by Grauel at a friend's house with the key, and that the car was subsequently found destroyed by arson on a vacant lot. Both Grauel and a friend reported the car as stolen. Grauel was in financial distress at the time the car was destroyed.

Grauel with charged with three criminal charges, which included "Willful Destruction, Injury, Secretion of Insured Property," pursuant to RCW 48.30.220; Arson in the Second Degree, pursuant to RCW 9A.48.030(1); and filing a False Insurance Claim (RCW 48.30.220). CP. 83. Grauel pleaded guilty to Reckless Burning in the First Degree (RCW 9A.48.040), and Filing a False Insurance Claim (RCW 48.30.220).

There were no contrary affidavits or declarations submitted by Reliable to create an issue of fact. The language in the Progressive loss payable clause is set forth in an endorsement that is required by

WAC 284-21-990, is unambiguous, and operates to exclude coverage for the loss.

Reliable's argument that the loss payable clause should be construed against Progressive is not applicable here as the language in the endorsement is required by statute and administrative rule. Rules of statutory construction apply to administrative rules and regulations. *Sunnyside v. Fernandez*, 59 Wn. App. 578, 582, 799 P.2d 753 (1990). Terms in administrative rules must be given their ordinary meaning. *Hubbard v. State*, 86 Wn. App., 119, 126, 126, 936 P.2d 27 (1997). The plain meaning of WAC 284-21-990 is not ambiguous. As a result, the rule of construction construing any ambiguity against the insurer does not apply.

The decision in *Progressive American Ins. Co. v. Florida Bank at Daytona Beach*, 452 So.2d 42 (1984) is directly on point and provides compelling authority. In *Florida Bank*, the Court held that the conversion exception to coverage applied where the owner reported the insured vehicle as stolen and was later involved in its theft. *Id.* at 44-45. The *Florida Bank* decision construed a Progressive automobile policy with comparable policy language under similar facts and determined that there was no coverage.

The trial court correctly reasoned that there was no dispute of fact and that as a matter of law Progressive was entitled to a declaration that it owed Reliable nothing under the policy. The trial court's Summary Judgment Order in favor of Progressive should be affirmed.

E. ARGUMENT

(1) Standard of Review

This Court reviews a Summary Judgment order de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary Judgment is properly granted where the pleadings and affidavits show there is no genuine issue 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 reviewed de novo. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Insurance policies are contracts, and rules of contract interpretation apply. *Hall v. State Farm Insurance Company*, 133 Wn. App. 394, 399, 134 P.3d. 941 (2006)

(2) The Trial Court Correctly Determined that There Was No Issue of Fact.

The facts involving the reporting by Grauel of the BMW as stolen and the subsequent stripping of parts and arson are not contested. Numerous documents from the criminal investigation of Grauel were

submitted to the court. CP 51. Reliable did not submit contrary affidavits to create an issue of fact.

Reliable in its brief admits that there are no factual disputes on the matters at issue. (Appellant's Brief, pg. 10) There was no issue of fact that would preclude the grant of Summary Judgment.

The Arresting Officers Report supports the court's determination that Grauel secreted and converted the BMW. CP 86-87. The evidence set forth in the Arresting Officer's Report explains that Grauel was in financial distress and was having a difficult time making the payments. He secreted/converted by reporting the BMW as stolen to obtain the insurance payment. The facts that establish this are set forth below.

- Grauel financed more than the BMW was worth on the loan, as he purchased "GAP" coverage in which he financed \$10,000 for the purchase where the car was valued at \$8,900." Grauel was experiencing financial difficulties at the time the car was destroyed as he was having difficulty making the car payments. Grauel discussed with a family friend his intention to report the car as stolen and to dump it off in the hills outside of Vancouver and collect the insurance money for the false claim. *Id.*
- On November 16, 2009, Grauel caused the vehicle to be destroyed by leaving it at a friend's house with the key attached to the car. The car was found stripped of parts, burned, and deposited on a vacant property. CP 86.

- The Clark County Prosecutor’s Office’s investigation resulted in criminal charges being brought against Grauel. Grauel was charged in the Criminal Information with “Willful Destruction, Injury, Secretion of Insured Property,” pursuant to RCW 48.30.220; Arson in the Second Degree, pursuant to RCW 9A.48.030(1), and filing a False Insurance Claim (RCW 48.30.230).¹ CP 83. Grauel pleaded guilty to Reckless Burning in the First Degree (RCW 9A.48.040), and Filing a False Insurance Claim (48.30.230). CP 89.

These facts were uncontroverted in the Summary Judgment hearing. The court correctly decided as a matter of law that Grauel converted or secreted the vehicle.

(3) The Progressive Loss Payable Clause Is Required by Administrative Rule and Is Not Ambiguous.

Reliable in its brief argues that the loss payable clause is ambiguous and should be construed against Progressive. This clause differs from ordinary policy language due to the fact that the language of the endorsement form is set forth in WAC 284-21-990. Reliable acknowledges that the loss payable clause is required by WAC 284-21-990 in its brief. (Appellant’s Brief, pgs. 21-22).

¹ RCW 48.30.220, is set forth below:
“Any person, who, with intent to defraud or prejudice the insurer thereof, burns or in any manner injures, destroys, secretes, abandons, or disposes of any property which is insured at the time against loss or damage by fire, theft, embezzlement, or any other casualty, whether the same be the property of or in the possession of such person or any other person, under circumstances not making the offense arson in the first degree, is guilty of a class C felony”.

Insurance policies are considered as a whole, and are given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). If the language is clear, the court must enforce the policy as written and may not create ambiguity where none exists. *Id.* The expectations of the insured cannot override the plain language of the contract. *Id.*

The language in Progressive’s loss payable clause is based upon the express language set forth in WAC 284-21-990, which was adopted in 1968. This language was mandated by RCW 48.18.125 in 1967, which requires auto insurers to use this language in Washington auto policies. The statute provides that following the adoption of such forms (WAC 284-21-990), no insurer authorized to do business in the state shall use any form other than those so adopted. This clause is referred to as the “loss payable endorsement.”

WAC 284-21-990 requires all insurers to use the conversion, embezzlement or secretion language. Rules of statutory construction apply to administrative rules and regulations. *Sunnyside v. Fernandez*, 59 Wn. App. at 582. Regulations must be given their ordinary meaning. *Hubbard v. State*, 86 Wn. App. at 126.

This language is not ambiguous and is the result of administrative rulemaking by the Washington State Office of the Insurance Commissioner and, therefore, should not be construed against Progressive. The rule of strict construction against the insurer does not apply here, as the statutory mandated language should be construed in accordance with its plain meaning. *Federated Mutual Implement and Hardware Insurance Company v. Grupton*, 357 F. 2d 155, 156-157 (1966).

The language set forth in WAC 284-21-990 is unambiguous. “The primary goal of statutory construction is to carry out legislative intent.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington’s traditional process of statutory interpretation, this analysis begins by looking at the words of the statute. “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* The Court must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the Court’s role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

The loss payable clause is mandated by statute, is not ambiguous, and should not be construed against Progressive. This is an important distinguishing fact that separates this case from decisions in other jurisdictions that have considered this matter. The rule of construction for construing against the drafter should not apply.

The terms “convert” and “secrete” should not be given a restrictive interpretation here. The Court should apply the plain meaning of these terms. The trial court was correct in finding that the endorsement was not ambiguous.

(4) The Trial Court was Correct in Finding That No Coverage Was Available Under the Terms of the Policy.

There are no appellate cases in Washington that have addressed the issue of conversion or secretion under the loss payable clause with similar facts. In *Progressive American Ins. Co. v. Florida Bank at Daytona Beach*, 452 So.2d 42 (1984), the court determined that the lender was not entitled to recover where the insured converted or secreted the vehicle by reporting the vehicle as stolen.

In *Florida Bank*, the owner of an automobile purchased an insurance policy from Progressive with the lender on the vehicle being the lienholder. *Id.* at 43. The insured reported the automobile stolen.

Progressive stopped payment on the settlement draft based on information that the owner was involved with the theft. *Id.* at 44.

There was evidence that the insured converted or secreted the vehicle. The lender filed suit against Progressive. Progressive contended that under the loss payable clause the owner's illegal involvement precluded any compensation under the policy. *Id.* The trial court in *Florida Bank* found that acts of conversion were not covered and that the lender failed to purchase a policy that would cover the loss. *Id.* at 45. The loss payable clause in *Florida Bank* contained similar language for the policy exclusion to the policy at issue here.²

The court provided an extensive discussion of the two major types of loss payable clauses and then determined that the Progressive

² The loss payable clause in *Florida Bank* is set forth below:

“Loss or damage, if any, under the policy shall be payable as interest may appear to Florida National Bank 130 N. Ridgewood Avenue, Daytona Beach, FL 32015, and this insurance as to the interest of the Bailment Lessor, Conditional Vendor, Mortgagee or other, secured party or Assignee of Bailment Lessor, Conditional Vendor, Mortgagee or other secured party (herein called the Lienholder) shall not be invalidated by any act or neglect of the Lessee, Mortgagor, Owner of the within described automobile or other Debtor nor by any change in the title or ownership of the property; **provided, however, that the conversion, embezzlement or secretion** by the Lessee, Mortgagor, Purchaser or other Debtor in possession of the property insured under a bailment lease, conditional sale, mortgage or other security agreement is not covered under such policy, unless specifically insured against and premium paid therefor; and provided,” *Id.* at 44. (Emphasis supplied)

Policy was a hybrid clause.³ *Id.* at 44. This is an important distinction as differentiates this case from decisions involving pure “union,” “standard,” or “New York” clauses. The court explained why the clause was a hybrid clause, stating that,

“Although the clause provides that the insurance shall not be

³ The court found that the Progressive Policy contained a hybrid loss payable clause and explained the differences between an “open” clause and a “union”, “standard”, or “New York” clause, as set forth below:

“A loss payable clause is one method by which a lienholder or mortgagee protects its property interest. Generally, two types of loss payable clauses exist and are often referred to as (1) an open loss payable clause, and (2) a union, standard or New York clause. Under the open loss payable clause, the lienholder/mortgagee stands in the owner/mortgagor's place, and is usually subject to the same defenses as may be used against the owner/mortgagor. The open loss payable clause does not create a new contract between the lienholder/mortgagee and the insurer, nor does it abrogate any condition of the policy. The union, standard or New York clause provides that the owner/mortgagor's acts or neglect will not invalidate the insurance provided that if the owner/mortgagor fails to pay premiums due, the lienholder/mortgagee shall on demand pay the premiums. In return for incurring premium liability, the lienholder/mortgagee is freed from the policy defenses which the insured might have against the owner/mortgagor. The union, standard or New York loss payable clause is then an agreement between the lienholder/mortgagee and the insurer independent of the policy contract between the owner/mortgagor and the insurer. J. A. Appleman, *Insurance Law and Practice*, Vol. 5A, § 3401 (1970); *Glens Falls Insurance Co. v. Porter*, 44 Fla. 568, 33 So. 473 (1902); *Bank of Commerce v. Occidental Fire & Casualty Co.*, 264 So.2d 101 (Fla. 4th DCA 1972); *Southern Ins. Co. v. First National Bank at Orlando*, 237 So.2d 302 (Fla. 4th DCA 1970).

The loss payable clause in the instant case is neither an open nor a standard loss payable clause; rather, it is a hybrid clause. Although the clause provides that the insurance shall not be invalidated by any act or neglect of the owner/mortgagor and the lienholder/mortgagee is to pay the premiums upon the owner/mortgagor's default, it also establishes several instances where coverage would not exist, to-wit: (1) conversion, embezzlement or secretion by the owner/mortgagor unless specifically insured against and a premium paid; (2) nonpayment of insurance by owner or lienholder; and (3) the lienholder, after notifying the insurer of a change of ownership or an increase in hazard, fails to pay the increased premium after insurer's demand.” *Id.* at 44.

invalidated by any act or neglect of the owner/mortgagor and the lienholder/mortgagee is to pay the premiums upon the owner/mortgagor's default, it also establishes several instances where coverage would not exist, to-wit: (1) conversion, embezzlement or secretion by the owner/mortgagor unless specifically insured against and a premium paid.”

The claimant argued that the clause was ambiguous. The court found the clause was not ambiguous, stating that the “plain and unambiguous language requires no interpretation and should be given its popular and usual significance absent public policy reasons to the contrary.” *Id.* at 45. The court emphasized that the lender could have protected itself by purchasing additional insurance. *Id.*

The loss payable clause titled “Lienholder Agreement” here makes the lender subject to the acts of the insured if there is conversion or secretion under the policy. Accordingly, this is a hybrid clause and the cases allowing recovery for the lender do not apply which utilize the “standard” or “New York” loss payable clauses.

It is important to note that the lender under the Washington form loss payable endorsement has the option to purchase additional coverage to cover conversion or secretion under the policy. Reliable did not purchase additional insurance here.

(5) Response to Specific Arguments Raised by Reliable.

Reliable argues that the words “conversion” and “secretion” are not defined in the policy, and that there can be no conversion of one’s own property. Undefined terms in insurance contracts should be given their plain, ordinary, and popular meaning, and courts may look to the dictionary to determine the common meaning. *Boeing Co. v. Aetna Cas. & Sur Co.*, 113 Wn. 2d 859, 784 P.2d 507 (1990).

“Secrete” is defined by The American Heritage Dictionary Second College Edition (1991) as “to conceal in a hiding place.” Grauel moved the BMW from his residence to another location with the intent to commit insurance fraud by having his friend falsely report the car as stolen. The car was found dumped in a vacant lot in Vancouver stripped of parts and burned. Grauel intended to collect the insurance proceeds and he did “secrete” the car.

In *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 674-675, 910 P.2d 1308, review denied, 130 Wn. 2d 1015, 928 P.2d 416 (1996) the court defined conversion, stating that “Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.” The facts

establish that there was a “conversion” or “secretion” here as the commonly understood meaning of the terms applies.

Reliable argues that one cannot convert one’s own property. The *Meyers Way* decision answered this question as it provides express precedent for treating a lender’s security interest in property as being subject to conversion. The Court of Appeals in *Meyers Way* found a sufficient property interest in a bank’s security interest in the proceeds from a sale of sand to support an action in conversion. *Id.* at 675. The court adopted the modern view that to maintain a conversion action “the plaintiff need only establish “some property interest in the goods allegedly converted.” *Id.* at 675.

Reliable in its brief contends that no court has ever held that an insured’s intentional destruction of his or her own property amounts to conversion (Appellant’s Brief Pg. 9.) This is not the case.

In *Commerce Union Bank v. Midland National Insurance Co.*, 193 N.E. 2d 230 (1963), the court construed the term “conversion” to cover the arson of a tractor by the insured in remanding a case back to the trial court for a trial on the merits. *Id.* at 232. In *Commerce Union Bank*, the policy insuring the tractor had a loss payable clause which contained an exception from coverage for the insured’s conversion of

the vehicle. *Id.* at 231. In holding that the intentional destruction of the tractor constituted a conversion, the court stated that: “It is difficult to conclude that either a complete consumption of an article if it is consumable, or its intentional destruction, would be covered by a policy which excluded liability for ‘conversion.’” *Id.* at 232.

There are numerous cases that enforce the loss payable clause based on the conversion exclusion. In *National Union Fire Ins. Co. of Pittsburgh v. Care Flight Air Ambulance Service, Inc.*, 18 F. 3d 323 (5th Cir. 1994), the court held that “the unauthorized and unlawful exercise of dominion and control over property inconsistent with or to the exclusion of another’s superior right in that property” was conversion subject to the loss payable exclusion. *Id.* at 325.

The facts in *National Union* involved an aircraft that was wrongfully sub-leased and was seized by the Columbian government. *Id.* at 324. General Electric Capital Corporation was a lender on the aircraft. National Union Fire Insurance Company was the insurer on the aircraft. *Id.* The conversion occurred when Care Flight wrongfully subleased the aircraft. *Id.* at 329.

In *National Union*, the court construed a breach of warranty endorsement that excluded from coverage losses resulting from

"conversion, embezzlement or secretion by or at the direction of the Named Insured." *Id.* The court rejected the lenders arguments that a conversion did not occur, stating that "The result appellants seek would make the conversion exclusion to the breach of warranty endorsement meaningless." *Id.* The same result should apply here as the clause would have no effect otherwise.

In *Universal CIT Credit Corp. v. Kaplan*, 198 Va. 67, 76, 92 S.E.2d 359, (1956), the Virginia Supreme court found that the acts of the insured constituted conversion. In *Kaplan*, a car buyer named Bailey purchased a car under a conditional sales contract. *Id.* at 68. Under the terms of the contract, title to the car was reserved in the auto lender pending payment by Bailey of the total purchase price. *Id.* Bailey defaulted, erased the plaintiff's name from the certificate of title, and sold the car to a third party. *Id.* at 69.

The court held that since Bailey was in default, and had no right to sell the car, his actions exercised dominion over the property inconsistent with plaintiff's rights and constituted conversion. *Id.* at 365-366. The court noted conversion exists where there is "Any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion." *Id.* at 365.

Here, Reliable has alleged that it had a secured interest in the equipment. Burning the BMW in disregard of that interest is a conversion. As with a sale, it is an act of unauthorized dominion inconsistent with the rights of the lienholder.

Reliable cites the *Foremost Insurance Co. v. Allstate Ins. Co.*, 439 Mich. 378, 486 N.W. 2d 600 (1992) decision which can be distinguished as the Progressive policy clearly excludes coverage for “conversion, secretion or embezzlement” on the part of the insured. In *Foremost*, the court concluded that the limiting language of the loss payable clause referred back to claims by the insured, as the court stated that “We are persuaded that the exclusion simply provides that the insured will not be covered when he converts his own property. In other words, the conversion provision focuses on the insured's property and not on State Employees Credit Union's lien.” *Id.* at 606. This is a strained reading of the policy and ignores the loss payable language.

The facts are undisputed that Grauel intentionally caused the BMW to be destroyed. Such an act is indisputably an unauthorized dominion over the property in which Reliable had a secured interest. By damaging and destroying the BMW, Grauel converted the property and deprived Reliable of its rights in the secured property.

(6) The Trial Court was Correct in denying Reliable' Cross Motion for Summary Judgment.

For the foregoing reasons, the trial court was correct in denying Reliable's cross-motion for Summary Judgment.

(7) Reliable's Request for Attorney Fees Based on Olympic Steamship Should Be Denied.

In *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), the Court held that an insured may recover reasonable attorney fees where the insurer, by denying coverage, compels the insured to take legal action to obtain the full benefit of his insurance contract. Based on the arguments raised above, Progressive respectfully requests that attorney fees be denied to Reliable for this appeal.

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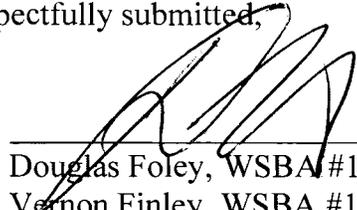
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G. CONCLUSION

It is respectfully submitted that the trial court's order be affirmed granting Progressive's motion for Summary Judgment and denying Reliable's cross motion for Summary Judgment.

DATED this 28th day of December, 2011.

Respectfully submitted,

By: 

Douglas Foley, WSBA #13119
Vernon Finley, WSBA #12321
Douglas Foley and Associates, PLLC
13115 NE 4th Street, Suite 260
Vancouver, WA 98684
(360) 883-0636

Attorneys for Respondents
Progressive Direct Insurance
Company

APPENDIX

APPENDIX 1

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Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

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

Plaintiff,

v.

PROGRESSIVE DIRECT
INSURANCE COMPANY, an Ohio
corporation,

Defendant.

No. 10 2 02654 5
JUDGMENT

This matter came before this court, the Honorable Diane M. Woolard presiding, for oral argument on Plaintiff's Motion for Partial Summary Judgment, and Defendant's Motion for Summary Judgment on June 7, 2011. Plaintiff appeared by and through its attorney of record, Andrew T. Reilly of Black Helterline LLP, and defendant appeared by and through its attorney of record, Douglas Foley of Douglas Foley & Associates, PLLC. This court heard oral argument of counsel, took the matter under advisement, and on June 13, 2011, issued a letter opinion denying plaintiff's motion, and granting defendant's. Based thereupon, and the remaining claims not disposed of on summary judgment having since been voluntarily dismissed by plaintiff without prejudice or costs, final Judgment on plaintiff's claims for

1 breach of contract and declaratory relief shall be and hereby is entered in
2 favor of defendant and against plaintiff.

3 Done in open court this 8th day of July, 2011.

4 /s/ DIANE M. WOOLARD

5 By _____
6 DIANE M. WOOLARD
7 SUPERIOR COURT JUDGE
8 Clark County Superior Court

9 PRESENTED BY:

10 Douglas F. Foley WSB #13119
11 Douglas F. Foley, WSB #13119
12 Attorney for Defendant 473/4120
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APPENDIX 2

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Scott G. Weber, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK**

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

Plaintiff,

v.

**PROGRESSIVE DIRECT
INSURANCE COMPANY, an Ohio
corporation,**

Defendant.

No. 10 2 02654 5

**ORDER ON MOTIONS FOR
SUMMARY JUDGMENT**

This matter having come before the Court on the Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, and the Plaintiff appearing by and through its attorney, Andrew T. Reilly, Defendant appearing by and through its attorney, Douglas F. Foley of Douglas Foley & Associates, PLLC, and the Court having heard arguments of the parties, reviewed the records and files herein, including:

1. Plaintiff's Motion for Partial Summary Judgment;
2. Affidavit of Scott Callahan in Support of Plaintiff's Motion for Partial Summary Judgment;
3. Defendant's Motion for Summary Judgment;

- 1 4. Declaration of Douglas F. Foley in Support of Defendant's
2 Motion for Summary Judgment;
3 5. Defendant's Response to Plaintiff's Motion for Summary
4 Judgment;
5 6. Plaintiff's Response to Defendant's Motion for Summary
6 Judgment; and,
7 7. Plaintiff's Reply in Support of Motion for Partial Summary
8 Judgment; and
9 8. Defendant's Reply Memorandum in Support of Motion for
10 Summary Judgment,

11 and the Court being in all matters fully advised; now, therefore, it is hereby

12 ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for
13 Partial Summary Judgment is denied. It is further

14 ORDERED, ADJUDGED and DECREED that Defendant's Motion for
15 Summary Judgment is Granted.

16 Done in open Court this 22 day of July, 2011.

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18 By 
19 JUDGE OF SUPERIOR COURT
20 Clark County Superior Court

21 PRESENTED BY:



22 Douglas F. Foley, WSB #13119
23 Attorneys for Defendant
24 473/4120

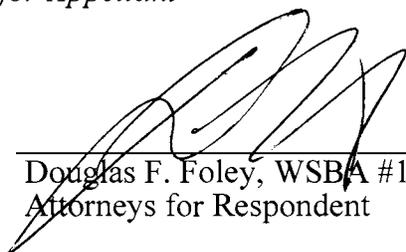
CERTIFICATE OF SERVICE

11 DEC 29 AM 10:28

I, Douglas F. Foley, certify that on December 28, 2011, I served
BY *K* DEPUTY
STATE OF WASHINGTON

or caused to be served, a copy of the foregoing Respondent's Brief, on
the following counsel of record at the following address by the means
indicated:

Andrew T. Reilly *Via Overnight Mail*
Black Helterline LLP
1900 Fox Tower
805 S.W. Broadway
Portland, Oregon 97205
Attorneys for Appellant

By 
Douglas F. Foley, WSBA #13119
Attorneys for Respondent