

No. 88673-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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EXPEDIA, INC., a Washington corporation; EXPEDIA, INC., a Delaware corporation; HOTELS.COM, L.P., a Texas limited liability partnership; HOTELS.COM, G.P., LLC, a Texas limited liability company; HOTWIRE, INC., a Delaware corporation; TRAVELSCAPE, a Nevada limited liability company,

Filed

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Plaintiffs/Petitioners,

Clerk of Supreme Court

vs.

STEADFAST INSURANCE CO., a Delaware corporation; ZURICH AMERICAN INSURANCE COMPANY, a New York corporation; ROYAL & SUN ALLIANCE, a foreign corporation; ARROWPOINT CAPITAL CORP., a Delaware corporation; ARROWOOD SURPLUS LINES INSURANCE COMPANY, a Delaware corporation; ARROWOOD INDEMNITY COMPANY, a Delaware corporation,

Defendants/Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, and has an interest in the rights and obligations of insureds under Washington law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case is before this Court on discretionary review of several superior court orders bearing on the extent to which an insurer may delay a determination whether it owes a duty to defend its insured in underlying litigation, so that the insurer may complete discovery related to coverage defenses under the policy.

This action was filed by Expedia, Inc., a Washington corporation, and related entities (collectively Expedia), against Zurich American Insurance Company and other insurers (collectively Zurich), for declaratory judgment, insurance bad faith, and violation of Washington's Consumer Protection Act, Ch. 19.86 RCW (CPA). The underlying facts are drawn from the briefing of the parties, the rulings of the superior court, and the Court of Appeals order denying discretionary review. See

Expedia Br. at 1-4, 5-13; Zurich Br. at 1-6, 8-22; Expedia Reply Br. at 1-2; CP 1883-87 (Order Granting Zurich & Steadfast's Motion for Summary Judgment In Part & Denying in Part, Mar. 2, 2012); CP 1714-17 (Proposed Order Granting in Part & Denying in Part The Motion For Summary Judgment of Defendants Zurich American Insurance Company & Steadfast Insurance Company); CP 4540-42 (Order Granting Defendants' Motion for Rule 56(f) Continuance, Apr. 26, 2012); CP 4907-09 (Order re Plaintiffs' Motion to Set Summary Judgment Hearing Date & For Protective Order, Aug. 20, 2012); Order Denying Discretionary Review, Court of Appeals, Division I, Cause #69341-7-I, Mar. 11, 2013.

For purposes of this amicus curiae brief, the following facts are relevant.¹ Expedia conducts an online hotel reservations business. It makes hotel reservations for customers and collects the discounted hotel rental charges and estimated local taxes, while charging a fee for its services. During a period spanning approximately six years, Expedia carried commercial liability insurance with Zurich. Six separate policies covering this period of time required Zurich to indemnify Expedia for

¹ The record on review is extensive and the parties have differing views of what occurred below and what issues are properly before this Court. WSAJ Foundation has not reviewed the entire record, and its rendition of the facts for purposes of this brief is based upon what appears to be undisputed in the briefing before the Court, except where indicated otherwise.

certain losses and to defend it in any suit seeking damages covered under the policies.²

In 2005, the City of Los Angeles sued Expedia for allegedly failing to collect and remit the full amount of local hotel occupancy taxes owed the city as a result of Expedia's business. Expedia tendered this claim to Zurich, which rejected it for various reasons and refused to provide Expedia a defense. Expedia defended this lawsuit at its own expense.

Over the course of the next five to six years, Expedia became embroiled in approximately 80 similar tax-related lawsuits. Zurich Br. at 11 (indicating approximately 80 lawsuits "all told"); Expedia Br. at 8 (referring to tender of 62 additional lawsuits); Zurich Br. at 3 (referring to "nearly sixty" tendered lawsuits); *id.* at 15-16 (referring to 56 lawsuits tendered in November 2010, and six additional lawsuits tendered in September 2011). Some of these were damage actions similar to the City of Los Angeles litigation, some were lawsuits seeking declaratory relief, and others involved litigation initiated by Expedia. These cases were defended, or in some instances prosecuted, by Expedia at its own expense. Some of the cases were settled or fully adjudicated, but as of 2010-11 most of them remained unresolved.

During 2010 and 2011, Expedia tendered these lawsuits to Zurich, again requesting a defense and indemnification. Zurich denied any duty to

² Expedia characterizes the duty to defend provisions of these policies as involving "standard form language." Expedia Reply Br. at 13. Zurich does not appear to take issue with this description. *See* Zurich Br. at 12.

defend or indemnify these claims on a number of grounds, and Expedia has continued to defend (or prosecute) these lawsuits at its own expense.³

In 2010, Expedia sued Zurich for declaratory relief regarding its duty to defend and indemnify, later amending the complaint to include claims for insurance bad faith and violation of the CPA. Zurich moved for summary judgment, contending that it had no duty to defend or indemnify because the underlying claims do not involve "damages," as defined in the policies, and on the basis of two exclusions apparently common to the six policies at issue.⁴ The superior court ruled that Zurich is entitled to summary judgment as a matter of law on four of the six policies in question. However, the court denied summary judgment as to two of the policies, apparently concluding that it could not decide as a matter of law that there was no coverage under these policies. See Zurich Br. at 17-18; CP 1885-86. In so doing, the superior court declined to enter Expedia's proposed order on summary judgment, which would have provided that Zurich has a duty to defend Expedia under these two policies. See Expedia Br. at 10; CP 1714-17.

Expedia subsequently brought its own motion for summary judgment seeking, among other things, a determination that Zurich has a

³ Zurich denied these claims on various grounds, including that the claims did not involve "damages" as defined in the policies, the policies were obtained through misrepresentation, the claims involved known losses, and that belated tender of the claims by Expedia had prejudiced Zurich's rights. See Zurich Br. at 3, 15-16.

⁴ Zurich asserts that this motion did not raise all its potential arguments as to why it has no duty either to defend or pay. See Zurich Br. at 16.

duty to defend under the remaining two policies.⁵ In response, Zurich sought a continuance of the motion under CR 56(f) pending further discovery regarding coverage matters and policy defenses, including late tender by Expedia of the underlying claims. The superior court granted the motion for continuance pending completion of discovery by Zurich. See CP 4540-42. Expedia responded to some discovery requests by Zurich, but challenged others as irrelevant to whether Zurich owed a duty to defend. Expedia sought a protective order to stop Zurich from pursuing additional discovery until the underlying lawsuits were resolved, and moved the superior court to set a hearing date for Expedia's motion for summary judgment. See Expedia Br. at 10.

The superior court denied Expedia's motion to set a summary judgment hearing date and for a protective order. See CP 4907-09. In so doing, the court indicated that if it could be shown that further discovery by Zurich prejudiced Expedia's rights in the underlying lawsuits, then Expedia could seek to stay the declaratory action. In reaching this result, the trial court took into account the perceived impact on Zurich of Expedia's late tender of many of the underlying claims, and Expedia's ability to continue defending the underlying lawsuits on its own until the declaratory judgment action against Zurich could be resolved. See Expedia Br. at 12; Zurich Br. at 21-22.

⁵ Zurich notes that this summary judgment motion also sought determinations regarding insurance bad faith and CPA liability. See Zurich Br. at 19.

Expedia sought discretionary review before Division I of the Court of Appeals of the superior court's order denying a summary judgment hearing date and protective order, and related orders. The appellate court denied review. See Order Denying Discretionary Review at 8. This Court granted Expedia's motion for discretionary review.

III. ISSUES PRESENTED

1. When an insured tenders a claim to its liability insurer, and establishes that a conceivable basis for coverage exists under Washington's "complaint allegation rule," may the insurer delay a court determination whether it has a duty to defend in order to conduct discovery relating to coverage defenses?
2. In resolving the above question, may the court take into account whether the insured may have prejudiced the insurer's rights under the policy because of a late tender of the claim?

IV. SUMMARY OF ARGUMENT

Insureds obtain liability insurance in order to provide security and peace of mind. In exchange for financial consideration paid by the insured, the liability insurer agrees to defend and indemnify its insured. A liability insurer's duty to defend is separate and distinct from, and broader than, its duty to indemnify. While the duty to indemnify applies only when there is an *actual* basis for coverage, under the "complaint allegation rule" the duty to defend applies when the underlying complaint sets forth any *conceivable* basis for coverage. Only if the claim is clearly not covered is the insurer relieved of the duty to defend, and any court determination to this effect only operates prospectively.

When the complaint allegation rule is met, an insurer fails to defend the insured at its peril, and may be liable for common law and statutory remedies. The insurer has the option of providing a defense under a reservation of rights, and/or initiating a declaratory judgment action to prove there is no conceivable basis for coverage triggering the duty to defend. Pending a declaratory judgment determination, the insurer must continue to view the complaint and policy provisions in a light most favorable to the insured, and may not seek to interject extrinsic facts in order to absolve itself of the duty to defend. At the same time, an insurer that pursues a declaratory judgment determination seeking to be relieved of the duty to defend may not do so in a manner that might prejudice the insured's defense of the underlying action. Any such conduct would undermine the duty to defend and exalt the insurer's interests over the insured's in contravention of Washington's "equal consideration" rule.

For the same reasons, an insurer may not attempt to forestall an insured's effort to obtain a court ruling whether the insurer is obligated to defend by seeking discovery in the declaratory judgment action regarding coverage defenses it asserts under the policy. This strategy is inconsistent with the complaint allegation rule, and the insurer's obligation to give equal consideration to the rights of its insured.

To the extent the insurer contends the insured's own conduct in belatedly tendering the insurance claim has actually prejudiced the insurer, this is a separate and distinct inquiry from whether the duty to defend

arises under the complaint allegation rule. Allowing an insurer to inject a claim of prejudice to alter or counteract operation of the complaint allegation rule would undermine its broad duty to defend under Washington law, improperly conflating the duty to defend with the duty to indemnify. Ultimately, upon proof of actual prejudice, the insurer may be entitled to reimbursement (or offset) for some or all of the defense costs incurred (or paid) regarding the insured's defense, depending upon the particular facts and circumstances. However, this inquiry must await resolution of coverage issues on the merits.

V. ARGUMENT

Introduction

This argument assumes that Expedia has properly preserved the issues raised, and either has met or can meet the threshold requirements under Washington law for triggering Zurich's duty to defend with respect to the two policies subject to review.⁶ Based on this assumption, the argument below focuses on the law regarding the duty to defend, as it relates to review of the superior court's refusal to grant Expedia's motions for a summary judgment hearing date and protective order.

⁶ In its briefing, Zurich contends that, although the superior court denied its motion for summary judgment regarding the two remaining policies, it did not do so on the basis that Expedia had met the required threshold showing entitling Expedia to a defense under these two policies. See Zurich Br. at 1-2. On the other hand, Expedia argues that, even though the superior court did not enter its proposed order on Zurich's motion for summary judgment, which would have expressly recognized a duty to defend as to these two policies, the denial of summary judgment implicitly establishes Expedia's entitlement to a defense under these policies. See Expedia Br. at 9-11.

A. Overview Of Washington Law Regarding A Liability Insurer's Duty To Defend.

In a series of recent decisions, this Court has outlined in detail the nature of a liability insurer's duty to defend its insured, and clarified the rights and obligations of the insured and insurer. See Nat'l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 297 P.3d 688 (2013); Am. Best Food, Inc. v. Alea London, 168 Wn.2d 398, 229 P.3d 693 (2010); Mut. of Enumclaw v. USF Ins. Co., 164 Wn.2d 411, 191 P.3d 866 (2008); Mut. of Enumclaw v. Dan Paulson Constr., 161 Wn.2d 903, 169 P.3d 1 (2007); Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 164 P.3d 454 (2007); Truck Ins. Exch. v. VanPort Homes, 147 Wn.2d 751, 58 P.3d 276 (2002). These cases provide a clear picture of Washington law regarding the duty to defend, and the key features of this duty are now well understood.

In exchange for financial consideration paid by insureds, liability insurers agree to both defend and indemnify their insureds for claims covered by the policy. See generally Thomas V. Harris, Washington Insurance Law §11.01 (3rd ed. 2010). Understandably, insureds procure these benefits for security and peace of mind. See Immunex, 176 Wn.2d at 878 (recognizing “[t]he bargained-for peace of mind comes from the assurance that the insured will receive prompt payment of money in times of need”; quoting Oregon Auto. Ins. Co. v. Salzberg, 85 Wn. 2d 372, 376-77, 535 P.2d 816 (1975)); see also Coventry Assocs. v. American States Ins. Co., 136 Wn. 2d 269, 283, 961 P.2d 933 (1998) (stating “the

insurance contract brings the insured a certain peace of mind that the insurer will deal with it fairly and justly when a claim is made”).

The insurer’s duty to defend, in particular, “is a valuable service paid for by the insured and one of the principal benefits of the liability insurer’s policy.” Woo, 161 Wn.2d at 54. In many cases it is much more valuable to the insured than indemnification; for example, when the defense of the underlying claim is successful, or when defense costs exceed the amount of the settlement or judgment entered in the underlying claim. See Alea London, 168 Wn. 2d at 405 (stating “[t]he entitlement to a defense may prove to be of greater benefit to the insured than indemnity”); Truck Ins., 147 Wn. 2d at 765 (stating “[t]he defense may be of greater benefit to the insured than the indemnity”).

The duty to defend is separate from and substantially broader than the duty to indemnify. See Immunex at 878; Truck Ins. at 760. It arises when a complaint is filed in the underlying action. See Woo at 52. Under what is referred to here as Washington’s “complaint allegation rule,” the liability insurer has a duty to defend when there is a *conceivable* basis for coverage based on the allegations of the complaint, as opposed to an *actual* basis for coverage required for the duty to indemnify. See id. at 53-60. The allegations of the complaint are liberally construed in favor of triggering the insurer’s duty to defend. See id. at 53. Similarly, policy provisions and applicable law must be viewed in a light most favorable to the insured. See Alea London at 412-14.

If it is not clear from the face of the complaint whether the claim is conceivably covered, "the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend." Woo at 53. The insurer may rely on facts extrinsic to the complaint to trigger the duty to defend, but it may not rely on such facts to deny a defense. See id. at 54.

As explained in Truck Ins.:

Truck Insurance denied coverage claiming that after an investigation it had determined that no coverage existed. There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both the exceptions favor the insured. If coverage is not clear from the face of the complaint but may exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has an obligation to defend. Similarly, facts outside the complaint may be considered if “(a) the allegations are in conflict with facts known to or readily ascertainable by the insurer or (b) the allegations of the complaint are ambiguous or inadequate.” An insurer has an obligation to give the rights of the insured the same consideration that it gives to its own monetary interests. Put simply, an insurer may not rely on facts extrinsic to the complaint in order to *deny* its duty to defend where, as here, the complaint can be interpreted as triggering the duty to defend.

147 Wn.2d at 761 (citations omitted).⁷

Once the duty to defend attaches under the complaint allegation rule, the insurer must continue to defend its insured until a court determines that the underlying claim is clearly not covered under the policy. See Alea London at 405; see also Immunex at 887-88 (stating the insurer “may be held responsible for the reasonable defense costs incurred by its insured until the trial court determined [the insurer] had no duty to

⁷ Zurich takes issue with this principle, citing several cases for the proposition that an insurer may present extrinsic evidence negating the duty to defend. See Zurich Br. at 31-41. These cases are discussed in § B below.

defend”). These rules stem from the separate and distinct nature of the duty to defend, the public policy underlying Washington insurance law, and the insurer’s quasi-fiduciary obligation not to put its own interests ahead of its insured’s in contravention of the "equal consideration" rule. See Tank v. State Farm Fire & Casualty Co., 105 Wn.2d 381, 386, 715 P.2d 1133 (1986); see also Truck Ins. at 761; Immunex at 887.

A liability insurer’s failure or refusal to defend can have drastic consequences for both the insured and the insurer. An insurer that fails or refuses to defend is subject to claims for breach of contract, insurance bad faith (including coverage by estoppel), and CPA liability, if it is subsequently determined that the duty to defend applies. This result may occur regardless of whether it is ultimately determined that the insurer has no duty to indemnify under the policy. See Truck Ins. at 759.

However, the insurer is not without a safe harbor. If there is uncertainty regarding the duty to defend, the insurer may choose to defend under a “reservation of rights,” and initiate a declaratory judgment action seeking a determination that the duty to defend does not apply. An insurer invoking the reservation of rights device thereby avoids potential liability for failing to defend the insured. Again, as explained in Truck Ins.:

Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination. If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. “When that course of action is taken,

the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay.”

147 Wn.2d at 761 (citations omitted); accord Alea London at 405; Woo at 54. An insurer may also refuse to defend, and initiate a declaratory judgment action. See Harris, supra §§ 14.01-.02; see also Immunex at 884-85 (discussing insurer’s decision whether to defend).⁸

Regardless of whether the insured refuses to defend and initiates a declaratory judgment action or initiates such an action while defending under a reservation of rights—or, for that matter, is responding to a declaratory judgment action initiated by the insured—it is clear that the insurer cannot pursue declaratory judgment while the underlying litigation is pending if it would potentially prejudice the insured's defense in the underlying action. To do so would elevate the insurer’s interests over those of the insured and violate the insurer's obligations under the equal consideration rule. See Harris at §14.02; Tank, 105 Wn.2d at 387-88; Holland America Ins. v. Nat’l Indem., 75 Wn.2d 909, 912-15, 454 P.2d 383 (1969); Dan Paulson, 161 Wn.2d at 913-19.

Because the duty to defend under the policy is triggered whenever there is a conceivable basis for coverage, a declaratory judgment of no coverage operates prospectively only. See Immunex at 885 (concluding insurer defending under reservation of rights that prevailed on coverage determination could not recoup prior defense costs, while allowing that

⁸ As noted above, Zurich chose not to accept the tenders of defense by Expedia and defend under a reservation of rights, nor did it initiate a declaratory judgment action in 2005 or thereafter. See supra at 3-4.

separate late tender defense may affect this outcome). Only when a declaration of no coverage is made does the conceivable coverage from which the duty to defend arises cease to exist. This result is dictated by the separate and distinct nature of the duty to defend, designed to provide security and peace of mind for the insured, at the very least until coverage issues are fully sorted out.⁹

Lastly, determining whether the duty to defend has been triggered, based on application of the complaint allegation rule, is a separate and discrete inquiry from whether an insurer may be relieved of its duties to defend or indemnify because of a coverage defense such as a claim of "late tender" by the insured. See Immunex at 889 (explaining application of late tender defense in duty to defend context involving a reservation of rights and insured's claim for pre- and post-tender defense costs). A late tender defense requires the insurer to prove that it was "actually and substantially prejudiced." Id. at 890; see also Staples v. Allstate Ins. Co., 176 Wn.2d 404, 416-21, 295 P.3d 201 (2013) (discussing actual prejudice requirement in non-duty to defend context involving claim of failure to cooperate); USF Ins., 164 Wn.2d at 423 (indicating late tender rule allows insured to tender at any time, subject to actual prejudice analysis).

Even if the insurer meets its burden of proving actual prejudice, the insured does not automatically forfeit his rights regarding a defense; instead, the insurer is merely entitled to offset or recoup defense costs

⁹ Contrast the dissent in Immunex, which unsuccessfully urged that a declaration of no coverage means "the insurer never had the duty to defend." See 176 Wn.2d at 892 (Wiggins, J., dissenting).

necessary to ameliorate the prejudice. Thus, in Immunex, which involved a reservation-of-rights defense, after this Court held that a determination of no coverage extinguishes the duty to defend prospectively only, it went on to hold that a successful late tender defense would not result in a forfeiture or otherwise excuse the duty to defend except to the extent that the insurer proves actual prejudice. See id. at 890 n.5 (stating “an insured’s breach of a policy provision does not result in a forfeiture unless, *and then only to the extent*, that the breach prejudices the insurer”; emphasis added); id. at 891 (stating “[a]n insurer who owes a duty to defend may nonetheless be excused from its obligation *to the extent* it demonstrates actual and substantial prejudice flowing from its insured’s untimely tender of the claim”; emphasis added).

Generally the issue of actual prejudice involves questions of fact that cannot be resolved without trial. See Staples, 176 Wn.2d at 419 (stating “[p]rejudice is an issue of fact that will seldom be established as a matter of law”); Immunex at 891 (similar). As a consequence, unless actual prejudice can be established by the insurer as a matter of law, an insurer’s allegations of prejudice should not preclude a determination that the underlying claim is conceivably covered under the complaint allegation rule. If the existence and amount of actual prejudice are later established at trial, then and only then will the insurer be able to offset or recoup defense costs to the extent necessary to account for proven prejudice. In this way, the actual prejudice determination will customarily

occur after the duty to defend issue is resolved pursuant to the complaint allegation rule. There is no element of unfairness in this result, as this is the business of the insurer, and this is one of the risks it has accepted in offering such coverage. See Immunex at 884 (recognizing “Washington cases regarding the duty to defend ... have squarely placed the risk of the defense decision on the insurer’s shoulders”).

B. When The Complaint Allegation Rule Is Met, An Insurer May Not Forestall A Determination That The Duty To Defend Has Been Triggered In Order To Conduct Discovery Regarding Coverage And Policy Defenses; A Claim Of Prejudice By The Insurer Should Not Alter This Application Of The Rule.

Zurich argues that it is entitled to conduct discovery regarding its coverage and policy defenses before the superior court rules on the duty to defend, and that it is further entitled to rely on extrinsic evidence obtained during discovery to negate any duty to defend. See Zurich Br. at 31-32, 37-42. This argument is contrary to the complaint allegation rule discussed in § A above, and should be rejected. Under this rule, the only material facts relating to the duty to defend are the allegations of the complaint(s), the language of the policy(ies), and any extrinsic evidence that *supports* the duty to defend. Extrinsic evidence that tends to negate the duty to defend is not material and may not be considered. See Alea London, 168 Wn. 2d at 404-05; Woo, 161 Wn. 2d at 52-54; Truck Ins., 147 Wn.2d at 760-61. Thus, to the extent that the partial denial of Zurich’s motion for summary judgment reflects a determination that the allegations of one or more of the complaints against Expedia are conceivably covered under Zurich’s policies, the court should have declared that the duty to defend

had been triggered as to those complaints.¹⁰ Similarly, as to Expedia's motion for a hearing on its summary judgment motion and protective order regarding the duty to defend, the court should have entertained the motion without further discovery regarding Zurich's coverage defenses.¹¹

In support of its argument that it should be permitted to discover and present extrinsic evidence negating the duty to defend, Zurich relies primarily on Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 38 P.3d 322 (2002). See Zurich Br. at 31-32, 38-42. In Overton, without any explanation, a majority of this Court considered extrinsic evidence that the insured was aware of pollution on his property before purchasing the insurance policies, in the course of determining that there was no coverage under the policies. See 145 Wn. 2d at 429-31. The majority's decision impacted both the duty to defend and the duty to indemnify alike. The Overton dissent took issue with the majority's failure to consider the duty to defend and the duty to indemnify separately, urging that the duty to defend should have been resolved based solely on the allegations of the underlying complaint, and that extrinsic evidence of the insured's knowledge could *not* be considered in resolving the duty to defend issue. See id. at 441-45 (Chambers, J., dissenting). This dissent presages the

¹⁰ See CR 56(c) (providing that summary judgment "shall be rendered forthwith if ... there is no genuine issue as to any material fact"); see also Rossiter v. Moore, 59 Wn. 2d 722, 724, 370 P.2d 250 (1962) (stating materiality is based on governing substantive law); Impecoven v. Department of Revenue, 120 Wn. 2d 357, 365, 841 P.2d 752 (1992) (approving summary judgment for nonmoving party where material facts are undisputed).

¹¹ See CR 56(f) (authorizing continuance of summary judgment to discover or present evidence); Pitzer v. Union Bank of California, 141 Wn. 2d 539, 556, 9 P.3d 805 (2000) (indicating CR 56(f) continuance should be denied where the evidence is not material).

complaint allegation rule as refined by the Court approximately 10 months later in Truck Ins.

Even if Overton is viewed as supporting Zurich's argument,¹² the opinion predates and conflicts with the complaint allegation rule as subsequently clarified in Truck Ins. and its progeny. Zurich does not attempt to harmonize Overton with these cases. To the extent Overton and Truck Ins. conflict, Truck Ins. should be controlling as the Court's more recent pronouncement on the subject. See Matsyuk v. State Farm Fire & Cas. Co., 173 Wn. 2d 643, 659, 272 P.3d 802 (2012).¹³

Zurich's argument (and the analysis of the majority in Overton) is incorrect because it collapses the duty to defend with the duty to indemnify, and undermines the relatively broad and independent nature of the duty to defend. See supra § A. If an insurer can delay providing a defense in order to conduct discovery with a view toward unearthing extrinsic evidence negating coverage, the insured is deprived of the "security and peace of mind [that] are the principal benefits of insurance[.]" Immunex, 176 Wn.2d at 878. Accordingly, the majority opinion in Overton should not be controlling here, and there appears to be

¹² The proposition for which Zurich cites Overton is not stated in the majority opinion and is only implicit in the majority's consideration of extrinsic evidence. However, the opinion is not clear whether the insured in Overton objected to the insurer's reliance on extrinsic evidence of his prior knowledge of the pollution. See 145 Wn.2d at 429-30. Instead, the insured tried unsuccessfully to amend equivocal testimony regarding his knowledge of the pollution. See id.

¹³ Zurich suggests that Overton can only be overruled upon a showing that it is incorrect and harmful. See Zurich Br. at 39. However, it would appear that Overton has already been overruled sub silentio. See Matsyuk, 173 Wn.2d at 659 (quoting Lunsford v. Saberhagen Holdings, Inc., 166 Wn. 2d 264, 280, 208 P.3d 1092 (2009), for the proposition that "[a] later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law").

no legitimate basis for delaying a hearing or decision on whether Zurich owes a duty to defend the complaints against Expedia under either of the insurance policies in question.¹⁴

Zurich also appears to argue that its claim of prejudice based on Expedia's late tender of the complaints alters the application of the complaint allegation rule, and permits discovery and consideration of extrinsic evidence negating the duty to defend. In support of the argument, Zurich characterizes the Court's decision in Immunex at 891 as "affirm[ing] that discovery on the issue of whether an insured's late notice has prejudiced the insurer is appropriate." Zurich Br. at 41-42. This

¹⁴ In addition to Overton, Zurich cites several other cases for the proposition that Washington courts have permitted the use of extrinsic evidence to negate the duty to defend. See Zurich Br., at 40-41 (citing Campbell v. Tigor Title Ins. Co., 166 Wn.2d 466, 475, 209 P.3d 859 (2009); Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 428-32, 983 P.2d 1155 (1999), *review denied*, 140 Wn.2d 1009 (2000); Hartford Fire Ins. Co. v. Leahy, 774 F. Supp. 2d 1104, 1111-12 (W.D. Wash. 2011); Trinity Universal Ins. Co. v. Northland Ins. Co., 2008 WL 4386760 (W.D. Wash., Sept. 23, 2008); Reynolds v. Farmers Ins. Co., 90 Wn. App. 880, 960 P.2d 432 (1998)).

These cases are unavailing. Campbell applies the complaint allegation rule, and does not appear to involve consideration of any extrinsic evidence in determining the claim at issue was not conceivably covered under the policy. See 166 Wn.2d at 471-72. Reynolds is unrelated to the duty to defend. The case involves the application of contract law regarding extrinsic evidence bearing on the question of whether a scrivener's error in an insurance policy should be reformed on grounds of unilateral mistake. See 90 Wn. App. 884-85.

The remaining cases appear to be inconsistent with the complaint allegation rule, as described in Truck Ins. Leven involves consideration of extrinsic evidence, consisting of contradictory statements by the insured, see 97 Wn. App. at 429-31, but this decision predates Truck Ins. Hartford involves consideration of extrinsic evidence consisting of contradictory statements by the alleged insured, based on Washington cases that do not seem to support its holding. See 774 F. Supp. at 1111-14 (distinguishing Holland America Ins. Co. v. Nat'l Indem. Co., 75 Wn.2d 909, 454 P.2d 383 (1969), which expressly prohibits consideration of extrinsic evidence; also discussing Scottish & York Int'l Ins. Group v. Ensign Ins. Co., 42 Wn. App. 158, 709 P.2d 397 (1985), which purports to resolve coverage based on the complaint and the insurance policy in question and does not expressly reference extrinsic evidence). Trinity involves consideration of extrinsic evidence consisting of contradictory statements by the insured, relying on Overton as factually similar. See Trinity, 2008 WL 4386760, at **4-6.

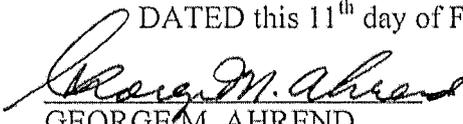
To the extent Harris, *supra* § 13.01, suggests there are exceptions that permit an insurer to present extrinsic evidence negating the duty to defend, these exceptions have not been recognized by this Court, appear to be in conflict with the complaint allegation rule, and do not appear to be implicated in this review.

reading is incorrect. Immunex does not render a claim of actual prejudice material to a determination of whether the duty to defend has been triggered, nor does it hold that a determination of the duty to defend can abide a trial regarding actual prejudice. To the contrary, in Immunex this Court first resolved whether a determination of no coverage applied retroactively to a reservation-of-rights defense, rejecting the insurer's argument that it was not responsible for any defense costs once noncoverage is established. Only *after* resolving this question did the Court turn to the insurer's separate late tender defense and address the issue of actual prejudice. See Immunex at 878-80, 890-91 & n.5. Immunex makes clear that the actual prejudice question is only relevant to the late tender defense, not the duty to defend. The superior court below appears to have accepted Zurich's argument to the contrary by considering perceived prejudice to Zurich in the course of denying Expedia's motion to set a summary judgment hearing and for a protective order. See Expedia Br. at 12-13; Zurich Br. at 21. If this occurred, the court committed an error of law rendering its decision an abuse of discretion.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief and resolve the issues on review accordingly.

DATED this 11th day of February, 2014.


GEORGE M. AHREND


FOR BRYAN P. HARNETIAUX, WITH AUTHORITY

On Behalf of WSAJ Foundation

OFFICE RECEPTIONIST, CLERK

From: George Ahrend <gahrend@trialappeallaw.com>
Sent: Tuesday, February 11, 2014 3:05 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: mparris@orrick.com; mhooks@forsberg-umlauf.com; Stewart A. Estes; Bryan P Harnetiaux
Subject: Re: Expedia, Inc. v. Steadfast Ins. Co. (S.C. #88673-3) - Request for Permission to File Amicus Curiae Brief
Attachments: WSAJF Expedia Brief.pdf

Dear Mr. Carpenter,

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is attached to this email for filing with the Court. A letter request for the Foundation to appear as amicus curiae was previously submitted on February 6 (see email below). Counsel for the parties are being served simultaneously by copy of this email, by prior agreement.

Respectfully submitted,

George Ahrend
On Behalf of WSAJ Foundation

On Thu, Feb 6, 2014 at 1:40 PM, <amicuswsajf@wsajf.org> wrote:

> Dear Mr. Carpenter,
>
> Attached is co-counsel George Ahrend's letter request on behalf of
> Washington State Association for Justice Foundation for amicus curiae
> status in this case. Arrangements for electronic service on counsel
> are explained in the letter.
>
> Respectfully submitted,
>
> Bryan Harnetiaux, WSBA #5169
> OI #91108
> On Behalf of WSAJ Foundation
>
>

--
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