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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 MICHAEL DEAN,

8 Plaintiff,

9 v.

10 ALLSTATE INSURANCE COMPANY,

11 Defendant.

CASE NO. 2:21-cv-00205-BAT

**ORDER GRANTING DEFENDANT
ALLSTATE INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

12 Defendant Allstate Insurance Company moves, pursuant to Fed. R. Civ. P. 56, for an
13 order granting summary judgment on Plaintiff Michael Dean's claims for underinsured motorist
14 ("UIM") benefits and damages. Defendant contends that Plaintiff's claims must be dismissed as
15 Plaintiff was made whole as a matter of law when he accepted a settlement from the defendant
16 tortfeasors in an amount much less than the policy limits. Dkt. 12. Plaintiff contests the motion
17 and argues that he has irrefutable evidence that his provable medical damages exceed the
18 tortfeasors' policy limits. Dkt. 14.

19 This Court has already issued a ruling in a companion case, *Dean v. GEICO*, Case No.
20 2:20-cv-01496-BAT, 2021 U.S. Dist. LEXIS 206564, 2021 WL 4963638 (2021) (the
21 "Companion Case"). Because Plaintiff has already had a full and fair opportunity to present the
22 identical issue presented herein and the other requirements of the collateral estoppel doctrine are
23 met, the Court finds that this matter may be dismissed with prejudice on this basis.

ORDER GRANTING DEFENDANT
ALLSTATE INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT - 1

1 Accordingly, Defendant's motion for summary judgment is **GRANTED**.

2 BACKGROUND

3 A. Facts Pertaining to Underlying Claims

4 Plaintiff was involved in three separate motor vehicle accidents in 2014. Dkt. 13,
5 Declaration of Rory W. Leid, III. On June 11, 2014, Plaintiff was involved in an accident where
6 his car was rear-ended. *Id.*, Exhibit A (Complaint for Damages in Snohomish County Superior
7 Court Case No. 17-2-05671-21) at § IV. On August 28, 2014, Plaintiff was involved in a head-on
8 motor vehicle collision. *Id.* at § V. Finally, on November 25, 2014, Plaintiff was involved in a
9 third accident where his car was rear-ended. *Id.* at § VI. This is the accident which forms the
10 basis of Plaintiff's claims in this lawsuit.

11 Plaintiff filed a lawsuit in Snohomish County Superior Court on June 8, 2017, against
12 each of the tortfeasors for the three accidents under a theory of joint and several liability. On
13 August 3, 2014, Plaintiff settled his claims against Defendant Rolle for the total sum of
14 \$35,000.00. Dkt. 13, Leid Decl., Exhibit G (Mediated Settlement Agreement).

15 On August 8, 2018, Plaintiff's bodily injury claims for the three accidents were
16 dismissed. Dkt. 13, Leid Decl., Exhibit B (Stipulation and Order of Dismissal with Prejudice and
17 Without Fees and Costs) and Exhibit C (Notice of Appearance for Defendants Rolle).

18 Plaintiff settled the June 11, 2014 bodily injury claim for \$20,000.00 – the liability limits
19 were \$1,000,000.00. *Id.* Plaintiff settled the August 28, 2014 bodily injury claim for \$40,000.00
20 – the liability limits were \$50,000.00 per person and \$100,000.00 per occurrence. *Id.* Plaintiff
21 settled the November 25, 2014 bodily injury claim for \$35,000.00 – the policy limits were
22 \$50,000.00 per person and \$100,000.00 per occurrence. *Id.*, Exhibit D (Release of Claims and
23 Settlement Agreement for Defendant Rolle).

1 Allstate, Plaintiff's insurer, paid \$18,945.05 in Personal Injury Protection ("PIP")
2 benefits to Plaintiff. Allstate Policy No. 007305613 ("the Policy") provided Plaintiff with up to
3 \$25,000.00 in PIP. The Policy provides, in pertinent part:

4 **Subrogation Rights**

5 When we pay, an **injured person's** rights of recovery from anyone else become
6 **ours** up to the amount **we** have paid. However, **we** may recover only the excess
7 amount the **Injured person** has received after being fully compensated for the
8 loss. These rights must be protected. The **injured person** must help **us** enforce
9 them.

8 Dkt. 13, Leid Decl., Exhibit H (Policy of Insurance). To date, Plaintiff has not repaid any of the
9 \$18,945.05 in PIP benefit.

10 B. Facts Pertaining to This Claim

11 Plaintiff filed this cause of action originally in Snohomish County on November 24,
12 2020. Dkt. 1. Plaintiff claims that the vehicle driven by the tortfeasor (Lory Rolle) in the
13 November 25, 2014 motor vehicle accident was "underinsured" and therefore, Plaintiff failed to
14 receive full recovery of his damages. *Id.* Plaintiff sues Defendant for negligence and/or gross
15 negligence, bad faith, unfair and deceptive acts, and breach of its contractual duty to conduct a
16 reasonable investigation and fair settlement. *Id.* Plaintiff states that at the time he settled with the
17 underlying tortfeasor defendants, he "was unaware of the full extent of [his] neurological
18 injuries...". Dkt. 16, Declaration of Michael Dean.

19 Plaintiff consulted with Dr. Sanford Wright, M.D., a neurological surgeon consultant and
20 expert witness, on September 17, 2020 – about two years after Plaintiff's "chiropractor
21 completed treatment in approximately 2017-2018." Dkt. 17, Declaration of Sanford Wright,
22 M.D., Exhibit 2, p. 3. Dr. Sanford reviewed Plaintiff's C-MRI scans of October 27, 2015 and
23 July 25, 2018. *Id.*, Exhibit 2 (Dkt. 17-1, p. 5). Both scans showed "moderately severe C6-7

1 foraminal stenosis, right side, and mild cervical DDD.” *Id.* Dr. Sanford noted that Dr. Singh, who
2 ordered the C-MRI scans, had advised a surgical consultation, but Plaintiff was “fearful of
3 surgery” at that time. *Id.*

4 Dr. Wright diagnosed cervical and right and lower thoracic strains due to the June 11,
5 2014 motor vehicle accident; aggravation of those strains with new onset migraine like
6 symptoms due to the August 28, 2014 motor vehicle accident; and further aggravation of all
7 these symptoms due to the November 25, 2014 motor vehicle accident. *Id.*, Exhibit 2 (Dkt. 17-1,
8 p. 6). Dr. Wright proposed further surgical consultation with Ali Anissipour, D.O.

9 A third MRI of Plaintiff’s cervical spine was taken on February 12, 2021. Dkt. 18-1, p. 5.
10 Dr. Anissipour evaluated Plaintiff on February 18, 2021. Dkt. 18, Declaration of Alireza
11 Anissipour. The most recent MRI showed a mild right-sided paracentral disc bulge at C5-6
12 resulting in moderate foraminal stenosis and a large paracentral disc bulge/herniation at C6-7
13 causing some right central hemicord compression and severe right 7 foraminal stenosis. Dkt. 18-
14 1, p. 7. Dr. Anissipour recommended a C6-7 cervical disc arthroplasty. Dkt. 18, Anissipour
15 Decl., at p. 2.

16 At the time Plaintiff settled with the underlying tortfeasor defendants in 2018, he was
17 aware that he was a surgical candidate. See Dkt. 21, Supplemental Declaration of Rory W. Leid,
18 III, Exhibit 1 (Plaintiff’s Expert’s Independent Medical Examination (“IME”) Report of Gary R.
19 Schuster, M.D., dated July 30, 2018) and Exhibit 2 (Plaintiff’s Expert’s letter from Dr. Schuster,
20 dated July 31, 2018). Based on Plaintiff’s IME and C-MRIs dated October 27, 2015 and July 26,
21 2018, Dr. Schuster opined that, on a more probable than not basis, Plaintiff needed a cervical
22 decompression with foraminotomy at C5-6 and C6-7, microdiscectomy at C5-6 and C6-7. Dr.
23 Schuster assessed Plaintiff with a 10% whole person impairment rating and estimated the costs

1 of surgery and cubital tunnel transposition (including preoperative care, anesthesia, operating
2 room, surgical fees, hospitalization, and postoperative physical therapy) at approximately
3 \$63,000.00. See *id.*, Exhibit 2 at p. 30.

4 C. The Companion Case Against GEICO

5 In Case No. 2:20-cv-01496-BAT, Plaintiff sued GEICO, claiming, as he does here, that
6 he has irrefutable evidence that his provable medical damages exceed the underlying tortfeasors'
7 policy limits. GEICO argued, as Allstate does here, that Plaintiff was made whole as a matter of
8 law when he accepted a settlement from the defendant tortfeasors in an amount much less than
9 the policy limits. On October 26, 2021, the Court entered judgment in favor of GEICO. See
10 *Dean v. GEICO*, Case No. 2:20-cv-01496-BAT, 2021 U.S. Dist. LEXIS 206564, 2021 WL
11 4963638 (2021).

12 In its reply, Allstate argued that this case may be dismissed because Plaintiff is
13 collaterally estopped by the Court's ruling in the Companion Case. Dkt. 20. Due to the timing of
14 the parties' filings in this case in relation to entry of the Judgment in the Companion Case, the
15 Court directed that Plaintiff could file a response, by November 29, 2021, to address Allstate's
16 collateral estoppel argument. Dkt. 22. Plaintiff did not file a response. Such failure to file a
17 response may be considered by the Court as an admission that the motion has merit. See LCR
18 7(b)(2).

19 LEGAL STANDARD

20 A party is entitled to summary judgment if there is no genuine issue of material fact and
21 the party is entitled to judgment as a matter of law. "A material fact is one that affects the
22 outcome of the litigation and requires a trial to resolve the parties' differing versions of the
23 truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). A party opposing summary

1 DISCUSSION

2 As this Court has already found Plaintiff Dean was made whole when he accepted a
3 settlement with the defendant tortfeasors in an amount less than the available policy limits,
4 summary judgment on the ground that Plaintiff is collaterally estopped here is appropriate.
5 Because the court's jurisdiction in this case is grounded in diversity, the court applies the law of
6 the state in which it sits to determine whether collateral estoppel applies to the issues raised here.
7 *See Jacobs v. CBS Broad., Inc.*, 291 F.3d 1173, 1177 (9th Cir. 2002).

8 Collateral estoppel bars the re-litigation of issues that were decided in a previous
9 proceeding involving the same parties. *Sprague v. Spokane Valley Fire Dep't*, 189 Wash.2d 858,
10 899, 409 P.3d 160, 183 (Wash. 2018). The Court considers four factors when deciding whether
11 collateral estoppel applies: (1) whether the issue decided in the prior action was identical to the
12 issue presented in the second action; (2) whether the prior action ended in a final judgment on
13 the merits; (3) whether the party to be estopped was a party or in privity with a party in the prior
14 action; and (4) whether the application of the doctrine will work an injustice. *Id.* (citing
15 *Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858, 860 (Wash. 1987)). In
16 addition, the issues to be precluded must have been actually litigated and necessarily decided in
17 the first proceeding. *Id.* Further, the party against whom collateral estoppel is asserted must have
18 had a full and fair opportunity to litigate the issues in the first proceeding. *Id.* All of the elements
19 of collateral estoppel apply here.

20 1. Identical Issues

21 For collateral estoppel to apply, the "issues to be precluded must have been actually
22 litigated and necessarily decided in the first proceeding." *Shoemaker*, 109 Wash.2d at 508, 745
23 P.2d 858.

1 In the Companion Case this Court found as follows:

2 There is no dispute that Plaintiff, who was represented by counsel, settled
3 all three of his bodily injury claims against the underlying tortfeasors for less than
4 the policy limits. Plaintiff settled his claims for a total of \$95,000.00, leaving over
5 \$1 million on the table. There is no evidence that Plaintiff was obligated to settle
6 for less than the liability policy limits. And there is no dispute that at the time he
settled these claims, Plaintiff knew he was a surgical candidate. The question
presented here is whether in light of these facts, Plaintiff is entitled to recover
additional compensation from his UIM insurer on the theory that one of the
underlying tortfeasors was "underinsured."

7 Dkt. 28, p. 5:16-23. It is undisputed that the same analysis applies here and therefore, this
8 element has been met for collateral estoppel to apply.

9 2. Judgment on the Merits

10 This element of collateral estoppel is met as, on October 26, 2021, Judgment was entered
11 in favor of GEICO in the Companion Case. Dkt. 29 (therein). This Judgment is on the merits as
12 it incorporates by reference the Court's order granting GEICO's motion for summary judgment
13 on the identical issue advanced herein.

14 3. Parties in Privity

15 It is undisputed that Plaintiff Michael Dean is the same Plaintiff in the Companion Case
16 and in the underlying state court lawsuit against the three tortfeasors. For collateral estoppel to
17 apply, the party against whom collateral estoppel is being asserted must be the same. *Weaver v.*
18 *City of Everett*, 194 Wn. 2d 464, 474, 450 P.3d 177 (2019). This element of collateral estoppel
19 has also been met.

20 4. Substantial Justice


21 To determine whether collateral estoppel will work an injustice, Washington courts "ask
22 whether the party against whom the doctrine is asserted had sufficient motivation for a full and
23 vigorous litigation of the issue in a prior proceeding." *Weaver v. City of Everett*, 194 Wash.2d

1 464, 474, 450 P.3d 177 (2019). Here application of collateral estoppel is appropriate because 1)
2 Plaintiff Dean vigorously defended against summary judgment dismissal in the Companion Case,
3 and 2) the relief sought by Plaintiff Dean in the instant matter is substantially similar to the relief
4 sought in the Companion Case. This element has been met for collateral estoppel to apply.

5 In the Companion Case, Plaintiff sued GEICO, claiming, as he does here, that he has
6 irrefutable evidence that his provable medical damages exceed the underlying tortfeasors' policy
7 limits. GEICO argued, as Allstate does here, that Plaintiff was made whole as a matter of law
8 when he accepted a settlement from the defendant tortfeasors in an amount much less than the
9 policy limits. Because this issue was litigated and decided in the Companion Case, Plaintiff is
10 collaterally estopped from relitigating it here.

11 Accordingly, it is **ORDERED** that the Motion for Summary Judgment of Defendant
12 Allstate Insurance Company (Dkt. 12) is **GRANTED**; Plaintiff's claims against Defendant
13 Allstate Insurance Company are **dismissed with prejudice**.

14 DATED this 7th day of December, 2018.

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BRIAN A. TSUCHIDA
United States Magistrate Judge

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