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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 ALLSTATE PROPERTY AND  
9 CASUALTY INSURANCE CO.,

10 Plaintiff,

11 v.

12 RICHARD W. GIROUX, et al.,

13 Defendants.

CASE NO. C15-5954 BHS

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT WITHOUT  
PREJUDICE

14 This matter comes before the Court on Plaintiff Allstate Property and Casualty  
15 Insurance Co.'s ("Allstate") motion for summary judgment (Dkt. 16). The Court has  
16 considered the pleadings filed in support of and in opposition to the motion and the  
17 remainder of the file and hereby denies the motion without prejudice for the reasons  
18 stated herein.  
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20 **I. PROCEDURAL HISTORY**

21 On December 31, 2015, Allstate filed a declaratory judgment action against  
22 Defendants Andy Rhee, Kevin Rhee, and Richard Giroux ("Giroux"). Dkt. 1 ("Comp.").  
Allstate seeks an order that it does not have a duty to defend or indemnify Andy Rhee  
and Kevin Rhee (collectively, "the Rhees") and their spouses in the lawsuit filed against

1 them by Giroux. *Id.* ¶ 14. On March 15, 2016, the Rhees filed an answer and asserted  
2 counterclaims against Allstate. Dkt. 7. The Rhees allege Allstate breached its duty to  
3 investigate and duty of good faith and fair dealing. *Id.* ¶ 25.

4 On May 20, 2016, Allstate moved for summary judgment. Dkt. 16. On June 13,  
5 2016, the Rhees responded. Dkt. 18. On June 16, 2016, Allstate replied. Dkt. 20.

## 7 **II. FACTUAL BACKGROUND**

### 8 **A. Underlying Suit**

9 On December 7, 2015, Giroux filed a personal injury complaint against the Rhees  
10 and their spouses in Pierce County Superior Court. Dkt. 17, Declaration of Douglas  
11 Foley (“Foley Dec.”), Ex. 1. The following allegations are taken from Giroux’s  
12 complaint.

13 Giroux was teaching a golf lesson at the Meadow Park Golf Course in Pierce  
14 County on June 7, 2015. *Id.* ¶ 2.01. During the lesson, one of Giroux’s students  
15 inadvertently picked up one of the Rhees’ golf balls and gave it to Giroux. *Id.* ¶ 2.02.  
16 Giroux realized that the student had picked up the Rhees’ golf ball as the Rhees  
17 approached in a golf cart. *Id.* ¶ 2.03.

18 According to Giroux’s complaint, the Rhees “exited the golf cart, repeatedly  
19 swore at the group, and aggressively approached [Giroux] and [the] golf students.” *Id.*  
20 ¶ 2.05. Giroux claims Kevin Rhee approached him and “started to flick the brim of the  
21 [Giroux’s] hat with his finger, exclaiming ‘what are you going to do about it?’” *Id.*  
22 ¶ 2.06.

1           Giroux further asserts that Andy Rhee “then used both hands to forcefully, and  
2 intentionally, push [Giroux], causing [him] to fall backwards onto the ground.” *Id.*

3 ¶ 2.07. Giroux alleges he sustained injuries to his right arm and shoulder. *Id.* ¶ 2.08.

4 While Giroux was on the ground, the Rhees “stood over him, nudging [Giroux] with their  
5 feet and saying, ‘get up.’” *Id.* ¶ 2.09.

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7           Giroux brings claims for assault and battery, outrage, negligent infliction of  
8 emotional distress, and negligence. *Id.* ¶¶ 3.1–6.3. According to the Rhees’ briefing,  
9 Allstate agreed to defend them under a reservation of rights. Dkt. 18 at 10.

#### 10 **B. Allstate Policies**

11           Andy Rhee and Kevin Rhee each have homeowners’ insurance policies with  
12 Allstate. Foley Dec., Exs. 2 & 3. Their Allstate policies are the same policy form, and  
13 therefore contain the same coverage, terms, definitions, and exclusions. *See id.*

14           The Allstate policies provide family liability coverage for “damages which an  
15 insured person becomes legally obligated to pay because of bodily injury or property  
16 damage arising from an occurrence to which this policy applies, and is covered by this  
17 part of the policy.” Foley Dec., Ex. 2 at 50. “If an insured person is sued for these  
18 damages, [Allstate] will provide a defense with counsel of [its] choice, even if the  
19 allegations are groundless, false or fraudulent.” *Id.*

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21           The policies define “bodily injury” as “physical harm to the body, including  
22 sickness or disease, and resulting death.” *Id.* at 24. An “occurrence,” in turn, is defined  
as “an accident, including continuous or repeated exposure to substantially the same

1 general harmful conditions during the policy period, resulting in bodily injury or property  
2 damage.” *Id.* at 26.

3 Relevant to the instant motion, the policies contain an “intentional or criminal  
4 acts” exclusion to family liability coverage:

5 We do not cover any bodily injury or property damage intended by,  
6 or which may reasonably be expected to result from the intentional or  
7 criminal acts or omissions of, any insured person. This exclusion applies  
8 even if:

9 a) such insured person lacks the mental capacity to govern his or her  
10 conduct;

11 b) such bodily injury or property damage is of a different kind or  
12 degree than intended or reasonably expected; or

13 c) such bodily injury or property damage is sustained by a different  
14 person than intended or reasonably expected.

15 *Id.* at 52.

16 Finally, the policies include a joint obligations clause:

17 This policy imposes joint obligations on the Named Insured(s) listed  
18 on the Policy Declarations as the insured and on that person’s resident  
19 spouse. These persons are defined as you or your. This means that the  
20 responsibilities, acts and omissions of a person defined as you or your will  
21 be binding upon any other person defined as you or your.

22 This policy imposes joint obligations on persons defined as an  
insured person. This means that the responsibilities, acts and failure to act  
of a person defined as an insured person will be binding upon another  
person defined as an insured person.

*Id.* at 26–27.

### III. DISCUSSION

Allstate moves for summary judgment on its duty to defend and duty to indemnify.

Dkt. 16.

1 **A. Summary Judgment Standard**

2 Summary judgment is proper only if the pleadings, the discovery and disclosure  
3 materials on file, and any affidavits show that there is no genuine issue as to any material  
4 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
5 The moving party is entitled to judgment as a matter of law when the nonmoving party  
6 fails to make a sufficient showing on an essential element of a claim in the case on which  
7 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
8 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,  
9 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
10 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
11 present specific, significant probative evidence, not simply “some metaphysical doubt”).  
12 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists  
13 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
14 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
15 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
16 626, 630 (9th Cir. 1987).

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18 The determination of the existence of a material fact is often a close question. The  
19 Court must consider the substantive evidentiary burden that the nonmoving party must  
20 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
21 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
22 issues of controversy in favor of the nonmoving party only when the facts specifically  
attested by that party contradict facts specifically attested by the moving party. The

1 nonmoving party may not merely state that it will discredit the moving party’s evidence  
2 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
3 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
4 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
5 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).  
6

7 **B. Insurance Policy Interpretation**

8 In Washington, the interpretation of insurance policies is a question of law. *Am.*  
9 *Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874 (1993), *opinion supplemented by* 123 Wn.2d  
10 131 (1994). Washington courts construe insurance policies as a whole, giving force and  
11 effect to each clause in the policy. *Id.* If the policy language is clear and unambiguous,  
12 the Court will not modify the policy or create an ambiguity. *Id.* If the policy language is  
13 fairly susceptible to two different reasonable interpretations, it is ambiguous, and the  
14 Court may attempt to discern the parties’ intent by examining extrinsic evidence. *Id.* If  
15 the policy remains ambiguous after resort to extrinsic evidence, the Court construes the  
16 ambiguities against the insurer. *Id.* at 874–75.

17 **C. Allstate’s Motion**

18 Allstate argues it does not have a duty to defend or indemnify the Rhees in the  
19 underlying suit because Giroux’s complaint is not covered by the Allstate policies. Dkt.  
20 16.  
21

22 Under Washington law, the duty to defend is broader than the duty to indemnify.  
*Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52 (2007). “The duty to defend arises  
based on the insured’s *potential* for liability and whether allegations in the complaint

1 | *could conceivably* impose liability on the insured.” *Id.* at 60. An insurer defending a suit  
2 | under a reservation of rights “must defend until it is clear that the claim is not covered.”  
3 | *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405 (2010). “Moreover, an  
4 | ambiguous complaint must be construed liberally in favor of triggering the duty to  
5 | defend.” *Woo*, 161 Wn.2d at 60. Meanwhile, the duty to indemnify depends on “the  
6 | insured’s actual liability to the claimant and actual coverage under the policy.” *Hayden*  
7 | *v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64 (2000).

9 | To determine whether the duty to defend exists, the Court first “examines the  
10 | policy’s insuring provisions to see if the complaint’s allegations are conceivably  
11 | covered.” *Id.* If the complaint’s allegations are conceivably covered, the Court “must  
12 | then determine whether an exclusion clearly and unambiguously applies to bar coverage.”  
13 | *Id.* Exclusionary clauses are strictly construed against the insurer. *Expedia, Inc. v.*  
14 | *Steadfast Ins. Co.*, 180 Wn.2d 793, 803 (2014). The insurer bears the burden of proving  
15 | that an exclusionary clause applies. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875  
16 | (1993).

17 | In the underlying suit, Giroux alleges he “was the victim of an unprovoked assault  
18 | and battery perpetrated by Defendants Andy and Kevin Rhee” that involved flicking his  
19 | hat, pushing him to the ground, and kicking him while on the ground. Foley Dec., Ex. 1  
20 | ¶ 3.2. Giroux further claims the Rhees “intentionally and recklessly inflicted emotional  
21 | distress” upon him. *Id.* ¶ 4.3. Finally, Giroux alleges the Rhees “had an independent  
22 | duty to use reasonable care to avoid causing [him] emotional distress” and “failed to use  
reasonable care to avoid causing [his] damages.” *Id.* ¶¶ 5.2, 6.2.

1 Allstate contends it does not have a duty to defend the Rhees because all of  
2 Giroux’s claims stem from deliberate acts, which do not constitute an “occurrence” under  
3 the coverage provisions of the Allstate policies. Dkt. 16 at 10–12. For the same reason,  
4 Allstate argues the intentional and criminal acts exclusion precludes coverage as well. *Id.*  
5 at 13.  
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7 The Allstate policies provide family liability coverage for an “occurrence,” which  
8 is defined as “an accident . . . resulting in bodily injury or property damage.” Foley Dec.,  
9 Ex. 2 at 50. The policies do not define the term “accident.” When undefined in an  
10 insurance policy, Washington courts have “referenced two similar definitions of the term  
11 ‘accident’ in insurance coverage cases: (1) an unusual, unexpected, and unforeseen  
12 happening; and (2) a loss that happens without design, intent, or obvious motivation.”  
13 *United Servs. Auto. Ass’n v. Speed*, 179 Wn. App. 184, 197 (2014) (internal quotation  
14 marks and citations omitted). In light of these definitions, “Washington courts repeatedly  
15 have held that the insured’s deliberate conduct generally does not constitute an accident.”  
16 *Id.*  
17

18 The policies also contain an intention or criminal acts exclusion, which precludes  
19 coverage for “any bodily injury or property damage intended by, or which may  
20 reasonably be expected to result from the intentional or criminal acts or omissions of, any  
21 insured person.” Foley Dec., Ex. 2 at 52. This exclusion applies even if the “bodily  
22 injury or property damage is of a different kind or degree than intended or reasonably  
expected.” *Id.* Based on the plain language of these provisions, the Allstate policies



1 preclude coverage for deliberate acts or omissions that result in bodily injury or property  
2 damage.

3           At this time, the Court cannot conclude that the underlying complaint is clearly not  
4 covered by the Allstate policies. Although Giroux’s complaint contains allegations of  
5 intentional conduct, Giroux also alleges the Rhees negligently caused him emotional  
6 distress and failed to use reasonable care to avoid causing him damages. The inclusion of  
7 these allegations creates ambiguity on the face of Giroux’s complaint, which the Court  
8 must construe liberally in favor of triggering a duty to defend. *See Woo*, 161 Wn.2d at 64  
9 (“The insured must be given the benefit of the doubt if is not clear *from the face of the*  
10 *complaint* that the policy does not provide coverage.”).

12           To the extent Allstate argues Giroux has not pled sufficient facts to support his  
13 negligence claims, *see* Dkt. 16 at 14, this argument should be raised in the underlying  
14 state court suit, which is still ongoing. This Court is without jurisdiction to dismiss the  
15 underlying negligence claims for failure to provide sufficient factual allegations. In the  
16 event Giroux’s negligence claims are dismissed in the underlying suit, Allstate may  
17 renew its motion for summary judgment in this Court.

18           With regard to Allstate’s duty to indemnify, the Rhees’ actual liability in the  
19 underlying suit has not yet been determined. It is therefore premature for the Court to  
20 decide whether Allstate has a duty to indemnify. *See Hayden*, 141 Wn.2d at 64 (“The  
21 duty to indemnify hinges on the insured’s actual liability to the claimant and actual  
22 coverage under the policy.”). For these reasons, the Court denies Allstate’s motion.

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**IV. ORDER**

Therefore, it is hereby **ORDERED** that Allstate's motion for summary judgment (Dkt. 16) is **DENIED without prejudice**.

Dated this 7th day of July, 2016.



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BENJAMIN H. SETTLE  
United States District Judge