UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

THOMAS J. COLLI Plaintiff	: :	CIVIL ACTION NO. 1:07-444-ML
VS.	:	
MOUNTAIN VALLEY INDEMNITY COMPANY Defendant	: :	OCTOBER 31, 2008

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Local R. Civ. P. 7, Plaintiff Thomas J. Colli submits this Memorandum in Support of his Motion for Summary Judgment.

Introduction

This is an action to recover underinsured motorist ("UIM") benefits for severe personal injuries (including a traumatic brain injury) Plaintiff sustained in a two-vehicle accident that occurred at an intersection in Scituate, Rhode Island.[1]

There is no genuine issue of material fact as to the cause of the accident—the other driver (Mildred H. Brown, age 78) simply failed to obey a stop sign, and failed to yield the right of way:

- The undisputed physical evidence and expert testimony holds that Brown failed to stop at the stop sign;
- The undisputed physical evidence and expert testimony holds that Brown failed to yield the right of way to the Plaintiff;
- The undisputed physical evidence and expert testimony demonstrates that Plaintiff was not in any way at fault for the accident;

[1] Plaintiff settled his claim against the tortfeasor with her liability insurance company, and there is no dispute that the liability coverage is exhausted, nor that Plaintiff was an insured under the Mountain Valley UIM policy at the time, and was operating the vehicle in the scope of his employment at the time of the accident.

- Neither driver has any recollection of the accident (due to its high impact and resulting head injuries), and no eyewitnesses survived the crash;
- At the time of the accident, it was daylight and there were no adverse weather conditions;
- In pursuing its successful subrogation claim for first-party property damage benefits, the UIM carrier took the position that Brown was at fault for the accident and recovered every dollar it had paid out on the property claim (for damage to the truck Plaintiff was driving);
- At trial, the UIM carrier will be precluded from offering expert testimony on the cause of the accident, from arguing that there was comparative negligence by the Plaintiff, and from offering any evidence or argument to suggest that anything other than Brown's negligence was the cause of the accident.

Clearly, there are no genuine issues of material fact concerning liability for the accident, yet Mountain Valley Indemnity Company, the UIM carrier, indicates that it intends to contest this at trial. Accordingly, Plaintiff moves for entry of summary judgment on this issue in his favor. The only issues to determine at trial are the extent of Plaintiff's damages and Mountain Valley's obligations.

Statement of Facts

The two-vehicle (one operated by the Plaintiff, the other by Brown) accident giving rise to the UIM claim here occurred on December 30, 2004 at the intersection of Chopmist Hill Road and Central Pike in Scituate, Rhode Island. [Plaintiff's Statement of Undisputed Facts ("SUF") ¶ 1-3][2]

Just prior to the collision, Plaintiff was traveling southbound on Chopmist Hill Road approaching the intersection of Central Pike; Brown was traveling westbound on

[2] Local Rule 12.1 requires that the moving party file a "concise statement of all material facts as to which he contends there is no genuine issue necessary to be litigated." Loc. R. Civ. P. 12.1(a)(1). Plaintiff submits a Statement of Material Facts, along with affidavits by his liability expert and by his counsel in support of his Motion for Summary Judgment.

Central Pike approaching the same intersection. [SUF ¶¶ 4-5] Stop signs and stop lines regulate traffic on Central Pike, at its intersection with Chopmist Hill Road, but Brown failed to stop her vehicle, and failed to yield the right of way. [SUF ¶¶ 6-7][3] As a result, she entered the intersection moving directly into Plaintiff's path of travel and caused the two vehicles to collide violently. [SUF ¶ 7]

Neither driver recalls the accident, and the only eye-witness, Brown's passenger was killed on impact. [SUF ¶ ¶ 10-13]. It was daylight at the time of the accident, and there were no adverse weather conditions. [SUF ¶ 14] Plaintiff was not faced with a stop sign on Chopmist Hill Road at its intersection with Central Pike. [SUF ¶ 4]

Plaintiff has disclosed an expert witness—Stephen R. Benanti, an experienced, well-qualified Accident Reconstruction Specialist—who has reached conclusions and opined as to the cause of the accident. [SUF ¶15] Upon examining and analyzing all available information, Benanti reached several conclusions within a reasonable degree of scientific certainty, including that:

a) Brown's vehicle and Plaintiff's vehicle were traveling at approximately 35 mph at the point of impact;
b) Brown's vehicle did not stop at the stop line before entering the intersection (since it would have been impossible for her vehicle to reach a speed of 35 mph in the distance—41 feet—between the stop line and the point of impact); and
c) Plaintiff did not have enough time and distance available to have avoided the collision.

[3] Mountain Valley will argue that Brown testified at her deposition that she did recall stopping at the stop sign (she could not remember anything thereafter about the accident). She did testify that she stopped at the sign, but the overwhelming weight of evidence is to the contrary. [SUF ¶ 14, 16-19] No reasonable juror could conclude that Brown stopped at or near the stop sign—it would have been physically impossible to get her vehicle up to the speed at which it was indisputably traveling at the moment of impact (as set forth in this Memorandum). **Assuming for purposes of the Motion however that she *did* in fact stop, there is no genuine dispute that she failed to yield the right of way, and that that failure caused the accident**.

[SUF ¶ 16][4]

On the other hand, Mountain Valley has not disclosed any expert witnesses concerning liability for the accident, and it is well past the deadline for doing so. [SUF ¶ 18] Moreover, Mountain Valley does not have any information that would in any way contradict the opinions and conclusions Benanti reached about the accident and its cause, nor did the company seek to depose Benanti while discovery was open. [SUF ¶¶ 19-20] Mountain Valley has not pled comparative negligence as to the Plaintiff, nor does any evidence exist that would support such a claim. [See SUF ¶¶ 21-22]

Additionally, Mountain Valley successfully pursued subrogation against Brown's liability carrier—taking the position that she was at fault for the accident. In that contested arbitration, Mountain Valley recovered every dollar it had paid out on the first-party property damage claim. [SUF ¶¶ 24-25]

Plaintiff suffered severe injuries—including a traumatic brain injury—and incurred substantial damages as a result of the accident. [SUF ¶ 10] He settled his negligence claim against Brown for her policy limits of $250,000 [SUF ¶ 26], but he has not been fully compensated for the severe and permanent injuries and losses he sustained due to her negligence.[5]

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[4] The facts, opinions and conclusions stated in Plaintiff's expert's Collision Reconstruction Analysis are stated within a reasonable degree of scientific certainty and are based on his training and experience, reliance on, and application of, accepted scientific principles of accident reconstruction, his inspection of the scene of the accident, including photographing, measurement and visibility analysis of the scene and the conduct of drag factor tests, and his review and analysis of all other available information concerning the subject accident (as set forth in detail in his report). [SUF ¶17]

[5] At a point in time prior to the date of the accident, Mountain Valley issued a policy of insurance to Plaintiff's employer, James E. Dolan d/b/a Pipe Pro, Inc., which policy provided UIM benefits ($500,000 liability limit for each accident). [SUF ¶ 29] At the time of the accident, Plaintiff's employer had paid all premiums due on that policy; the policy was in full force and effect; Plaintiff was in the course and scope of his employment; and he was an insured as defined by the insurance policy and covered for UIM benefits. SUF ¶¶ 28-31]

Applicable Law

Summary Judgment Standard

The purpose of summary judgment is to pierce the pleadings and assess the proof to determine if there is a genuine need for trial. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Fed. R. Civ. P. 56(c).

An issue is "genuine" if the pertinent evidence is such that a rational fact-finder could resolve the issue in favor of either party, and a fact is "material" if it "has the capacity to sway the outcome of the litigation under the applicable law." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1 Cir. 1995).

The moving party bears the burden of showing the Court that no genuine issue of material fact exists. *Id.* Once the movant has made the requisite showing, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added).[6]

Summary Judgment Is Appropriate in a Negligence Case Where the Physical Evidence and Expert Testimony On Causation Is Uncontroverted.

Summary judgment is appropriate here on the underlying issue of who was at fault for the accident.

To succeed on a claim for negligence, "a plaintiff must establish a legally

[6] After the moving party files a "concise statement of all material facts as to which he contends there is no genuine issue necessary to be litigated," the nonmoving party must submit a similar statement identifying the facts "as to which he contends there is a genuine issue necessary to be litigated." Loc. R. Civ. P. 12(a)(2). The court may assume that the facts as claimed by the moving party exist unless they are disputed by affidavit or by other evidence that the court may consider pursuant to Rule 56 of the Federal Rules of Civil Procedure. Loc. R. Civ. P. 12.1(d).

cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." *Jenard v. Halpin*, 567 A.2d 368, 370 (R.I. 1989).[7] "[B]ecause of the peculiarly elusive nature of the concept of negligence, it is the rare personal injury case which may be properly disposed of by summary judgment." *Bland v. Norfolk and Southern Railroad Co*., 406 F.2d 863, 866 (4th Cir. 1969). However, while a court may not weigh the evidence or make credibility determinations in granting summary judgment, the court may end a suit before trial if the court determines that, taking the facts and reasonable inferences therefrom in the light most favorable to the non-moving party, no reasonable juror could find for the defendant. *E.g., Taylor v. Gallagher*, 737 F.2d 134, 137 (1st Cir. 1984) ("summary judgment is appropriate where, as here, only one inference can be drawn from the facts") see *Thore v. Howe*, 466 F.3d 173 (1st Cir. 2006) (affirming entry of summary judgment entered in part on the basis of application of judicial estoppel).

Argument

The Court Should Grant Summary Judgment In Plaintiff's Favor As to Liability for the Underlying Accident Because There Are No Genuine Material Fact Issues.

Mountain Valley faces insurmountable obstacles in contesting liability for the underlying accident:

- The undisputed physical evidence and expert testimony established that Brown failed to obey the stop sign and failed to yield the right of way at the intersection [SUF ¶ 7];

[7] When approaching an intersection a motorist has the duty of observing the traffic and general situation at or in the vicinity of the intersection. She must look in the careful and efficient manner in which a [person] of ordinary prudence in like circumstances would look in order to ascertain the existing conditions for her guidance. *Hefner v. Distel*, 813 A.2d 66, 70 (R.I. 2003) (quoting *Dembicer v. Pawtucket Cabinets & Builders Finish Co*. 193 A. 622, 625 (R.I. 1937)); see also *Clements v. Tashjoin*, 168 A.2d 472, 474 (R.I. 1961) (if a duty imposed by a statute was breached it is *prima facie* evidence of negligence).

- There is no evidence that Plaintiff bears any comparative fault, nor did Moutain Valley affirmatively plead comparative negligence as a defense [SUF ¶ 21-23];

- Mountain Valley has not disclosed any expert witnesses concerning liability for the accident (*i.e.* an accident reconstruction or forensic specialist), nor did the company seek to depose plaintiff's liability expert during discovery [SUF ¶¶ 18, 20];

- Mountain Valley does not have any information that would in any way contradict the opinions and conclusions Benanti reached from conducting his analysis of the accident [SUF ¶¶ 11-14, 19, 21-23]; and

- Perhaps most significantly, Mountain Valley took the position—in a contested arbitration—that Brown was at fault for the accident, and the company recovered the full amount it paid for its insured's property damage [SUF ¶¶ 23 – 24].

Accordingly, given the absence of genuine, material factual issues, summary judgment is appropriate because only one inference can be drawn from the facts—Brown was at fault for the accident. See *e.g., Wallace v. Shade Tobacco Growers Agricultural Ass'n*, 642 F.2d 17, 20 (1st Cir. 1981); *O'Neill v. Dell Publishing Co.,* 630 F.2d 685, 690 (1st Cir. 1980).

Failure to Offer Expert Testimony As to Liability—for an Accident With No Surviving Eyewitnesses, Which the Two Drivers Cannot Remember, and Where Mountain Valley Has Not Pled Comparative Fault—Is Fatal to Mountain Valley's Chances of Proving That Anything Other Than Brown's Negligence Caused the Accident.

Expert testimony is required to establish any matter that is not obvious to a layperson and thus lies beyond common knowledge. See *Boccasile v. Cajun Music Limited*, 694 A.2d 686, 690 (R.I. 1997); *Allen v. State*, 420 A.2d 70, 72-73 (R.I. 1980) (in Rhode Island, expert testimony will be admitted when such testimony will aid the trier of

fact in understanding a subject matter beyond the ken of a lay person of ordinary intelligence).[8]

Expert testimony is quite clearly required as to liability under the unusual circumstances of this case—neither driver remembers the accident, there were no surviving eyewitnesses, and there were no adverse sight or weather conditions.

Furthermore, Mountain Valley will not be permitted to introduce evidence of any comparative fault by Plaintiff due to its failure to plead such an affirmative defense. See SUF ¶ 21 and Fed. R. Civ. P. 8(c)(1) ("Rule 8. General Rules of Pleading ...(c) Affirmative Defenses. ... (1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: ... contributory negligence"); see *Marino v. Otis Engineering Co*., 839 F.2d 1404 (10th Cir. 1998) (granting motion in *limine* preventing defendant from introducing any evidence related to plaintiff's contributory negligence, since contributory negligence must be pleaded according to Fed. R. Civ. P. 8(c) and noting (at n. 3), that what is referred to in the decision as contributory negligence is more commonly known elsewhere as comparative negligence but that "does not alter [defendant's] obligation to plead such negligence as an affirmative defense") (emphasis added);[9] see also *State Distribs., Inc. v. Glenmore*

[8] See also *Hochen v. Bobst Group, Inc*., 290 F.3d 446, 451 (1st Cir. 2002) (in diversity action, whether expert testimony is required is a matter of state law—applying Massachusetts state law to determine whether expert testimony was required to prove a design or manufacturing defect).

[9] The district court, in granting the motion in *limine* as to contributory negligence, noted "I think it's a good motion in that the defendant has alleged or pled no affirmative defense whatever, just a general denial. So we'll just have to wait and see if any evidence is tendered on behalf of the defendant or attempted to [be] tendered by way of an affirmative defense. I'm not going to allow it because you didn't plead any. The burden is still on the plaintiff to prove his case." See 839 F.2d at 1409 (emphasis added). The difference here is that Plaintiff has already carried his burden—as noted herein, by way of his unopposed liability expert's conclusions, facts conceded and admissions made by Mountain Valley / application of judicial estoppel—*and* Mountain Valley will be precluded from attempting to adduce evidence or make argument concerning any alleged comparative fault.

Distilleries Co., 738 F.2d 405, 410 (10th Cir. 1984) (the purpose behind rule 8(c) is putting "plaintiff on notice well in advance of trial that defendant intends to present a defense in the nature of avoidance") (internal citations omitted). The purpose of the rule has been frustrated if Mountain Valley plans to make avoidance arguments here. It should not be permitted to do so.

Given the unusual circumstances presented here—no eyewitnesses to the accident, and drivers without any memory of it—the only way to definitively determine what caused the accident is to conduct a measurement and visibility analysis of the scene, conduct drag factor tests, collect other data, and to apply accepted principles of accident reconstruction—an exercise that is certainly beyond the ken of the ordinary juror.[10] Plaintiff has disclosed such a liability expert; Mountain Valley has not, and will not be permitted to call an accident reconstruction or similar expert at trial.

Moreover, Mountain Valley was successful in a contested arbitration of its subrogation claim arising out of the accident. Mountain Valley's statements in connection with that arbitration will be considered admissions. See also Fed. R. Evid. 801(d)(2) (Statements which are not hearsay, Admission by party-opponent), (standing for the proposition that a party owns its words). In short, Mountain Valley has no chance of success in contesting liability for the accident.

[10] Additionally, because Mountain Valley cannot (and even if it could, will not be permitted to) present any evidence to establish any fault of Plaintiff's (or indeed any fault other than Brown's) for the accident, there is not a question of comparative negligence.

Judicial Estoppel Prevents Mountain Valley From Arguing That Brown Was Not At Fault for the Accident Since the Company Took the Exact Opposite Position In Successfully Pursuing Subrogation.

The doctrine of judicial estoppel[11] precludes a party from taking a position in a case contradict their previous legal positions. See *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (holding that the doctrine may be employed in federal court at the court's discretion); see *e.g., Warda v. Comm'r*, 15 F.3d 533, 535 (6th Cir. 1994) (litigant sought to avoid paying taxes by claiming that she held a piece of property in trust when she already had been declared the titleholder in earlier litigation—to allow her to pursue such a contradictory path, the court stated, "represented a knowing assault on the integrity of the judicial system")).[12] Here, allowing Mountain Valley to take such blatantly inconsistent and self-serving positions—Brown was at fault for the accident for purposes of subrogation but not in the UIM context—would impugn this Court's integrity.

The purpose of the judicial estoppel doctrine is to protect the integrity of the judicial system. See *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 8-9 (1st Cir. 1999) (applying judicial estoppel to prevent unfairness and avoid destruction of the integrity of the judicial system threatened by litigant's contradictory positions).[13] The threat to judicial integrity has been described as occurring when litigants "'play fast and loose with the courts to suit the exigencies of self interest.'" See *In re Coastal Plains, Inc.*, 179

[11] Also known as estoppel by inconsistent positions.

[12] Judicial estoppel does not require that the issue have been actually litigated in the prior proceeding. *New Hampshire*, 532 U.S. at 748-49; 18 Moore's Federal Practice § 134.30, at 134-69 (3d ed. 2005); see also *Western Mass. Blasting Corp. v. Metropolitan Property and Casualty Insurance Co.*, 783 A.2d 398, 403 (R.I. 2001) (arbitration is a quasi-judicial proceeding; it is an adversary proceeding and not a negotiation; nor is an arbitration award a negotiated settlement).

[13] See also *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002) (the doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, "numerous courts have concluded, and we agree that while privity and/or detrimental reliance are often presented in judicial estoppel cases, they are not required") (quoting *Ryan Operations G.P v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996)).

F.3d 197, 205 (5th Cir. 1999) (quoting *Teledyne Indus., Inc. v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988) (or "abuse the judicial process through cynical gamesmanship, achieving success on one position, then arguing then arguing the opposite to suit an exigency of the moment").[14] Accordingly, federal law of judicial estoppel applies even where, as here, the Court exercises its diversity jurisdiction, since protection of the integrity of the federal courts implicates strong federal interests. See *Lowery v. Stoveall*, 92 F.3d 219, 223 n. 3 (4th Cir. 1996) (judicial estoppel is a matter of federal law).

The First Circuit has long permitted invocation of the doctrine of judicial estoppel. See *Thore v. Howe*, 466 F.3d 173, 180-181 (1st Cir. 2006) (observing that the First Circuit permitted its use prior to the U.S. Supreme Court's addressing it) (citing *Patriot Cinemas, Inc. v. Gen. Cinemas Corp*., 834 F.2d 208, 215 (1st Cir. 1987) (binding party to its prior representation that it would not pursue a claim)); see also *Fagin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999).[15]

Mountain Valley should be judicially estopped from espousing a position that directly contradicts its (successful) position in the subrogration arbitration—that Brown was at fault for the accident.

Conclusion

For the foregoing reasons, Plaintiff Thomas J. Colli respectfully submits that his Motion for Summary Judgment should be granted as to the issue of Brown's liability for the underlying accident. The only fact issue to be determined at trial is the full extent of

[14] See also *Beem v. McKune*, 317 F.3d 1175, 1186 (10th Cir. 2003) ("Now is the time to embrace the invitation extended by the Supreme Court in *New Hampshire* and join other circuits in reining in those litigants who play 'fast and loose with the courts.'" (O'Brien, J., concurring) (quoting *Sperling v. United States*, 692 F.2d 223, 227 (2d Cir. 1982) (Graafeiland, J., concurring)).

[15] See also *Patriot Cinemas*, 834 F.2d at 214 (noting that there are not inflexible prerequisites, nor is there an exhaustive formula" for application of the doctrine of judicial estoppel).

Plaintiff's losses; the only legal issue is the extent of Mountain Valley's obligations to him.

Dated: _____

Respectfully submitted,

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