

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 REPLY BRIEF

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I. Introduction

While Reliable contends that all the facts relevant to this appeal are found within the “Statement of the Case” section of Appellant’s Opening Brief, certain of those contained within Progressive’s Brief of Respondent deserve special mention, if only for their utter irrelevance and inadmissibility. First, Progressive’s assertions about the nature of the loan from Reliable to Mr. Grauel or the surrounding transaction (e.g., that it was a “high-interest rate loan,” that Mr. Grauel purchased GAP insurance or the reasons for him having done so,¹ or regarding the value of the vehicle) are not only entirely irrelevant, but are also based on hearsay and speculation, and provided without proper foundation or other support.

- Whether the loan in question carried interest at 3% or 300% has no bearing upon whether the loss in question is a covered loss under the

¹ In fact, GAP coverage, as its name implies, is intended to close the “gap” between the fair market value of a vehicle at the time of a loss and the amount still owed on the loan used to purchase said vehicle, and is frequently purchased by those buying new vehicles, which significantly depreciate the moment they’re rolled off the lot, and/or those financing nearly 100% of the purchase price – whether new or used. It is not, as suggested by Progressive or the “Arresting Officer,” some part of a nefarious plot where the actual purchase price is artificially inflated and unsupported by fair market value of like-kind vehicles. Reliable respectfully suggests that anyone suggesting that the purpose of GAP insurance is the latter fundamentally misunderstands the very business models upon which both the consumer finance and insurance industries are based.

policy at issue. And, whether the car was worth what Mr. Grauel paid for it when he bought it makes no difference when assessing whether the loss was the result of Mr. Grauel's conversion or secretion of his own vehicle. As before the trial court, Reliable requests that any such statements be disregarded in their entirety, and stricken from the record accordingly.

Second, Progressive's assertions about Mr. Grauel's financial condition or other motivations for recklessly destroying his own vehicle by knowingly causing a fire² are both irrelevant and unsupported by admissible evidence, and likely intended to impermissibly affiliate Reliable with the bad actions and illegal conduct of Mr. Grauel – precisely what RCW 48.18.125 and WAC 284-21-010(1) and WAC 284-21-990 are meant to avoid. Reliable has never argued that Mr. Grauel *did not* set fire to his own vehicle; nor has Reliable ever claimed that Mr. Grauel *did not* move his vehicle to a location other than his own driveway prior to setting it on fire. Without question, based on Mr. Grauel's guilty plea,³ he did both of these things, however, that does not advance the inquiry in this matter one iota. The question of interest here is *what* Mr. Grauel did, or

² Which is, in fact, exactly that to which Mr. Grauel pleaded guilty.

³ Progressive's references to the Criminal Information, or the crimes with which Mr. Grauel was eventually charged, in addition to being irrelevant, are inadmissible. An indictment or charge, without more, is evidence of nothing.

more precisely, how *what* he did is characterized; it is not *why* he did it. Again, Reliable requests that these statements be disregarded in their entirety, and stricken from the record accordingly.

II. Arguments in Reply

As before the trial court, Progressive appears to misunderstand the issue presented by Reliable's Complaint, Motion for Partial Summary Judgment, and Opening Brief. Contrary to the issue as framed by Progressive, the question is not whether the policy in question unambiguously excludes lienholder coverage for losses resulting from the primary insured's "conversion, secretion, or embezzlement" (whatever that means); rather, the sole issue of concern is whether the acts of Mr. Grauel in this instance – or perhaps even more broadly, what sort of acts in general – unambiguously amount to conversion or secretion, as those terms are commonly understood.

A policy may clearly and unambiguously exclude coverage for losses caused by "booglebandeboo," inasmuch as it may clearly actually say precisely that, but such a lack of apparent ambiguity does nothing to resolve whether that particular policy effectively excludes coverage for losses resulting from a given set of facts and circumstances. Unless the policy clearly and unambiguously defines "booglebandeboo" or the sort of acts amounting to "booglebandeboo," or the same are plain,

obvious, inescapable, and inarguable to the casual purchaser of insurance, the exclusion is ambiguous and ineffective. *See National Union Fire Ins. Co. v. Zuveri*, 110 Wash.2d 207, 210, 750 P.2d 1247 (1988); *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).

The question here is not whether Progressive's policy excludes lienholder coverage for losses resulting from the primary insured's conversion or secretion.⁴ Instead, the question here is whether Progressive's policy clearly and unambiguously applies to *any* given set of facts or circumstances, or more particularly, those presented by this case.

On its face, Progressive's policy purports to exclude lienholder coverage for losses resulting from the primary insured's

⁴ Whether Progressive's policy unambiguously excludes lienholder coverage for losses occasioned by the primary insured's conversion or secretion was the question addressed by the Florida Court of Appeals in *Progressive American Ins. Co. v. Florida Bank at Daytona Beach*, 452 So.2d 42 (Fla. App. 1984), discussed more fully below. In that case, the lienholder stipulated that the given loss was the result of secretion, but nevertheless contended that the policy did not unambiguously exclude coverage for losses caused by secretion. That is NOT the question presented by this case. Progressive knows this, yet continues to point to the *Florida Bank* case as somehow relevant.

“conversion,” “secretion,” or “embezzlement,”⁵ but that fact alone does nothing to advance the inquiry, as the policy has no definitions or other provisions that might help one discern what any of this actually means. How, for example, does one convert property in which only he has an actual ownership and possessory interest? What amounts to the sort of concealment or hiding sufficient to trigger the “secretion” exclusion, or from whom must the automobile be hidden?

As Progressive’s policy does not define these terms, 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 a named insured’s own intentional destruction of his own vehicle – by any means – may well be wrongful, dishonest, and an overall immoral thing to do, but is not “conversion” or “secretion.” *See, e.g., Gibraltar Financial Corp. v. Lumberman’s Mut. Cas. Co.*, 513 N.E.2d 681, 683 (Mass. 1987) (insured’s

⁵ Importantly, while Progressive repeatedly states that this exclusion applies to the “conversion, embezzlement or secretion of the vehicle,” the mandated language says no such thing. Instead, the actual language used applies only to the “conversion, embezzlement, or secretion by [the primary insured or his/her agents],” which presumably applies to a far broader class of actions, such as the destruction or altering of the title to remove the lienholder’s name, or absconding with funds intended to be applied toward the purchase or repair of the vehicle.

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); *Nationwide Mut. Ins. Co. v. Dempsey*, 495 S.E.2d 914 (N.C. App. 1998), *review denied*, 502 S.E.2d 847 (N.C. 1998) (automobile policy's loss payable clause invalidating lienholder's interest only upon insured's conversion of vehicle did not apply when the vehicle was destroyed by fire allegedly set by insured since the vehicle was not changed from one purpose to another).

To avoid the result counseled by the near-unanimous, in fact arguably unanimous, line of decisions on point from across the nation, Progressive relies primarily, although erroneously, on three decisions that either do not stand for the propositions urged or are simply inapposite. As discussed briefly above, Progressive mistakenly relies upon *Progressive American Ins. Co. v. Florida Bank at Daytona Beach*, 452 So.2d 42 (Fla. App. 1984) as support for its position that the "conversion, secretion, or embezzlement" exclusion unambiguously applies to exclude coverage in this case. However, the *Florida Bank* case says nothing of the sort. In

Florida Bank, the court was confronted with a situation where the named insured apparently, actually, and by stipulation, “disappeared” the insured vehicle.⁶ The lienholder bank in that case did not contend that the named insured’s actions did not amount to a “secretion, conversion, or embezzlement,” but rather stipulated that they did, and instead argued that the clause was ambiguous notwithstanding its stipulation. *Progressive*, 452 So.2d at 45. Not surprisingly given the stipulation (i.e., “the parties stipulate and agree that the loss was caused by booglebandeboo”), the District Court of Appeal of Florida for the Fifth District found that the exclusion applied to bar coverage for the lienholder. This case simply adds nothing to the inquiry.

Progressive’s reliance upon *Commerce Union Bank v. Midland Nat’l Ins. Co.*, 43 Ill. App.2d 332, 193 N.E.2d 230 (1963) is similarly misplaced. Progressive cites the decision in *Commerce Union* as support for its contention that an insured’s destruction of his own vehicle by arson was, in fact, a conversion thereof, but that is not what the court there held or said. Rather, the court in *Commerce Union* was confronted with an evidentiary question as to whether evidence tending to show arson on the part of the named insured was properly excluded by the trial court.

⁶ The court’s opinion fails to mention whether the vehicle was ever found, but in light of the bank’s stipulation, it is safe to assume that it was not.

Having reviewed the evidentiary record developed at trial, and being unable to say based thereupon whether the fire was caused by arson or some other cause, or being unable to definitively say as a matter of law that arson could *never* amount to conversion, the Appellate Court of Illinois, Fourth District, decided merely that it was error to have excluded evidence of arson. Again, this case adds nothing to the inquiry.

Progressive also mistakenly points to *Universal CIT Credit Corp. v. Kaplan*, 198 Va. 67, 92 S.E.2d 359 (1956), as supporting its position. In reality, that case could hardly be more different than that presented here. It did not involve an insurance policy or a covered cause of loss, but rather a defaulting conditional sale buyer's sale of a vehicle acquired under a conditional sales contract to a third party after erasing the lienholder's name from the title. Perhaps obviously, such a "loss" is neither a "collision" nor a "comprehensive" physical loss or destruction of a vehicle, and would therefore never even come within the ambit of coverage, were it a coverage case. The court in *Universal CIT* never had occasion to address whether the defaulting conditional sales buyer's actions amounted to "conversion, secretion, or embezzlement" as defined in an insurance policy, or whether such terms were ambiguous as applied.

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However, the mere fact that the trial court in *Universal CIT* disagreed with the appellate court on whether given conduct amounted to “conversion” only strengthens Reliable’s argument in this case.

Somewhat confusingly, Progressive points to *National Union Fire Insurance Company of Pittsburgh v. Care Flight Air Ambulance Service, Inc.*, 18 F.3d 323 (5th Cir. 1994), as supporting its position. However, few cases actually demonstrate more clearly the point of Reliable’s principal argument: that one cannot convert one’s own property. In that case, the alleged converter, Care Flight Air Ambulance Service, Inc. (“Care Flight”) did not own the property allegedly converted, a private plane, but leased it from the owner pursuant to an agreement prohibiting its sublease. After Care Flight subleased the plane without authorization in violation of the lease agreement, the plane was seized by the Colombian government. Care Flight, which never owned anything but a leasehold interest in the plane in the first instance, was deemed to have converted the plane through its unauthorized sublease, as its doing so was an “unauthorized and unlawful exercise of dominion and control over property inconsistent with or to the exclusion of another’s superior rights in that property.” *Id.* at 325. Care Flight was not the owner of the plane, and was not alleged to have converted its own property. This case adds nothing to the inquiry.

Finally, Progressive reads far too much into *Meyers Way Development Limited Partnership v. University Savings Bank*, 80 Wn. App. 655, 910 P.2d 1308 (1996). There, a borrower in default renegotiated and refinanced a large construction loan on which it had defaulted, granting the lender a security interest through a deed of trust, in first position, on the land in question and a lien on all proceeds derived from the sale of sand on the property, entitling the lender the right to immediate possession of 70% of the gross sale proceeds so realized. Thereafter, the borrower again defaulted, and the lender took action to repossess the property and foreclose upon its security interest. Throughout the pendency of those proceedings, the borrower sold sand excavated from the property, and retained all the proceeds, and it was subsequently held to have converted the same.

As in *National Union*, the alleged converter in *Meyers Way* was never an owner of the thing converted and, as in *National Union*, the alleged converter's rights in the property converted were inferior and subordinate to the rights of the party alleging conversion.⁷ While noting that Washington courts have moved away from the "archaic and formalistic" requirement that a party alleging conversion be entitled to

⁷ In fact, the *Meyers Way* court noted that the borrowers really never held any interest in the portion of the sale proceeds subject to the lien. See *Meyers Way*, 80 Wn. App. at 675, fn. 17.

immediate possession of the converted property, the *Meyers Way* court reiterated that “[c]onversion is the unjustified, willful interference with a chattel *which deprives a person entitled to the property of possession*” and that “[t]he burden is on the plaintiff to establish ownership and a right to possession of the converted property.” *Id.* at 674-75, quoting *Eggert v. Vincent*, 44 Wn. App. 851, 854-55, 723 P.2d 527 (1986), review denied, 107 Wash.2d 1034 (1987). Thus, while an immediate right of possession may no longer be a prerequisite to maintaining a conversion action, the alleged converting party’s rights to possession of the property must still be inferior to those of the complaining party.

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 of the primary insured’s own property would amount to a conversion thereof, and the precise type of protection afforded lienholders by statute, administrative rule, and the Lienholder Agreement provisions in the subject policy would, in the end, prove non-existent.

Progressive’s argument as to the meaning or applicability of the secretion exclusion is similarly overbroad and ineffective. Progressive contends that Mr. Grauel secreted his vehicle by moving it somewhere other than his residence before setting it ablaze. Apparently,

so the argument goes, 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.

Progressive does not challenge or otherwise attempt to explain why the plain language interpretation of the term "conversion" – set forth by Reliable – is improper or somehow off-base. Nor does Progressive provide any contrary definition of the word "conversion," as used in its policy, or as might be commonly understood by the average purchaser of insurance. In fact, when all is said and done, Progressive's only real argument against the plain language interpretation of its policy is that if, in fact, one could never convert one's own property, then the exclusion for losses resulting from the primary insured's conversion would be meaningless, and the exclusion must therefore be read to mean what Progressive suggests it means (i.e., it applies to *any* intentional physical destruction, by the named insured, of the insured property). Progressive misses the point.

It is not Reliable that contends that one could never convert his or her own property, but the very dictionaries and reference materials to which one might look in analyzing what Progressive's policy actually means. As discussed in Reliable's prior briefing, those materials define conversion as involving the "unlawful appropriation and use" or the

“wrongful possession or disposition” of property *belonging to another*. Progressive does not suggest any contrary interpretation of this language; instead, it simply claims that if interpreted to apply only to property belonging to another, the exclusion might arguably *never* apply, and must therefore be interpreted more broadly⁸ so as to enable one to make sense of defendant’s own policy. Progressive has it backwards. It is Progressive’s obligation to ensure that exclusions found in its policies are plain, clear, and unambiguous; it is not this court’s job to attempt to clarify poorly written and ambiguous policy language to make Progressive’s policy “work” as Progressive alone claims it is intended.

As it appears in Progressive’s policy, “conversion” is listed with two other types of activities that relate to depriving another of his or her possession and ownership rights in property through fraudulent means. The plain language interpretation set forth in Reliable’s materials therefore gathers more force, as a word is known by the company it keeps (i.e., *noscitur a sociis*). Again, Progressive makes no effort to explain how or why Mr. Grauel’s reckless burning of a vehicle belonging only to him fits

⁸ Contrary to the law as stated in *Murray v. Western Pac. Ins. Co.*, 2 Wn. App. 985, 992-93, 472 P.2d 611 (1970) (“[E]xclusionary 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.”).

the plain and ordinary meaning or understanding of the word “conversion.”

IV. Conclusion

To be effective as an exclusion from coverage, the conversion, embezzlement, or secretion exclusion from lienholder coverage must unambiguously apply to the facts of this case. No appellate authority in any court across this nation that has ever specifically and squarely addressed whether an insured’s intentional destruction of his own vehicle amounted to a conversion thereof has ever held that to be the case. On the other hand, numerous courts that have confronted this precise issue have held that the “conversion, embezzlement, or secretion” clause is ambiguous, either as applied or in a vacuum, on the grounds that an owner of a vehicle cannot, as a matter of law, convert it, or because it is unclear from the terms of the policy in question what sort of acts are meant to be covered by the exclusion.

The conversion, secretion, or embezzlement exclusion from lienholder coverage is ambiguous, in that it is subject to numerous reasonable interpretations, but as a matter of law, cannot apply to one where the alleged converter was also the owner of the property in question. The trial court’s orders granting summary judgment in Progressive’s favor, and denying partial summary judgment in Reliable’s

favor, should be reversed, and Reliable should be awarded its attorney fees and costs in pursuing its coverage rights under the policy.

DATED this 2nd day of February, 2012.

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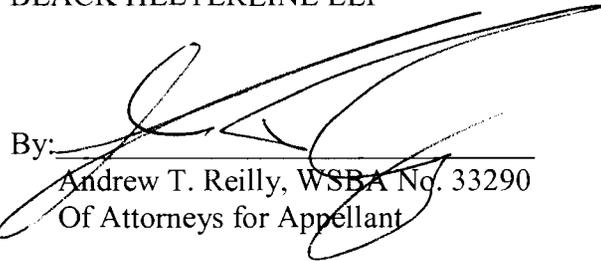
by sending a true copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorneys' address as shown above on the date set forth below.

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 2nd day of February, 2012.

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