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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

EXPEDIA, INC., et al.,

Plaintiffs/Petitioners

v.

STEADFAST INSURANCE COMPANY, et al.,

Defendants/Respondents.

**DEFENDANTS'/RESPONDENTS' RESPONSE TO
BRIEF OF AMICUS CURIAE**

Michael P. Hooks, WSBA #24153
Matthew S. Adams, WSBA #18820
FORSBERG & UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2047
Telephone: (253) 572-4200
Facsimile: (253) 627-8408

J. Randolph Evans, *pro hac vice*
Joanne L. Zimolzak, *pro hac vice*
MCKENNA LONG & ALDRIDGE LLP
1900 K Street NW
Washington, DC 20006
Telephone: (202) 496-7500
Facsimile: (202) 496-7756 Attorneys for Defendants/Respondents

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I. INTRODUCTION

Respondent Zurich asks this Court to decline discretionary review of the Court of Appeals' decision not to grant discretionary review of an interlocutory Superior Court decision denying Expedia's request for a protective order concerning certain discovery and schedule-related issues. (A.1-3, 4-14.)¹ *Amici* do not offer any unique information or perspective that warrants consideration by the Court in connection with this issue.

The reasons that courts consider the arguments of *amicus curiae* in appropriate circumstances are well documented:

Historically, *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another. *Amicus curiae* fulfill the role by submitting briefing designed to supplement and assist in cases of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case, or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

Cnty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy, 54

F. Supp. 2d 974, 975 (E.D. Wash. 1999) (internal citations omitted).

¹ "A." denotes citation to the Appendix to Petitioners' Motion for Discretionary Review. "SA." denotes citation to the Supplemental Appendix filed along with this Answer to Petitioners' Motion for Discretionary Review.

These considerations, however, are not present here. *Amici*'s version of the facts and the law is essentially the same as that offered by Expedia. They neither supplement the efforts of counsel nor draw the court's attention to different law, and as such, their positions here should be given no consideration. The discrete discovery and schedule issues addressed by the lower courts are unique to this case and "[t]he case must be made by the parties . . . and issues involved cannot be changed or added to by friends of the court." *City of Lakewood v. Koenig*, 160 Wn. App. 883, 887 n.2 (2011).

II. COUNTER STATEMENT OF THE CASE

Given their status as complete outsiders to these proceedings and lack of personal knowledge regarding this case, *amici* have submitted a brief ("Br.") that is notable both because it is unusually fact intensive and, as discussed below, it contains several record errors and omissions that illustrate the perils of making a fact-specific argument without the benefit of a complete understanding of the case. Both the Plaintiffs/Petitioners (Expedia) and the Defendants/Respondents (Zurich) previously have set forth their respective statements of the case. Rather than submitting yet another recitation of the facts and procedural history, Zurich refers this Court to the parties' statements and accompanying appendix materials.

III. ARGUMENT

After laying out a purported “statement of the case” that is not constrained by actual facts, *amici* attempt to persuade this Court by referring to the public interest and public policy considerations tied to the duty to defend and summarizing “three decades” of Washington jurisprudence on the subject. (Br. at 2, 7-10.) *Amici’s* myopic focus on the duty to defend in the context of the current briefing is misplaced. The only question here is whether Expedia has satisfied the requirements of RAP 13.5(b), which describes the circumstances in which this Court may grant review of the Court of Appeals’ decision not to grant discretionary review of an interlocutory Superior Court decision regarding the timing and scope of discovery and other schedule matters. *Amici* at best provide an incomplete assessment of the RAP 13.5(b) criteria and do not come close to demonstrating that those criteria mandate the discretionary review Expedia seeks.

A. *Amici Undermine Their Position By Misconstruing Or Omitting Key Facts In Their Analysis*

As an initial matter, the arguments presented by *amici* lack merit because they are based on an understanding of the factual record that is at best incomplete and at worst incorrect. For example, *amici* state the underlying plaintiffs seek “damages” arising from the alleged “shortfall” in paid occupancy taxes. (Br. at 5.) In so stating, however, *amici* do not

reference and apparently are unaware of the definition of “damages” contained in the at-issue policies, which excludes from coverage claims (like those presented in the underlying actions) for the following types of relief: punitive, exemplary, or multiple damages; fines, penalties, fees, or sanctions; matters deemed uninsurable; any form of non-monetary, equitable, or injunctive relief; or restitution, return, or disgorgement of any fees, funds, or profits. (A.87.) This is of course a merits issue that is not relevant to the discovery/schedule order as to which Expedia seeks discretionary review, but it is illustrative of *amici*’s poor understanding of the issues presented here.

Additionally, *amici*’s suggestion that the underlying plaintiffs did not specify any “reason for the shortfall” they seek to recover is wholly incorrect. (Br. at 5.) To the contrary, the underlying pleadings state the reason for the alleged shortfall quite clearly: Expedia’s business model. *See, e.g.*, S.A.20 (Compl., *Columbus, GA v. Expedia, Inc.*, No. S406-cv-1794-7 (Super. Ct. Muscogee Cty., Ga. May 30, 2006)) (“At all times material hereto, Defendant collected hotel/motel taxes from occupants of hotel/motel rooms located in Columbus’ tax district based on the total value of the room, but failed to remit the full amount of taxes collected.”); S.A.45 (Compl., *Orange County, FL, et al. v. Expedia, Inc., et al.*, No. 06-CA-2104 (Fla. Cir. Ct. Mar. 12, 2007)) (“The Plaintiffs seek a declaratory

judgment regarding whether the difference between the amount charged to the Defendants at wholesale, and the price charged by the Defendants to their customers, at retail, is subject to the Tourist Development Tax”)); A.33-35 (3d Am. Compl., *City of Los Angeles, CA v. Hotels.com, LP, et al.*, No. BC 326693 (Cal. Super. Ct. Mar. 2, 2007) (outlining “common practice[s] and scheme[s]” in which defendants “remit an insufficient amount of transient occupancy tax”).)

Amici also mischaracterize the trial court’s ruling on Zurich’s motion for summary judgment as follows: “[i]n January 2012, the Superior Court denied Zurich’s motion for summary judgment as to the duty to indemnify and duty to defend, *finding that Zurich had not met its burden to prove that there was no possibility for coverage under two of its policies.*” (Br. at 5 (emphasis added).) In reality, the trial court granted Zurich’s motion for summary judgment on the duty to defend with respect to four of the six insurance policies issued to Expedia and denied Expedia’s separate, subsequently filed motion seeking entry of an order finding that Zurich owed a duty to defend under the remaining two policies. The trial court’s final order regarding Zurich’s motion for summary judgment simply states that Zurich’s motion was denied as to two of the policies and says *nothing* about the existence or nonexistence of a duty to defend. (A.117-121.)

Further, although *amici* categorically state “[m]uch of Zurich’s requested discovery overlapped with matters at issue in the underlying cases” (Br. at 6), they ignore the fact that much of Zurich’s proposed discovery does not overlap. Among other things, Zurich is seeking discovery related to the six-page Declaration of Melissa Maher submitted by Expedia in support of its motion for summary judgment; Zurich’s late notice defense; and Expedia’s waiver of privilege regarding certain memoranda, which implicate another one of Zurich’s coverage defenses. As to the latter discovery, the trial court expressly stated that it “do[es]n’t see that as overlapping with the [underlying] plaintiff’s issues. That is a very different thing.” (A.17-18.)

In perhaps the most egregious demonstration of its lack of understanding of the facts and the record, *amici* state the “facts of this case illustrate the burdens that policyholders can wrongly be forced to bear if the duty to defend is wrongfully denied.” (Br. at 4.) To set the record straight: neither the trial court in its August 2012 order nor the Court of Appeals in its recent order denying Expedia’s motion for discretionary review made a determination regarding the duty to defend. (A.1-8, 9-11.) The trial court denied Expedia’s motion for a protective order and to set a hearing date for its summary judgment motion—a motion which concerned not only the duty to defend, but also claims for bad faith and

CPA violations. The Court of Appeals denied discretionary review of that order. *Amici's* allegation that the duty to defend was “wrongfully denied” as a result of these orders is misleading and belied by the facts.

B. *Amici Have Not Demonstrated That Discretionary Review Is Warranted Under RAP 13.5(b)*

Because *amici's* arguments do not establish that discretionary review is warranted under any standards laid out in RAP 13.5(b), those arguments must fail. *Amici's* legal analysis is unpersuasive and incorrect in several respects.

1. *Amici Do Not Address Key Parts Of The RAP 13.5(b) Standards*

Amici have failed to address key portions of the standards for discretionary review laid out in RAP 13.5(b). While they accuse the lower courts of committing probable or obvious error, for example, they do not address how obvious error would “render proceedings useless” or how probable error “alters the status quo or substantially limits the freedom of a party to act,” as required to demonstrate that discretionary review is justified. RAP 13.5(b)(1)-(2). *Amici* never even mention RAP 13.5(b)(3), which allows for discretionary review where the court has so far departed or sanctioned a departure from the accepted and usual course of judicial

proceedings as to call for review by the Supreme Court, notwithstanding Expedia's own reliance on this portion of the rule.²

2. The Decisions Below Were Neither "Obviously" nor "Probably" Erroneous

Although *amici* strenuously contend that discretionary review is needed because the decisions below contain erroneous determinations regarding Zurich's duty to defend, this is not the case. The trial court decision at issue, which the Court of Appeals declined to review at this stage of the case, denied the particular form of protective order sought by Expedia (which would have disallowed any further discovery before a hearing on Expedia's coverage and bad faith claims). The trial court did not rule on Zurich's duty to defend, nor was the court even asked to rule on the issue of whether extrinsic evidence is germane to the duty to defend. (A.16.) Thus, *amici's* allegation that the lower courts have somehow turned Washington's duty to defend law on its head through the challenged rulings is mistaken.

In the same misguided vein, *amici* assert that the Court of Appeals' order will "embolden insurers to disregard their defense obligations" and that "[d]enying defense and delaying adjudication of motions like Expedia's will force policyholders to direct their resources...toward

²Zurich's Answer to Expedia's Motion for Discretionary Review demonstrates the reasons that the RAP 13.5(b) criteria are not met here.

expensive litigation” (Br. at 3.) It goes without saying, however, that the Court of Appeals’ discretionary review denial cannot embolden insurers to disregard their defense obligations *because it makes no determination about an insurer’s defense obligations*. Simply stated, the decisions below do not create the risk of harm for policyholders in Washington claimed by *amici* because the decisions make no determinations regarding the duty to defend.

Amici’s insistence that the lower courts erred with regard to the availability of discovery in connection with an insurer’s “late notice” defense also misses the mark. Contrary to *amici’s* assertions in this regard, Washington courts have relied on evidence outside of the policies and pleadings in upholding an insurer’s late notice defense. *See, e.g., Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 428-31, 983 P.2d 1155 (1999) (directing entry of judgment for insurer in part because corporate principal’s seven year delay in notifying insurer of his potential personal liability eliminated its duty to defend him as a matter of law). And, this Court recently reaffirmed that discovery concerning an insured’s late tender can be relevant to the duty to defend. *National Surety Co. v. Immunex Corp.*, 297 P.3d 688 (Wn. 2013).

To prevail on this defense, an insurer must demonstrate that the insured’s late notice resulted in prejudice. *Mut. of Enumclaw Ins. Co. v.*

USF Ins. Co., 164 Wash. 2d 411, 417, 191 P.3d 866 (2008). In a number of cases, Washington courts have found such prejudice as a matter of law where, as here, claims were tendered after the underlying litigation was largely completed. See, e.g., *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wn. App. 352 (1985) (finding notice provided seven months after trial and one day before expiration of appeal to be unreasonable and not in compliance with policy's notice provisions as a matter of law); *Twin City Fire Ins. Co. v. King County*, 749 F. Supp. 230, 233 (W.D. Wash. 1990) (finding notice provided four months after the underlying trial, after an appeal had been filed, and one day before a court-arranged settlement conference resulted in prejudice as a matter of law; "just because the (insured) thought the insurer would dispute its claims does not remove the (insured's) obligation of notification.").

Relying on *Immunex*, amici maintain that that an insurer must always defend an insured until its late notice defense is fully and finally resolved. (Br. at 13.) *Immunex* involved a fundamentally different situation than the one presented here, however, in that the insurer in *Immunex* had agreed to defend under a reservation of rights. Thus, the issue in that case, unlike here, was "whether the insurer may unilaterally condition its reservation of rights defense on making the insured absorb the defense costs if a court ultimately determines there is no coverage."

297 P.3d at 689. A more analogous situation is the one presented in *Overton v. Consolidated Insurance Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002), where the insurer denied coverage based on the “known loss” doctrine *without* agreeing to defend under a reservation of rights and ultimately prevailed. The dissent in *Overton* raised essentially the same argument that *amici* make here, which is that an insurer involved in a coverage lawsuit must always defend the insured until the lawsuit is resolved. *Id.* at 435. This Court rejected that position in *Overton*, and this Court should do the same here.³

C. **Haskel Is Inapposite, But The “Alternatives” Outlined By The Courts Below Are Consistent With Haskel**

Although *amici* fault the lower courts for allegedly disregarding Washington law concerning the duty to defend, they have no trouble insisting that the Court take this opportunity to formally adopt the procedures of an out-of-state court. (Br. at 13-14) (citing *Haskel, Inc. v. Superior Court*, 33 Cal.App.4th 963, 39 Cal. Rptr.2d 520 (1995)). *Haskel* was decided based on out-of-state case law, involves a different set of

³ In arguing the lower courts erred in finding discovery was relevant to Zurich’s defenses, *amici* somehow twist the courts’ decisions into what *amici* refer to as a “mandate” of discovery. (See Br. at 11). This is wrong. Actually, the trial court held that certain discovery was *not* permitted, because it had the potential to prejudice Expedia in the underlying actions. (A.15.) Additionally, the trial court offered alternatives by inviting the parties to confer regarding a protocol for moving the case forward and even suggested that Expedia move for a complete stay of the case if it feels there is too much of an overlap, alternatives Expedia has so far refused to explore. (A.20-22.) Such a ruling is hardly a “mandate” in any sense.

facts, and is premised on an entirely different kind of motion than the one here, thus making it of limited (if any) application here. Unlike in *Haskel*, where the issues arose in the context of the insured's motion on the duty to defend, the issues here arose in the context of Expedia's motion for a protective order and to set a date for summary judgment hearing with regard to a summary judgment motion addressing not only the duty to defend, but also Expedia's claims for bad faith, CPA violations, and coverage by estoppel.

Though the legal pronouncements in *Haskel* do not apply here, it bears noting that the alternatives presented by the Superior Court (which the Court of Appeals declined to review at this time) are quite similar to those implemented in *Haskel*. In that case, the California appellate court recognized that the insurer was entitled to certain discovery related to its coverage defenses and remanded the case to the lower court with an instruction to determine which discovery "is so logically related to the issues in the underlying action that further pursuit of that discovery would prejudice [the insured's] interests in that action." Further, if any discovery was found to be prejudicial, the trial court was to issue a permanent stay "unless it finds that a properly drafted confidentiality order will be adequate to fully protect [the insured] from any prejudice to its interests in the underlying action." The *Haskel* court went on to declare, "[t]he

insurers shall, in any event, be entitled to proceed with any discovery which is not logically related to the issues in the underlying action and thus not prejudicial to [the insured's] interests.” *Haskel*, 33 Cal. App. 4th at 981, 39 Cal. Rptr. 2d at 530.

Similarly in this case, the trial court determined which discovery was overlapping with and potentially prejudicial to Expedia in the underlying lawsuits and protected Expedia from having to comply with such discovery requests at this time. It also offered Expedia alternatives to moving forward with non-overlapping discovery, by seeking a stay of the entire action or bringing motions on particular discovery issues on which the parties cannot agree. (A.20-22.) Expedia’s refusal to avail itself of these procedures cannot, of itself, provide a basis for discretionary review under RAP 13.5(b).

D. **Amici Ignore The True Cause of Any “Delay” In Obtaining a Ruling on the Duty to Defend In This Case**

Amici’s suggestion that the Court of Appeals is responsible for unfair “delay” here, precipitating the need for discretionary review, is equally unavailing. As the trial court noted, it is “fundamentally unfair for Expedia to...say that they want a prompt determination of their summary judgment motion, having sat on this issue for up to five years in some cases”. (A.19-20.) Any delay in the adjudication of this matter is entirely,

as the trial court said, “of Expedia’s own making.” (A.20.) Expedia delayed tender of the underlying actions to Zurich for years; Expedia refused to comply with Zurich’s discovery requests, resulting in an order to compel certain discovery; and Expedia refused to participate in the trial court’s suggested approach to move forward with non-overlapping discovery or seek a stay of the action, instead pursuing a motion for discretionary review, first before the Court of Appeals and now before this Court. (*See, e.g.*, A.20.)

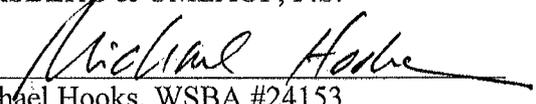
IV. CONCLUSION

Just as Expedia “overstated” the impact of the trial court’s order, *amici* overstate their interest in the outcome of this motion for discretionary review. (A.6.) Generally, *amici* claim they offer a “unique perspective” on the issues because of their “diverse constituents and services.” (Br. at 2.) As evidence of their supposed interest, they offer that they maintain liability insurance and face liability claims and even that they have been parties in cases resulting in important decisions by Washington courts. (*Id.*) There is nothing “unique” about maintaining liability insurance, facing liability claims, or being a party in an unrelated lawsuit that bestows on *amici* a perspective that would aid the court in deciding the issue here—a discovery issue particular to the unique facts of this case. This case arises out of an insured’s claim for coverage in

connection with suits seeking to recover unpaid or underpaid hotel occupancy taxes; the insured's years-long delay in tendering those suits to its insurer; and its insurer's right to certain discovery. *Amici* state no interest in these specific issues warranting the Court's attention.

Respectfully submitted this 10th day of May, 2013,

FORSBERG & UMLAUF, P.S.

By: 

Michael Hooks, WSBA #24153

Attorneys for Defendants/Respondents

Steadfast Insurance Co. and

Zurich American Insurance Co.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via hand-delivery a copy of **DEFENDANTS'/RESPONDENTS' RESPONSE TO BRIEF OF AMICUS CURIAE** on the following individuals:

Jeffrey I. Tilden
Franklin D. Cordell
GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154-1007

Craig R. Watson
PORT OF SEATTLE
Pier 69, 2711 Alaskan Way
Seattle, WA 98111

Mark S. Parris
Paul F. Rugani
ORRICK HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097

SIGNED this 10th day of May, 2013, at Seattle, Washington.



Jean M. Young

OFFICE RECEPTIONIST, CLERK

To: Jean M. Young
Cc: Michael P. Hooks; jzimolzak@mckennalong.com; mswiren@mckennalong.com; cwagner@mckennalong.com; pkelshaw@mckennalong.com; mparris@orrick.com
Subject: RE: Expedia, Inc., et al. v. Steadfast Insurance, et al. Supreme Court Cause No. 88673-3

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Sent: Friday, May 10, 2013 3:18 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Michael P. Hooks; jzimolzak@mckennalong.com; mswiren@mckennalong.com; cwagner@mckennalong.com; pkelshaw@mckennalong.com; mparris@orrick.com
Subject: Expedia, Inc., et al. v. Steadfast Insurance, et al. Supreme Court Cause No. 88673-3

Re: Expedia, Inc., et al. v. Steadfast Insurance, et al.
Supreme Court Cause No. 88673-3

Please see attached for filing: Defendants'/Respondents' Response to Brief of Amicus Curiae.

Thank you and have a great weekend.

Jean Marie Young | Forsberg & Umlauf, P.S.
Legal Assistant
901 Fifth Avenue, Suite 1400 | Seattle, WA 98164
Tel: 206-346-3923 (direct) | Fax: 206-689-8501
www.forsberg-umlauf.com

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