

COURT OF APPEALS
DIVISION II

No. 39390-5-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY
DEPUTY

DENNIS W. PAVLINA,

Appellant,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY, a California
corporation,

Respondent.

RESPONDENT'S RESPONSE BRIEF

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STATUTES

RCW 48.29.01024

I. INTRODUCTION

Appellant Dennis Pavlina wants this court to ignore the title insurance policy's plain language and adopt a new rule of law that would expand a standard title insurance policy to cover fictional easements not described or provided for in a property's legal description. Pavlina also seeks, implicitly, to overturn the long standing rule¹ that a preliminary title report **is not** an abstract of record and therefore an insured does not have a right to rely upon the report to expand coverage.²

Pavlina admits that the easement, for which he seeks coverage under the Policy, was not included within the bundle of rights that he acquired when he purchased Lot 1. And he admits that the Policy's description of the property also omits any reference to the non-existent easement.

So why does Pavlina believe he has coverage? Because the alleged easement was referenced in a document listed as an exception (Schedule B) to coverage and the Company did not list the later recorded amendment that eliminated the CC&Rs.³ Pavlina therefore contends that

¹ *Barstad v. Stewart Title Guaranty Co.*, 145 Wn. 2d 528, 39 P.3d 984 (2002).

² Seemingly recognizing the futility of this argument, Pavlina does not squarely ask this court to overturn prior case law, but he does want the court to find that he had a right to rely upon those matters listed in the Policy's exclusion (Schedule B) to expand coverage.

³ Schedule B, Part 2. CP 167.

the scope of the policy should be extended by those matters listed in the exclusions, and that he had a right to rely upon these exclusions to create additional property rights.

Pavlina's contentions are contrary to the Policy's plain language and well-established law. A standard title insurance policy, like the one at issue in this case, only guarantees title to that "land" described in the deed. The law is also clear that preliminary title reports are not abstracts of title – insureds cannot rely upon them as they would an abstract of title. For these reasons, the trial court's ruling should be affirmed.

II. STATEMENT OF ISSUES

First American restates the Issues as follows:

1. The Policy only covers title to the "land" **legally** described in Schedule A. Pavlina seeks coverage for a non-existent easement across an adjoining parcel not legally described in either the deed or the Title Policy (Schedule A's legal description of the "land"). Does a standard title insurance policy cover easements that are not part of the property conveyed?
2. Schedule B of the Title Policy lists matters excepted from coverage ("exceptions"). These exceptions limit, not expand upon, the scope of coverage. Pavlina relies upon a listed exception to claim coverage for a non-existent easement across an adjoining

parcel. Can an insured rely upon exceptions listed in Schedule B to expand coverage under the Policy?

3. Because preliminary title reports are deemed for the insurers', and not the insured's benefit, they **are not** considered abstracts of title under Washington law.⁴ Title companies have no independent legal duty to disclose title information to the insureds. Pavlina claims he relied upon a document listed as an exception to believe he had an easement across an adjoining parcel. Does an insured have a right to rely upon exceptions listed in a preliminary title to expand coverage under a standard Policy?

III. COUNTERSTATEMENT OF THE CASE

First American offers the following counter-statement of the case:

On June 26, 2002, Pavlina purchased Lot 1 of a two-lot commercial Short Plat located in Vancouver, Washington.⁵ While Lot 1 was vacant and undeveloped, Lot 2 contained an office building. Both lots had been created years before by a common developer who owned several larger parcels ("Parent Parcel")⁶.

⁴*Barstad v. Stewart Title*, 145 Wn. 2d 528, 540, 39 P.3d 984 (2002).

⁵ Recorded in Book 2 of Short Plats, Page 298 ("Short Plat") in Clark County. CP 44.

⁶ Referred to as Parcel 2 of the Park Place Business Park.

Parcel 2 is served by a cul-de-sac which lies entirely within its boundaries.⁷ Lot 1 has access to the adjoining public streets.⁸ Neither the Short-Plat nor the legal descriptions for Lot 1 provides a right of the owner of Lot 1 to use the cul-de-sac on Lot 2.

Pavlina took title to Lot 1 through a Bargain and Sale Deed (“Deed” or “Pavlina Deed”).⁹ The Deed described the property as “Lot 1” of the Short-plat and stated that the conveyance was “subject to Covenants [sic], conditions and restrictions of easements, if any, affecting title, which may appear in the public record, . . .”¹⁰

Prior to closing, First American issued a Preliminary Commitment for Title Insurance, listing the conditions under which it would issue title insurance. At closing, First American issued a standard Policy of Title Insurance (“Title Policy”).¹¹

Both Pavlina’s Deed and the Title Policy describe the “land” to be insured as, “Lot 1 of Said Short Plat recorded under Book 2 of Short Plats

⁷ CP 29

⁸ *Id.*

⁹ CP 141

¹⁰ *Id.*

¹¹ No. J1704159 (“Title Policy”) for Lot 1 to Pavlina. CP 63-76

at page 298, Records of Clark County.”¹² And neither the Deed nor the Short-Plat includes any description or reference to an easement for the benefit of Lot 1 over Lot 2.

After acquiring the property, Pavlina began to develop Lot 1.¹³ But when he tried to use the adjoining cul-de-sac, the neighbor objected.¹⁴ In addition to suing the owner of Lot 1, Pavlina tendered a claim to First American.¹⁵ He argued that because he relied upon a February 6, 1988 CC&R, which was listed as an exception in the Preliminary Title Report, he thought had a right to use the cul-de-sac.¹⁶

A brief review of the chain of title may help the court to understand the basis for Pavlina’s confusion.

On February 12, 1988, the original developer of the Parent Parcel, which included Lots 1 and 2, encumbered several nearby properties with a common set of CC&Rs.¹⁷ These CC&RS purported to create a right of

¹² CP 141, 66, 73.

¹³ CP 25.

¹⁴ *Id.*

¹⁵ CP 26.

¹⁶ CP 79-80, 84-87.

¹⁷ Recorded as Clark County Auditor’s File No. 88021200112 on February 12, 1988; CP 25,30.

“ingress, egress and parking” across each of the affected parcels.¹⁸ But on November 1, 1988, the developer recorded an Amendment to remove the CC&Rs from Lots 1 and 2.¹⁹ This meant that any rights the owners of Lots 1 or 2 may have had to use any of the other properties for ingress, egress or parking, including the right to use the other lots for access no longer existed.

However, because it was a potential encumbrance adversely affecting title to Lot 1, First American listed the February 6, 1988 CC&R as an “exception” to coverage on both the Preliminary Commitment for Title Insurance (exception 17) and on the final Title Policy (exception 16).²⁰ But First American did not list the November 1, 1988 Amendment as an exception on Schedule B of the Title Policy.

Pavlina eventually settled with his neighbor by paying fair market value for an easement to use the cul-de-sac.²¹ But Pavlina then looked to First American for reimbursement under the Title Policy. Although he had to pay fair market value for the easement, he claimed his right to use

¹⁸ CP 46.

¹⁹ The Amendment shows that the Developer never intended to encumber Lots 1 and 2 with any easements. CP 25-26.

²⁰ CP 63-76, CP 30-44.

²¹ CP 93-98. Pavlina and the owner of Lot 2 agreed to have an arbitrator determine the easement’s fair market value.

the cul-de-sac was covered by the Title Policy. He argued that without the cul-de-sac, title to Lot 1 was “unmarketable.”²² Because the cul-de-sac was never part of the “land” insured under the Policy, First American denied the claim.²³

Pavlina sued First American for breach of the Title Policy.²⁴ The parties filed cross-motions for summary judgment and, on March 12, 2009, Judge Barbara Johnson determined, in a written opinion, that the alleged easement was not covered under the Policy.²⁵ Final Judgment was entered on May 8, 2009²⁶ and Pavlina appealed.

IV. ARGUMENT

A. Summary of Argument

Pavlina can only prevail if this court: (1) expands the definition of “Property” as described in Schedule A to include references in documents listed as exceptions in Schedule B; or (2) changes the law to hold that a preliminary title report is an abstract of title which creates new and

²² Pavlina has never claimed lack of access. He claims Lot 1 is “unmarketable” because he cannot use the adjoining cul-de-sac.

²³ CP 83, Ex. “G” to Pavlina Decl., February 4, 2004 letter from Mitch Steeves.

²⁴ CP 26-27.

²⁵ CP 202-203.

²⁶ CP 204-206

additional liability on title companies beyond the terms of a standard policy.²⁷

The analysis should begin and end with the terms of the Policy – in particular its definition of “Property.” The court should also decline to overturn the well-established distinction between preliminary commitments of title and abstracts of title.

First American only agreed to cover those property rights associated with the “Land” (i.e. Lot 1) described in Schedule A, which is identical to those legal rights described in Pavlina’s Deed. Since the alleged – or non-existent – right to use the adjoining cul-de-sac was not part of the bundle of sticks that Pavlina acquired when he purchased Lot 1, there is no coverage under the Title Policy. Also, exceptions listed in a policy or preliminary title report cannot be used to expand insurance coverage.

It is also well settled that a preliminary title report is not an abstract of title; so insureds cannot claim negligence against a title insurer or seek liability beyond the terms of the policy. Because the adjoining cul-de-sac was beyond the bundle of rights associated with the Land insured by First American, Pavlina’s appeal should fail.

²⁷ CP 63-76

B. Summary Judgment was Appropriate

Because there were no material issues of fact, summary judgment was appropriate. And because an appellate court reviews a trial court's grant or denial of summary judgment *de novo*, the parties also agree that this Court should engage in the same inquiry as the trial court.²⁸

C. The Policy Only Insures Title to the "Land" legally described in Schedule A.

Pavlina's sole claim is that, without the right to use the adjoining cul-de-sac, Lot 1 is unmarketable (*i.e.* "unmarketability of the Title").²⁹ We must emphasize at the outset that Pavlina only purchased a **standard**, as opposed to an "extended", coverage policy.³⁰ The Policy therefore only insures that "Land" described in Schedule A.

The analysis must therefore start – and in this case end – with whether Pavlina's right to use the adjoining cul-de-sac was a right

²⁸ *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

²⁹ Pavlina does not claim coverage under Provision 4 of the Policy (*i.e.* "Lack of a right of access to and from the land"). The undisputed facts show that Lot 1 adjoins two public roads. The right of access is not a guarantee of a particular access. *Magna Enterprises v. Fidelity National Title Insurance Company*, 104 Cal. App. 4th. 122, 127 Cal. Rptr. 2d 681 (2002). CP 63-76, 30-44.

³⁰ Two basic types of title policies are available: standard and extended coverage. The standard policy schedule B exempts coverage for most off-record defects. For an additional premium, the insured may purchase an extended coverage policy that omits the standard schedule B exemptions. *Denny's Rests. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 198, 859 P. 2d 619 (1993).

included within the bundle of rights defined in Schedule A.³¹ If not, then Pavlina's claim must fail.

- (i) *The Policy guarantees marketability of Title to the Land*

A review of the Title Policy's plain language³² reveals that Pavlina's claim is not covered:

FIRST AMERICAN TITLE INSURANCE COMPANY, * * *, insures * * * against loss or damage, * * * 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 herein;

³¹ Title Insurance policies are no different than and will be construed with the general rules applicable to all other contracts. *Miebach v. Safeco Title Insurance Co.*, 49 Wn. App. 451, 453, 743 P. 2d 845 (1987). Because the language of the Policy at issue in this case is not ambiguous, the normal rule that requires ambiguous terms to be construed against the insurance company does not apply. As this court stated in *Santos v. Sinclair*:

The general rules of interpreting the language of an insurance policy are well-settled:

'If policy language is clear and unambiguous, the court may not modify the contract or create an ambiguity. An ambiguity exists if the language is fairly susceptible to two different reasonable interpretations. If an ambiguity exists, then the court may attempt to determine the parties' intent by examining extrinsic evidence. If a policy remains ambiguous even after resort to extrinsic evidence then this court will apply the rule that ambiguities in insurance contracts are construed against the insurer. The rule strictly construing ambiguities in favor of the insured applies with added force to exclusionary clauses which seek to limit policy coverage.

Further, language should be interpreted in accordance with the way it would be understood by an average person, rather than in a technical sense. 76 Wn. App. 320, 323, 884 P.2d 941 (1994). Internal citations omitted.

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.

Since Pavlina's claims under the Policy are based on not being able to use the adjoining cul-de-sac, the question is whether the right to use the cul-de-sac was a right associated with Lot 1.

(ii) Definition of "Land" under the Policy

Schedule A of the Commitment for Title Insurance and the Title Policy incorporates Exhibit C for the legal description of the "land" insured under the Title Policy.³³ This legal description is identical to the one provided in Pavlina's Deed. The only question then is whether the right to use the adjoining easement is a right provided a part of the bundle of rights associated with Lot 1.

Exhibit C describes the "land" as "Lot 1 of said Short Plat recorded under Book 2 of Short Plats at page 298, records of Clark

³³ WASHINGTON REAL PROPERTY DESKBOOK, 3d Ed., § 39-10 (WSBA 1996).

County.”³⁴ Neither the Short Plat nor the Title Policy includes any description of the alleged easement. In other words, the cul-de-sac was not a right appurtenant to the rights associated with Lot 1.

A review of the Policy’s definition of “land” lends further support to the trial court’s decision:

1.(d) “land”: the land described or referred to in Schedule (A), and Improvements affixed thereto which by law constitute real property. **The term “land” does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.**

Not only does the property description **not** include any rights to use the adjoining cul-de-sac, the plain terms of the Title Policy make clear that the definition of “land” does not extend beyond the perimeter described in the legal description.³⁵ A title policy only insures against title

³⁴ CP 73.

³⁵ WASHINGTON REAL PROPERTY DESKBOOK, § 39.10(b).

defects to that “land” described in the policy. It does not cover “land” that, by clear language, is excepted from the legal description.³⁶

The law is well established on this issue. Indeed, the Washington Desk Book states that an appurtenant easement, such as the one found in the CC&Rs, must be specifically described in Schedule A to be covered by the policy “because no interest in land is insured except as described under this paragraph.” For this reason, “a conveyance will commonly refer to an easement appurtenant by reciting, following the description of the main fee parcel, ‘TOGETHER WITH an easement for ingress, egress....’”³⁷

Pavlina argues that the purpose of describing the “land” in a policy is to identify what property is covered by the policy, **and not** to limit its coverage. We agree. But, as here, when the Policy’s legal description is identical to that contained in the Deed, the argument has no application.

Also important is the distinction between “extended” and “standard” coverage policies.” Insureds can pay a higher premium to have extended protection. But that was not the case here. Pavlina only paid for standard coverage. For example, Pavlina relies heavily upon *Denny’s*

³⁶ 18 Stoebuck WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS, § 14.20 (2d Ed. 2004); citing *Bernhard v. Reischman*, 33 Wn. App. 569, 658 P. 2d 2 (1983).

³⁷ *Id.*

Restaurants, Inc. v. Security Union Title Ins. Co. In that case, the legal description of the Property contained in the preliminary commitment for title insurance erroneously excluded the west 60 feet of the property that *Denny's* thought it was purchasing.³⁸ But because it was an extended policy, Security Union had sent an inspector out to visit the property. After a visual inspection, the inspector established the property lines to include the 60 feet area.³⁹

Denny's proceeded to purchase an extended coverage policy from Security Union by removing the standard Schedule B exclusions found in standard coverage policies, such as the one in this case. This extended coverage policy protected against “off record defects” such as “encroachments, matters of boundary and location, unrecorded easements, and adverse possession claims.”⁴⁰

A few years later, *Denny's* neighbor sued over the use of the west 60 feet of property that *Denny's* had been using for parking.⁴¹ *Denny's*

³⁸ 71 Wn. App. 194, 197, 859 P. 2d 619 (1993).

³⁹ *Id.*

⁴⁰ *Id.* at 198, n. 2.

⁴¹ *Id.* at 199.

tendered its defense to Security Union, and after Security Union denied the claim, *Denny's* sued for coverage under the extended coverage policy.

The *Denny's* court had to first resolve the Washington Supreme Court's holding in *Shotwell v. Transamerica Title Insurance Company*⁴² and its own holding in *Transamerica v. Northwest Building Corporation*.

The *Denny's* court found the reasoning in *Shotwell* more persuasive because:

“the *Transamerica* court found that the definition of land contained within the title policy was not ambiguous; however, such a restrictive definition of land becomes ambiguous when construed together with the unexpressed additional terms extending coverage for off-record defects.”⁴³

The court then stated that it found:

“that *Transamerica's* restrictive definition of ‘land’ becomes ambiguous in light of circumstances indicating the purpose of the

⁴² 140 Wn. App. 215, 165 P.3d 57(2007). In *Transamerica Title Insurance Company v. Northwest Building Corporation*, the Court held that a policyholder insured under an *extended* coverage policy was not insured for an encroachment of parking stalls onto the adjoining land. 54 Wn. App. 289, 292-294, 773 P. 2d 431 (1989). The Court held that the policy was limited to the land contained in the legal description only and could not be expanded to include land outside of the legal description. *Id.* at 293. The court held that the parking stalls were expressly excluded by the unambiguous definition of land contained within the policy. *Id.* *Transamerica* was overruled by *Denny's Restaurants v. Security Union Title Insurance Company* because the *Denny's* court held that *extended* coverage policies *do* cover land not expressly included in the legal description. 71 Wn. App. 197, 204, 859 P 2d 619.

⁴² 71 Wn. App. 194, 207.

⁴³ 71 Wn. App. 194, 207.

extended coverage policy is to insure against off-record defects, defects which may fall outside the legal description of land contained within the policy.”⁴⁴

The *Denny’s* court therefore overruled *Transamerica* because its holding “overlook[ed] the rationale for extended coverage title insurance.”

The *Denny’s* court found that the extended policy language was ambiguous as to whether the extended coverage protected against “off records” defects such as the additional 60 feet of property.

But the *Denny’s* court did not, as Pavlina implies here, provide additional coverage under a standard coverage policy to cover easements not legally described in Schedule A.

(iii) “Subject To” does not create additional right in the Property.

Realizing he cannot point to anything in his Deed that expressly references the non-existent easement, Pavlina tries to argue that the following language in his Deed granted to him a right under the Policy to use the adjoining cul-de-sac: “*This conveyance is subject to Covenants, conditions, restrictions, and easements, if any, which may affect title, appearing in the public record, including those shown on any recorded plat or survey.*”

⁴⁴ *Id.*

This disclaimer is a limitation, and not an expansion, of the rights associated with property.⁴⁵ Thus, the legal rights associated to Lot 1 do not include the right to use the cul-de-sac. Therefore, the right to use the cul-de-sac is not protected under the Policy.

D. Exceptions Listed in a Policy Cannot be Used to Expand Insurance Coverage.

Knowing his Deed's legal description, and the chain of title, does not include a right to use the cul-de-sac, Pavlina turns to the 1988 CC&Rs, listed as exceptions under the Policy (Schedule B), to try and expand coverage.

⁴⁵ The law is well settled in Washington that the language ("subject to") that Pavlina relies upon does not satisfy the requirements for conveying an easement. In *Zunino v. Rajewski*, the Court of Appeals held that a deed stating that the conveyance was "subject to" was not legally sufficient to create an easement because this language did not express the intent to create an easement. 140 Wn. App. 215, 165 P. 3d 57 (2007). This is the exact language that Pavlina relies upon in this case to try and convince this Court that the Easement is part of the legal description.

"Subject to" simply states that the purchaser is buying the property with those encumbrances that are part of the public record. Add to this the language "which may affect," and it becomes clear that this clause was not intended to create additional rights (appurtenant) in the property. It does not mean, as Pavlina suggests, that the deeded property comes with additional amenities, such as an easement to cross the adjoining properties.

Exceptions listed in a title policy cannot be used to expand coverage.⁴⁶ Instead, exceptions listed in Schedule B (sometimes referred to as exclusionary clauses) “merely represent aspects of the property that the insurance company will not cover if it issues a title insurance policy.”⁴⁷ “The exceptions or exclusions are not intended to indicate known encumbrances or defects of title.”⁴⁸ They are instead intended to limit the scale of coverage. Therefore, the title search conducted by a title insurer before issuing the preliminary commitment is for the benefit of the insurer and not the insured.⁴⁹

The Washington Supreme Court has made this principle clear in *Barstad v. Stewart Title Guaranty Company*. In that case, the Court held that a list of exclusions in a preliminary report, which become part of the title policy once accepted by the insured, “merely represent aspects of the property that the insurance company will not cover if it issues a title

⁴⁶ *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 540, 39 P. 3d 984 (2002) *citing* DESKBOOK at 39-20.

⁴⁷ *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 540, 39 P. 3d 984 (2002) *citing* DESKBOOK at 39-20.

⁴⁸ *Id.*, *citing* DESKBOOK at 39-13.

⁴⁹ *Id.* *citing* DESKBOOK at 39-12.

insurance policy...the exceptions or exclusions are not intended to indicate known encumbrances or defects of title.”⁵⁰

The *Barstad* Court cited and relied upon several Oregon, California, Idaho, and Nevada cases supporting the policy that title insurers do not have an abstracter’s duty to list all known encumbrances on title. One of the cases followed by the Washington Supreme Court in *Barstad* is the Nevada Supreme Court’s decision in *Pioneer Title Insurance & Trust Company v. Cantrell*.⁵¹

In *Pioneer Title*, an insured sued a title insurance company claiming he relied upon a title exception to believe he had title to a strip of land. In fact, the grantor had reserved title to the strip.⁵² The Court held the exception, “purported to be only a paraphrase for purposes of identity of the defect...it was not intended to constitute a representation or a binding expression or opinion as to the legal nature or extent of that defect.”⁵³ The Court further held the insured could not rely on the exception as a legal opinion of the encumbrance’s scope.⁵⁴

⁵⁰ *Id.* at 530, citing DESKBOOK at 39.8.

⁵¹ 71 Nev. 243, 286 P. 2d 261 (1955).

⁵² *Id.*

⁵³ *Id.* at 247.

⁵⁴ *Id.*

That is exactly what Pavlina wants to do in this case.⁵⁵ He claims coverage because he allegedly saw and relied upon Schedule B's listing of the February 6, 1988 CC&Rs to believe he had a right to use the cul-de-sac. He claims he was not aware of the November 1, 1988 Amendment because it was not listed in Schedule B.⁵⁶ In other words, he relied exclusively upon the matters listed in the preliminary title report to define what additional rights were associated with Lot 1.

Pavlina attempts to show that his case is similar to *Shotwell* and *Denny's*. But those cases are distinguishable because, in *Shotwell*, an easement actually existed at the time of the conveyances and in *Denny's* policy provided "extended coverage."

In *Shotwell*, the claim for coverage involved an easement across the insured's property that was contained in the legal description, but the width of the easement was incorrect and conflicted with the exception listed in the title policy.⁵⁷ For this reason, the Court held that the ambiguity was to be resolved in favor of the insured.

⁵⁵ Appellant's Brief, p. 20.

⁵⁶ *Id.* at 20-21.

⁵⁷ 91 Wn.2d 161, 588 P. 2d 208 (1978).

The insurance policy at issue in *Shotwell* exempted a “right of way for existing roads.” The existing 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 title company argued that the easement was excluded from coverage because the legal description in the Deed matched the legal description in the title policy, which included the exclusionary phrase “subject to rights of way.”⁵⁸

The *Shotwell* court favorably cited a Texas opinion as holding that the “description of the land in the policy was for the purpose of identifying the land covered by the policy and not, as the appellant contends, for the purpose of limiting the insurance protection purchased.”⁵⁹ The *Shotwell* court held that the title company must insure against the easement because the legal description included the easement, although the description of the easement was ambiguous. Interpreting the legal description in a manner that excluded coverage, when the legal description included a vague reference to the easement, was against the policy of resolving ambiguities in favor of the insured.

⁵⁸ *Id.* at 169.

⁵⁹ *Id.*, citing *San Jacinto Title Guar. Co. v. Lemmon*, 417 S.W.2d 429, 431-32 (Tex. Civ. App. 1967).

Of course this makes sense; the purpose of the legal description is to define what property is covered by the title policy. Without this limitation, a title company could possibly be responsible for insuring property beyond what could be reasonably anticipated.

Shotwell actually supports First American's position. The term "land" defines what property is covered by the Policy. It only covers the property legally described in Schedule A and expressly excludes all easements and rights of way that are not expressly contained in the legal description.

But, in this case, neither the legal description in the Deed, nor that found in the Title Policy, includes a reference to an easement across the cul-de-sac. First American has only promised to insure that "land" legally described in Schedule A; the boundaries of Pavlina's property. First American did not agree to insure beyond the boundaries of Pavlina's property or to guarantee additional property rights. Since the rights in Lot 1 did not include the right to use the cul-de-sac, there is not coverage under the policy.

Also, as explained above, *Denny's* is inapplicable to this case because it included an "extended coverage" policy. In this case, Pavlina

only purchased a standard policy which means that matters outside the legal description are not covered by the Policy.

This distinction was clearly noted in *Santos v. Sinclair*. In that case, this court noted that *Transamerica* had been overruled by *Denny's*, but stated that the holding from *Transamerica* wouldn't have applied because the legal description contained in Schedule A of the title policy incorporated by reference a legal description containing an easement.⁶⁰ This court also noted that the title policy covered the property contained in Schedule A, and because the easement was incorporated by reference, it was covered by the policy.⁶¹ Thus, the easement was expressly incorporated into the legal description of the property, the court in *Santos* held that the easement was covered by the policy.

But that is not the case here. Pavlina's legal description does not contain or incorporate the alleged easement. Simply put, whatever property rights he acquired when he closed on Lot 1 did not include the right to use the cul-de-sac. And since First American only agreed to guarantee the rights appurtenant to Lot 1, there was no coverage under the

⁶⁰ 76 Wn. App. 320, 326 , 884 P. 2d 941 (1994).

⁶¹ 76 Wn. App. at 326.

Title Policy. As Judge Johnson concluded, this court’s opinion in *Santos* supports First American’s position in this case.

E. A Preliminary Commitment of Title Is Not an Abstract of Record and Therefore Cannot Be Relied Upon By the Insured to Expand Coverage under the Policy

Pavlina suggests that First American breached some legal duty to Pavlina by not disclosing the 1988 Amendment before closing.⁶² This argument has been soundly rejected by Washington courts.⁶³

The courts have drawn clear distinctions between preliminary commitments for title insurance (or commitment for title insurance) performed by a title company in anticipation of issuing a title policy and an abstract of title which is governed by RCW 48.29.010. Because they differ and involve different duties on behalf of title companies.

“[T]itle companies have no general duty to disclose potential or known title defects in preliminary title commitments.”⁶⁴ “[A] preliminary commitment is not a representation of the condition of title, but a ‘statement of terms and conditions upon which the insurer is willing to

⁶² While not squarely making the argument, Pavlina points out on pages 7 and 22 that part of the premium included a “Title Search [and] examination. . .” Since Pavlina fails to assign error on this issue and fails to squarely raise this as an argument, this court should decline to consider this argument.

⁶³ *Barstad v. Stewart Title Guarantee Co.*, 145 Wn.2d 528, 530, 39 P. 3d 984 (2002).

⁶⁴ *Id.*

issue its title policy, if such offer is accepted.”⁶⁵ The preliminary commitment is merely “an offer to issue the title insurance subject to the stated conditions.”⁶⁶

In contrast, an abstracter, in preparing an abstract of title, has a duty to accurately report and disclose to their client all defects and encumbrances.⁶⁷ An abstract of title is a “written representation, provided pursuant to a contract...listing all recorded conveyances, instruments, or documents that impact the chain of title...intended to be relied upon by the person who has contracted for...such representation.”⁶⁸ Conversely, preliminary commitments “are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report.”⁶⁹

⁶⁵ *Id.* at 536 quoting RCW 48.29.010(3)(c).

⁶⁶ *Id.*

⁶⁷ *Id.* at 536, n. 14.

⁶⁸ *Id.* at 536 (relying on RCW 48.29.010(3)(b)).

⁶⁹ *Id.*

Put another way, a preliminary commitment “provides assurance that upon closing, a policy or policies will be issued subject only to those exceptions agreed upon or as permitted by the proposed insured.”⁷⁰

Therefore, under Washington law, an insured **does not** have a right to rely upon matters placed into a preliminary commitment of Title as a basis to expand coverage or to sue the title company. This court should therefore reject any direct or indirect attempts by Pavlina to impose liability based upon matters listed in the preliminary title report.

E. Pavlina is not entitled to Attorneys’ Fees or Costs.

Because the right to use the adjoining cul-de-sac was not a right appurtenant to Lot 1, First American did not breach the Title Policy. Pavlina is therefore not entitled to recover his attorneys’ fees or costs.

II. CONCLUSION

Under the standard title policy at issue here, First American agreed to insure marketable title to Lot 1. Because it **was not** a right associated with Lot 1, marketable title did not include the right to use the adjoining cul-de-sac. In addition, Pavlina cannot rely upon matters listed as an exception to coverage as a means to expand coverage under the Policy. Pavlina also does not have a right to rely upon matters listed as an

⁷⁰ *Id.* at 539, *citing* 3 WASH. STATE BAR ASS’N, WASHINGTON REAL PROPERTY DESKBOOK § 39.10, at 39-14 (3d Ed. 1996).

exception to coverage as a basis to sue the title company independent of the Policy. Pavlina's appeal should therefore be denied.

Dated this 21st day of December, 2009.

SCHWABE, WILLIAMSON & WYATT, P.C.

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CERTIFICATE OF FILING

I hereby certify that on the 21st day of December, 2009, I caused to be filed the original and one copy of the foregoing RESPONDENTS' RESPONSE BRIEF with the State Court Administrator at this address:

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COURT OF APPEALS
DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY Phd
DEPUTY

I hereby certify that on the 21st day of December, 2009, I served
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