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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DENNIS W. PAVLINA, Appellant,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a California  
corporation, Respondent.

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BRIEF OF APPELLANT

---

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## I. INTRODUCTION

This matter is an action by an insured under a policy of title insurance against the title insurer for wrongful denial of coverage, wrongful rejection of the insured's tender of the defense of the insured's title, and attorneys fees and costs incurred by the insured in defending his title and in bringing this action.

Plaintiff Dennis W. Pavlina (referred to herein as "Pavlina") is a real estate developer in Clark County, Washington. Pavlina purchased a parcel of real estate in Vancouver (referred to herein as "Lot 1") for the purpose of constructing an office building. There was an existing office building on the property immediately to the north (referred to herein as "Lot 2").

First American Title Insurance Company (referred to herein as "First American") issued a Policy of Title Insurance (referred to herein as the "Policy") insuring Pavlina's title to Lot 1. Schedule B of the Policy identified the Park Place Corporate Center Covenants (the "Covenants") as an exception. The Covenants granted Lot 1 an easement for ingress and egress by vehicular and pedestrian traffic and vehicular parking upon, over and across Lot 2.

Pavlina began construction of an office building on Lot 1. During construction, the owner of Lot 2 informed Pavlina that he had no right

whatsoever of access to or parking on Lot 2. He further advised Pavlina that Lot 1 and Lot 2 had both been removed from the Covenants by an Amendment that had been recorded with the Clark County Auditor many years earlier. The Amendment was not identified as an exception on Schedule B of the Policy.

Pavlina was unable to complete and operate the office building without such access and parking. Litigation with the owner of Lot 2 over the right of ingress, egress, and parking ensued. Pavlina made a claim under the Policy and tendered the defense of his title to First American Title Insurance Company. First American Title Insurance Company denied coverage of the claim under the policy and refused Pavlina's tender of the defense of Pavlina's rights. Pavlina agreed to binding arbitration to settle the litigation with the owner of Lot 2 and secure the required access and parking.

Pavlina filed this action to recover the cost of securing access and parking, attorney's fees and costs incurred in the litigation with the owner of Lot 2, and attorney's fees and costs in this action. On cross motions for summary judgment, the trial court ruled that because the easements described in the Covenants were not specifically identified in the legal description in Schedule A of the Policy, the Policy did not cover the loss

of said easements that resulted from the recorded but undisclosed Amendment. Pavlina appeals that ruling.

## II. ASSIGNMENTS OF ERROR

### ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that, because the easements described in the Park Place Corporate Center Covenants, Conditions, and Restrictions were not specifically included in the legal description in Schedule A, Policy of Title Insurance No. J1704159 did not cover the loss of said easements that resulted from the recorded but undisclosed Amendment to the Covenants, Conditions, and Restrictions.
2. The trial court erred in holding that First American Title Insurance Company did not breach Policy of Title Insurance No. J1704159 when it denied Pavlina's claim and refused Pavlina's tender of defense.

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

Issue No. 1. In reviewing an appeal from a summary judgment, the appellate court must engage in the same inquiry as the trial court.

Issue No. 2. A policy of insurance is construed most favorably to the insured.

Issue No. 3. Does a title insurance policy cover loss or damage incurred by the insured as a direct and proximate result of the loss of easement rights where a recorded document removing previously recorded easements was not disclosed to the insured or included in the exceptions in Schedule B of the policy, but the easements were not specifically described in the legal description in Schedule A of the policy?  
(Assignment of Error No. 1)

Issue No. 4. Does a title insurer breach a policy of title insurance by denying an insured's claim and refusing the insured's tender of the defense of the insured's easement rights where a recorded document removing previously recorded easements was not disclosed to the insured or included in the exceptions in Schedule B of the policy, but the easements were not specifically described in the legal description in Schedule A of the policy? (Assignment of Error No. 2)

Issue No. 5. Pavlina is entitled to attorney's fees and costs incurred in the prosecution of this matter in the trial court and on appeal.

### **III. STATEMENT OF THE CASE**

On February 12, 1988, the Park Place Corporate Center Covenants, Conditions, and Restrictions (referred to herein as the "Covenants") were recorded as Clark County Auditor's File No. 8802120012 (CP 123). The property the subject of this action was included in the legal description attached to the Covenants (CP 108 and CP 143). The property became subject to and was encumbered by the Covenants when the Covenants were recorded (CP 108 and CP 143). The Covenants state:

3.1 Ingress, Egress and Parking: Declarant, and each Owner hereto, as Grantor, hereby grants to the other Owners of Parcels, their respective tenants, contractors, employees, agents, licensees and invitees of such tenants, and for the benefit of each Parcel belonging to the other Owners, as Grantees, a mutual nonexclusive easement for ingress and egress by vehicular and pedestrian traffic and vehicular parking upon, over and across that portion of any Common Areas located on the Grantor's Parcel available for such purpose, except for those areas devoted to service facilities or drive-up or drive-through customer service facilities. The reciprocal rights of ingress, egress and parking set forth in this section shall apply to the Common Areas for each Parcel in the Property. (CP 124)

On November 1, 1988, an amendment to the Park Place Corporate Center Covenants, Conditions, and Restrictions (referred to herein as the

“Amendment”) was recorded as Clark County Auditor’s File Number 8811010136) (CP 108 and CP143). The Amendment states:

Declarant hereby deletes the property described in Exhibit A from the Park Place Corporate Center Declaration of Covenants, Conditions and Restrictions recorded February 12, 1988 under Auditors file 8102120012 (CP 137).

On November 23, 1988, a short plat (referred to herein as “SP 2-298”) that identified the property the subject of this matter as Lot 1 (referred to herein as “Lot 1”) was recorded at Book 2 of Short Plats, Page 298, records of Clark County, Washington (CP 29).

Plaintiff Dennis W. Pavlina is a real estate developer in Clark County, Washington. In June of 2002, Pavlina purchased Lot 1, a short distance west of Vancouver Mall, for the purpose of constructing an office building (CP 24). There was an existing office building on the property immediately to the north (referred to herein as “Lot 2”).

First American issued a Preliminary Commitment for Title Insurance to Pavlina on April 1, 2002 (CP 33). The Preliminary Commitment for Title Insurance identified the Covenants as an exception to coverage (CP 38), but did not identify the Amendment. The premium quoted in the Preliminary Commitment for Title Insurance was \$2,190.00 (CP 33).

Pavlina acquired title to Lot 1 by means of a Bargain and Sale Deed recorded as Clark County Auditor's File Number 3481856 on June 26, 2002 (CP 141 and CP 143). The Bargain and Sale Deed states "subject to covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record" at the end of the legal description (CP 141).

First American issued the Policy to Pavlina on June 26, 2002 (CP 63). Schedule A of the Policy (referring to Schedule C) identified Lot 1 as the real property the subject of the Policy (CP 66, CP 73 and CP 143). The Policy states "Total Fee for Title Search, Examination, and Title Insurance \$2,190.00" at the top of Schedule A (CP 66) (emphasis added). Schedule B of the Policy identified the Covenants as an exception (CP 70), but did not identify the Amendment the subject of this matter.

The Policy states:

"FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.” (CP 63)

The Policy states at Paragraph 1 - Definitions:

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title (CP 64).

Pavlina began construction of an office building on Lot 1 in 2002 (CP 25). On January 14, 2004, Pavlina received a letter from Richard A. Cantlin, an attorney representing the owner of Lot 2, the parcel adjoining the Property on the North. The letter states that the Amendment removed Lot 1 from the Covenants and that Pavlina had no right whatsoever of access to or parking on Lot 2. The letter also states that the owner of Lot 2 “will take any and all actions legally necessary to preclude you from accessing or parking on their property” (CP 77).

On January 28, 2004, attorney Phillip A. Foster sent a letter to First American on behalf of Pavlina (CP 79). The letter stated:

Counsel for an adjoining landowner claims that the property is not subject to these CC&Rs because of a subsequent amendment revoking the CC&Rs as to Phases III and IV (recorded under Auditor's recording number 8811010136), and that accordingly the ingress and egress rights set forth in the

CC&Rs do not exist. I attach a copy of correspondence from Mr. Cantlin, the above-referenced counsel, so indicating. Given same, a tender and claim is now made to First American with respect to exception 17. If it is accurate, please so advise Mr. Cantlin. If it is not accurate, then the title report did not advise of the actual state of title and request is made that First American provide the insurance purchased to make the state of title as it was indicated, with the ingress and egress rights set forth in the CC&Rs (per paragraph 3).

On February 4, 2004, Mitch Steeves responded on behalf of First American with a letter (CP 83) that stated:

The items in question were raised as exceptions to the title and were excluded from coverage in our policy. Please note the initial paragraph of Schedule B of the policy specifically states that the items disclosed therein are not part of our insurance coverage. For coverage to be extended to the rights in question, it would have been necessary to disclose the conditions as an appurtenance in our legal description.

I must respectfully deny your tender and claim under our policy due to the fact that no coverage was provided for the items in question.

On March 16, 2004, attorney Phillip A. Foster again wrote to First American (CP 87), stating:

Again, the adjoining landowner, controlled by Mr. Greg Specht, is threatening to enforce claims that the property is not subject to these CC&Rs because of a subsequent amendment revoking the CC&Rs as to Phases III and IV (recorded under Auditor's recording number 8811010136), contrary to the terms of the title policy issued.

Again, the defense of this claim is tendered to First American. Please also provide a complete copy of the title insurance and escrow file relating to issuance of this policy.

On March 19, 2004, John P. Dahl responded on behalf of First American in a letter (CP 89) stating:

The exceptions in Schedule B Part II setting forth the restrictions or amendments thereto are items which we except from our insurance. Therefore, failure to show an exception (the 11/01/88) which removes another exception (02/12/88) does not change the matters insured against and is not a basis for a covered claim.

Pavlina was not able to negotiate access and parking with the owner of Lot 2. Litigation with the owner of Lot 2 over the right of ingress, egress, and parking was commenced on July 24, 2004 as Clark County Superior Court Cause No. 04-2-03930-8 (CP 26).

Pavlina was eventually able to settle the litigation and secure the required access and parking through an agreed binding arbitration (CP 27 and CP 93). The arbitration panel awarded the owner of Lot 2 the sum of \$250,000.00 as the value of the parking and access easements (CP 102).

Pavlina filed this action against defendant First American to recover the cost of securing access and parking, attorney's fees and costs expended in litigation with the owner of Lot 2, and attorney's fees and costs in this action (CP 1).

Discovery was conducted over the next several months. During the course of discovery, First American responded to Pavlina's First Requests for Admissions (CP 106 and CP 142), admitting most of the facts material to this matter.

Pavlina moved for partial summary judgment on liability (CP 12) and First American filed a cross motion for summary judgment (CP 177). The motions for summary judgment were argued before the trial court on December 12, 2008. The trial court issued a letter ruling granting First American's motion and denying Pavlina's motion on March 11, 2009 (CP 202). Final Judgment was entered on May 8, 2009 (CP 209). On June 5, 2009, Appellant filed a Notice of Appeal.

#### **IV. SUMMARY OF ARGUMENT**

First American issued the Policy insuring Pavlina's title to Lot 1, but the Policy failed to identify the Amendment as an exception on Schedule B. The effect of the Amendment was to remove Lot 1 from the Covenants, thereby depriving Lot 1 of critical easement rights. Pavlina was unable to develop Lot 1 without such rights.

First American's denial of Pavlina's claim for the loss of the easement rights removed by the Amendment was a breach of the Policy. As a direct result of said breach, Pavlina was compelled to file suit and

pay substantial damages to secure said easement rights. Pavlina is entitled to recover damages for said breach in the amount of the cost of securing said easement rights, including attorney's fees, and for attorney's fees and costs incurred at the trial court and on appeal in this action.

## V. ARGUMENT

Issue No. 1. In reviewing an appeal from a summary judgment, the appellate court must engage in the same inquiry as the trial court.

Summary judgment is appropriate where no genuine issue of material fact exists and where the moving party is entitled to judgment as a matter of law, **CR 56(c)**. In evaluating a motion for summary judgment, all reasonable inferences are to be construed against the moving party, **Marincovich v. Tarabochia**, 114 Wn.2d 271, 274, 787 P.2d 562 (1990), and the motion should only be granted if, from all the evidence, reasonable persons could only reach one conclusion, **Morris v. McNicol**, 83 Wn.2d 491, 494, 519 P.2d 7 (1974), **Senn v. Northwest Underwriters**, 74 Wn. App. 408, 875 P.2d 637 (1994).

The appellate court decides these questions of law by viewing all material evidence and all reasonable inferences in favor of the non-moving party, **Brashear v. Puget Sound Power & Light Co**, 100 Wn.2d 204, 667 P.2d 78 (1983); **Bernethy v. Walt Failor's, Inc.**, 97 Wn.2d 929, 653 P.2d

280 (1982). This court must engage in the same inquiry as the trial court. **Wilson v. Steinbach**, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The material facts in this matter are not disputed. The Covenants granted easement rights to Lot 1 that were critical to development. First American issued the Policy insuring Pavlina's title to Lot 1, but the Policy failed to identify the Amendment as an exception on Schedule B. The effect of the Amendment was to remove Lot 1 from the Covenants, thereby depriving Lot 1 of critical easement rights. Pavlina was unable to develop Lot 1 without such rights.

The question of law is whether the loss Pavlina suffered as a result of the Amendment is a loss insured against by the Policy.

Issue No. 2. A policy of insurance is construed most favorably to the insured.

Where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise. **Witherspoon v. St. Paul Fire & Marine Ins. Co.**, 86 Wn.2d 641, 548 P.2d 302 (1976); **Morgan v. Prudential Ins. Co.**, 86 Wn.2d 432, 545 P.2d 1193 (1976); **Glen Falls Ins. Co. v. Vietzke**, 82 Wn.2d 122, 508 P.2d 608 (1973); **Ames v. Baker**,

68 Wn.2d 713, 415 P.2d 74 (1966). This rule applies with added force in the case of exceptions and limitations to a policy's coverage. **Witherspoon v. St. Paul Fire & Marine Ins. Co.**, supra 86 Wn.2d at 650; **Thompson v. Ezzell**, 61 Wn.2d 685, 379 P.2d 983 (1963).

Unless coverage is limited by a specific exclusion, it is presumed that coverage exists for matters not specifically excluded. **Phil Schroeder, Inc. v. Royal Globe Ins. Co.**, 99 Wn.2d 65, 659 P.2d 509 (1983). The language of an insurance contract must be interpreted as it would be understood by the average person purchasing insurance. **Shotwell v. Transamerica Title Ins. Co.**, 91 Wn.2d 161, at 168, 588 P.2d 208 (1978).

Issue No. 3. The trial court misconstrued the purpose of the legal description in Schedule A of the Policy.

The trial court referred to **Santos v Sinclair**, 76 Wn. App. 320, 884 P.2d 941 (1994) in the March 11, 2009 letter ruling. The trial court ruled that because the easement granting the right to ingress and egress by vehicular and pedestrian traffic and vehicular parking upon, over and across Lot 2 was not contained within the legal description set forth in the Policy, such rights are excluded from coverage. The trial court misconstrued the purpose of the legal description in a policy of title insurance and misinterpreted **Santos v Sinclair**.

**Shotwell v. Transamerica** held that the description of the land in a title policy is for the purpose of identifying the land covered by the policy and not as an exclusion limiting the insurance protection provided by the policy. The **Shotwell v. Transamerica** court stated:

Further, petitioner's argument confuses the law of conveyancing with the principles of title insurance. As stated in *San Jacinto Title Guar. Co. v. Lemmon*, 417 S.W.2d 429, 431-32 (Tex.Civ.App.1967) in addressing the same argument raised here:

The description of the property in the policy is identical with and obviously copied from the description in the warranty deed by which appellees acquired title. . . . Unquestionably, the reference in the warranty deed to the recorded map or plat contemplated the purposes of the deed. The description of the land in the policy was for the purpose of identifying the land covered by the policy and not, as appellant contends, for the purpose of limiting the insurance protection purchased. In our opinion, this was the clear and unambiguous meaning of the policy. To hold otherwise would, in effect, require appellees, who have purchased title insurance, to be their own insurer in so far as their title to the land, in the respect here under consideration, is concerned. Such a result would not be in keeping with the principal purpose of the policy . . . (Emphasis added).

**Transamerica v Northwest Building Corp.**, 54 Wn. App. 289, 773 P.2d 431 (1989) held that a title insurance policy which defined "land" to exclude any property beyond the lines of the areas specifically described or referred to in the policy schedule, and did not cover encroachments onto surrounding property which were beyond those boundaries. **Transamerica v Northwest Building** was overruled by

**Denny's Restaurants, Inc. v. Security Union Title Ins. Co.**, 71 Wn. App. 194, 859 P.2d 619 (1993). Furthermore, **Transamerica v Northwest Building** is factually and legally distinguishable.

In overruling **Transamerica v Northwest Building**, the **Denny's v. Security Union** court relied on **Shotwell v. Transamerica**, stating:

The *Transamerica* court distinguished a Washington Supreme Court decision, *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978). The insurance policy in that case exempted a "right of way for existing roads". The existing visible road was only 15 feet in width. However, the insured parties later learned the property was subject to a wider 40 foot county right of way transversing the entire property, in which the visible road was located... The court declined to hold that the description of land within the policy limited the insurance protection.

...

We find the reasoning of the *Shotwell* court more persuasive than *Transamerica*.

...

In addition, a presumption exists that unless coverage is limited by a specific exclusion, coverage exists for matters not specifically excluded. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wash.2d 65, 69, 659 P.2d 509 (1983). Further, language should be interpreted as an average purchaser of insurance would understand it. *Shotwell*, 91 Wash.2d at 168, 588 P.2d 208.

In addition to being overruled, **Transamerica v Northwest Building** is factually and legally distinguishable from this matter. The loss the subject of **Transamerica v Northwest Building** was the result of the insured's encroachments onto surrounding property. The

encroachments were beyond the boundaries of the land the subject of the policy.

The loss the subject of this matter is the result of the loss of ingress, egress, and parking easements appurtenant to and for the benefit of the land described in Schedule A of the Policy. An easement, although an incorporeal "right," is an interest in the land benefited by the easement, in this case Lot 1, **Santos v Sinclair**, quoting **Perrin v. Derbyshire Scenic Acres Water Corp.**, 63 Wn.2d 716, 388 P.2d 949 (1964).

Even though the **Transamerica v Northwest Building** decision has been overruled, it should be noted that the decision did not exclude that loss from coverage entirely. The court stated at page 294:

If Northwest desired to insure against the risk that improvements on its land encroached onto surrounding property, it could have requested such coverage [FN3].

[FN3] We note that such a provision may arguably have existed in Northwest's policy. Encroachment of property onto adjacent land may render the encroaching property unmarketable, a risk expressly covered by Northwest's title insurance policy. See, e.g., *Brown v. Herman*, 75 Wash.2d 816, 823-34, 454 P.2d 212 (1969); Annot., *Encroachment of Structure on or Over Adjoining Property or Way as Rendering Title Unmarketable*, 47 A.L.R.2d 331 (1956); see generally, Annot., *Defect in, or Condition of, Adjacent Land or Way as Within Coverage of Title Insurance Policy*, 8 A.L.R.4th 1246 (1981). Because the parties failed to raise this issue, we decline to consider it in deciding this case. RAP 9.12, 10.3(g); *American Universal Ins. Co. v. Ranson*, 59 Wash.2d 811, 815, 370 P.2d 867 (1962).

Pavlina alleges the Amendment rendered Lot 1 unmarketable, a specifically risk covered by paragraph 3 of the insuring clause of the Policy.

The trial court recognized that the facts of **Santos v Sinclair** are similar to the facts of this matter. Santos bought Tract 3 of a short plat. Ticor Insurance Company insured title to Santos' property. Sinclair owned Tract 2 of the short plat. Santos used a road easement over Tract 2 to access a public highway. A dispute arose and Sinclair blocked Santos's use of the road. Santos filed a claim with Ticor, believing that his policy insured the road easement over Tract 2. Ticor denied the claim, maintaining that the easement either was not covered or was excepted from coverage.

The land insured by the policy was described in Schedule A. The description referred to a short plat, but did not mention the easement. The legal description in the short plat included an easement. Ticor argued that coverage in a title insurance policy is limited to the property specifically described in the policy, citing **Transamerica v Northwest Building** as authority. Based upon this rule, Ticor argued that because Schedule A did not explicitly describe any easement being insured, the policy's coverage did not include the easement.

The Court rejected Ticor's argument, stating:

Moreover, Ticor relies improperly on Transamerica Title, for the proposition that coverage in a title policy is limited to the property specifically described in the policy. *Transamerica* has been overruled by *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wash.App. 194, 859 P.2d 619 (1993), which held that the purpose of the legal description in a title insurance policy is to identify the subject of the insurance, not to limit the protection of the policy. *Denny's*, at 205, 859 P.2d 619; *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 169, 588 P.2d 208 (1978). Thus, the description of the property insured in Schedule A is intended to identify that it is Santos's property that is being insured and is not intended to limit the protection of the policy. Limitations and exclusions from coverage are located in another section of the policy. (Emphasis added).

...

Finally, an easement, although an incorporeal "right," is an interest in land, so the exception for a "right" is inapplicable to an "interest" such as the easement here. *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wash.2d 716, 719, 388 P.2d 949 (1964).

...

In short, the policy language, even considered in isolation, is ambiguous. *Shotwell* directs us to the policy as a whole and instructs the court not to place undue emphasis upon isolated segments of the policy, *Shotwell*, 91 Wash.2d at 166, 588 P.2d 208 (1978).

The trial court improperly distinguished **Santos v Sinclair**

because, in this matter, there was no easement described in SP 2-298. The point of **Santos v Sinclair** is that the purpose of the legal description in a title insurance policy is to identify the subject of the insurance, not to limit the protection of the policy. The trial court erred in holding that the legal

description in the Policy excluded the damages flowing from the loss of the easements that resulted from the recorded but undisclosed Amendment.

Issue No. 4. The exceptions in Schedule B of the Policy did not exclude loss or damage incurred by Pavlina by way of the effect of the Amendment from coverage.

It was not until the motions for summary judgment that First American claimed that Pavlina's losses were excluded by the legal description in the Policy. The only basis prior to this litigation stated by First American for denying Pavlina's claim was stated in John P. Dahl's March 19, 2004 letter:

The exceptions in Schedule B Part II setting forth the restrictions or amendments thereto are items which we except from our insurance. Therefore, failure to show an exception (the 11/01/88) which removes another exception (02/12/88) does not change the matters insured against and is not a basis for a covered claim.

Pavlina suffered no damage as a result of any exception listed in Schedule B Part II of the policy. Had there been no recorded document affecting title other than those listed in Schedule B Part II of the policy, Pavlina would have suffered no damage. The damage suffered by Pavlina

resulted from the effect of the Amendment, which was not disclosed or identified as an exception.

In the interpretation of insurance contracts, language must be given its ordinary meaning, **Nautilus v Transamerica Title Insurance**, 13 Wn. App. 345, 534 P.2d 1388 (1975), **Lesamiz v. Lawyers Title Ins. Corp.**, 51 Wn.2d 835, 322 P.2d 351 (1958), **Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.**, 59 Wash. 501, 110 P. 36 (1910), and where two constructions are possible, the 'construction most favorable to the insured must be applied, . . .' **Selective Logging Co. v. General Cas. Co. of America**, 49 Wn.2d 347, 351, 301 P.2d 535, 537 (1956); **Myers v. Kitsap Physicians Serv.**, 78 Wash.2d 286, 474 P.2d 109 (1970).

Title insurance policies are to be construed in accordance with the general rules applicable to all other contracts, **Santos v Sinclair, Miebach v. Safeco Title Ins. Co.**, 49 Wn. App. 451, 453, 743 P.2d 845 (1987).

In **Campbell v. Ticor Title Ins. Co.**, 166 Wn.2d 466, 209 P.3d 859 (2009), the Washington Supreme Court stated:

A "title policy" is "any written instrument, contract, or guarantee by means of which title insurance liability is assumed," RCW 48.29.010(3)(a). Chapter 48.29 RCW does not define title insurance itself, but it is generally understood as "[a]n agreement to indemnify against loss arising from a defect in title to real property, usually issued to the buyer of the property by the title company that conducted the title search." Black's Law Dictionary at 819 (8th ed.2004). Title insurance "characteristically combines search and disclosure with

insurance protection in a single operation.” *Shotwell v. Transamerica Title Ins. Co.*, 16 Wash.App. 627, 631, 558 P.2d 1359 (1976), aff’d, 91 Wash.2d 161, 588 P.2d 208 (1978).  
(Emphasis added)

A title insurance policy is presumed to include coverage within its terms "for matters not specifically excluded ", **Denny's v. Security Union**. Further, the language of an insurance contract must be interpreted as it would be understood by the average person purchasing insurance, **Santos v Sinclair**, (quoting *Shotwell v. Transamerica*).

John Dahl’s March 19, 2004 letter states that First American denied Pavlina’s claim because “failure to show an exception (the 11/01/88) which removes another exception (02/12/88) does not change the matters insured against and is not a basis for a covered claim”. First American’s basis for denying Pavlina’s claim requires a convoluted construction that is contrary to the foregoing cases and an interpretation that could not be understood by the average person purchasing insurance.

The Policy states that the premium Pavlina paid was for “Title Search, Examination, and Title Insurance”. The Preliminary Commitment and Policy both erroneously identified the Covenants as a recorded instrument affecting the title that was excluded from coverage. The Preliminary Commitment and Policy both erroneously failed to identify

the Amendment as a recorded instrument affecting the title (by removing the Covenants).

The effect this argument is that First American will not insure Pavlina against any loss that he may suffer as a result of any burden the Covenants impose on Lot 1 because the Covenants were disclosed as an exception, but First American will not insure Pavlina against any damage he may suffer as by the loss of any benefit the Covenants confer on Lot 1 because the Amendment that removed those benefits was not disclosed as an exception.

Pavlina's claim is not excluded from the coverage of this policy as claimed by First American.

Issue No. 5. Pavlina is entitled to attorney's fees and costs incurred in the prosecution of this matter in the trial court and on appeal.

First American's denial of Pavlina's claim forced Pavlina to file suit to secure the easements rights the subject of this action and to file this action to obtain the benefit of the Policy. Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance contract is irrelevant. In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its

commitment and, thus, is equally burden-some to the insured, **Olympic S.S. Co., Inc. v. Centennial Ins. Co.**, 117 Wn.2d 37, 811 P.2d 673 (1991), **Colorado Structures, Inc. v. Insurance Company of the West**, 161 Wn.2d 577, 167 P.3d 1125 (2007).

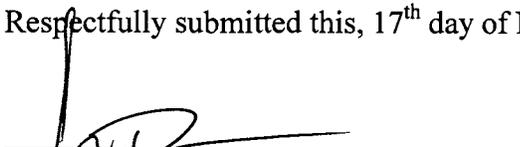
Pavlina is entitled to attorney's fees and costs incurred in the prosecution of this matter in the trial court and on appeal.

## VI. CONCLUSION

First American's denial of Pavlina's claim for the loss of the easement rights removed by the Amendment was a breach of the Policy. As a direct result of said breach, Pavlina was compelled to file suit and pay substantial damages to secure said easement rights. Pavlina is entitled to recover damages for said breach in the amount of the cost of securing said easement rights, including attorney's fees and costs incurred at the trial court and on appeal.

The trial court's Order on Summary Judgment and the Final Judgment should be reversed. This matter should be remanded to the trial court for entry of Partial Summary Judgment in favor of Pavlina and trial on damages.

Respectfully submitted this, 17<sup>th</sup> day of November, 2009.



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James D. Hamilton, WSB#9630  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT'S BRIEF upon the following named person(s) on the date indicated below by

mailing with postage prepaid;

hand delivery;

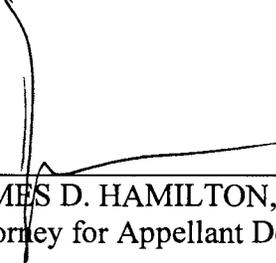
facsimile transmission;

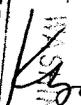
overnight delivery

a true copy thereof to said person(s), contained in a sealed envelope, at the address indicated below:

Bradley W. Andersen  
Schwabe, Williamson & Wyatt  
700 Washington St  
Suite 701  
Vancouver, WA 98660

Dated: November 17, 2009.

  
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JAMES D. HAMILTON, WSBA #9630  
Attorney for Appellant Dennis W. Pavlina

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