IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DENNIS W. PAVLINA, Appellant, v. FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation., Respondent.	No. 39390-5-II UNPUBLISHED OPINION

Hunt, J. — Real estate developer Dennis W. Pavlina appeals the trial court's grant of summary judgment to First American Title Insurance Company in his breach of contract lawsuit for wrongful denial of coverage and wrongful rejection of tendered defense of his claim seeking an easement across an adjacent property to provide access to his title-insured property. Pavlina argues that the trial court erred in ruling that his title insurance did not cover this easement. We affirm.

FACTS

These background facts are not in dispute. In 1988, the developer of the "Park Place Corporate Center" in Vancouver created a right of easement for "[i]ngress, [e]gress and [p]arking" across each lot ("easement"). Clerk's Papers (CP) at 123-24. This easement was expressed in the "Covenants, Conditions and Restrictions" (CC&Rs) recorded with Clark County

in February 1988. CP at 46. Shortly thereafter, however, in October 1988, the developer recorded an Amendment removing two lots, Lot One and Lot Two, from the CC&Rs, thereby extinguishing the easement for these two lots. A cul-de-sac and driveway adjacent to Lot One served and lay entirely within the boundaries of Lot Two, which the cul-de-sac connected to an adjacent public street, Northeast 77th Avenue; but there remained no immediately identifiable access for Lot One, bordered by two public streets for which there were apparently no "curb cuts."[1]

I. Title Insurance Policy

In 2002, after securing a Commitment for Title Insurance (Commitment)[2] from First American, Pavlina purchased Lot One to construct a commercial office building. The Commitment did not mention any easement in its legal description of Lot One. "Schedule B" of the Commitment, "Exceptions [to coverage]," CP at 35, (1) referenced the CC&Rs, noting, "The [insurance] policy or policies to be issued will contain exceptions to . . . protective covenants and/or easements [as listed in the CC&Rs]," CP at 35, 38; and (2) expressly excepted from coverage "[e]asements, claims of easement or encumbrances which are not shown by the public records," CP at 35, various public utility easements, and "[protective covenants and/or easements]." CP at 36, 38. The Commitment did not mention the 1988 Amendment removing Lots One and Two from the CC&Rs. Believing that he had an ingress, egress, parking and utility

[1] Pavlina's counsel explained at oral arguments that these adjacent public streets had no "curb cuts" and, therefore, provided no access, to his client's property.

[2] For purposes of our analysis, the language of this Commitment is essentially identical to the Policy of Title Insurance that First American issued to Pavlina in connection with his purchase of Lot One.

rights easement across Lot Two, as set forth in the 1988 CC&Rs, Pavlina purchased Lot One and began constructing his office building. With construction nearing completion in early 2004, the owner of Lot Two informed Pavlina about the CC&Rs' 1988 Amendment removing Lots One and Two from the CC&Rs, including the CC&Rs' creation of an easement, and explained that Pavlina's Lot One, therefore, had no right of easement through Lot Two.

II. Procedure

In January 2004, Pavlina filed a claim under his title insurance policy against First American, tendering defense of his title and of his right to use the easement on Lot Two. First American denied coverage on grounds that the CC&Rs and corresponding easement "were raised as [an] exception[] to the title and were excluded from coverage in [First American's] policy [to Pavlina]." CP at 83.

In July 2004, Pavlina sued the owner of Lot Two.[3] The parties to this lawsuit agreed to submit to binding arbitration, which resulted in Pavlina's payment of $250,000 to the owner of Lot Two to secure the easement. Pavlina then sued First American, in December 2004, for breach of the terms of his title insurance policy to recover the cost of acquiring the easement from the owner of Lot Two.[4] The parties filed cross-motions for summary judgment. Granting summary judgment to First American, the trial court ruled that (1) "the easement in question is not included in the legal description . . . [or] in the short plat which is referenced," CP at 203; (2) the easement is noted only in the exceptions to the policy, and (3) "no legal precedent has been identified which found coverage for an easement through the exceptions to the policy." CP at

[3] Clark County Superior Court, Cause No. 04-2-03930-8.

[4] Clark County Superior Court, Cause No. 06-2-06910-6.

203.

Pavlina appeals.

ANALYSIS

Pavlina argues that we should construe First American's title insurance policy for Lot One as including his right to an easement across Lot Two, even though the policy's legal description of Lot One does not include this easement and, instead, mentions easements and CC&Rs only as exceptions to coverage. Citing no authority in support, he argues that he is entitled to recover from First American the $250,000 he paid the owner of Lot Two for the easement because the title insurance policy did not mention the 1988 Amendment to the CC&Rs that excluded Lot One from the CC&Rs' original provision of this easement. His argument fails.

A trial court will grant a motion for summary judgment if the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). When facts are not in dispute and the issue of insurance coverage depends solely on the language of the policy, we interpret insurance policy language as a question of law; therefore we review the trial court's decision de novo. *Santos v. Sinclair*, 76 Wn. App. 320, 323-24, 884 P.2d 941 (1994).

Here, as the trial court correctly observed, no cognizable Washington law imposes title insurance coverage for an easement that a policy references only through exceptions to coverage and not in its legal description of the property covered by the title insurance. On the contrary, our Washington Supreme Court explained in *Barstad v. Steward Title Guar. Co., Inc.*, concerning a preliminary commitment for insurance:

> [E]xclusionary clauses merely represent aspects of the property that the insurance company will not cover if it issues a title insurance policy . . . [and that] exceptions or exclusions are not intended to indicate known encumbrances or defects of title.

145 Wn.2d 528, 540, 39 P.3d 984 (2002).

Pavlina does not persuade us to expand the law of insurance policy coverage. Instead, we agree with the trial court's ruling and with First American that

> whatever property rights [Pavlina] acquired when he closed on Lot [One] did not include the [easement] . . . [and therefore] there was no coverage [for the easement] under the [t]itle [p]olicy.

Br. of Resp't at 23-24; *see also* CP at 203. Nor does Pavlina persuade us that First American breached a duty by failing to reference the CC&Rs' Amendment in its Commitment, even though it referenced the CC&Rs, which included the easement in question in its exceptions to coverage. Holding that First American breached a duty here would spur land purchasers' unjustified reliance on exclusionary clauses, which, as the Supreme Court noted in *Barstad*, "merely represent aspects of the property that the insurance company will not cover if it issues a title insurance policy." 145 Wn.2d at 540.

We affirm.[5]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Van Deren, J.

[5] Because he is not the prevailing party, we deny Pavlina's request for attorney fees. First American does not request attorney fees.