IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JESSICA CLIPPINGER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	)	No. 2:20-cv-02482-TLP-cgc

ORDER DENYING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

This is Defendant State Farm Mutual Automobile Insurance Co.'s third attempt to dismiss Plaintiff Jessica Clippinger's claims. The Court denied Defendant's Motion to Dismiss (ECF No. 52) and its first Motion for Summary Judgment. (ECF No. 99.) But the Court granted Defendant's Motion to Compel Appraisal and to Stay this action. (*Id.*) Now, after the appraisal, State Farm moves again for summary judgment on Plaintiff's claims. (ECF No. 108.) Plaintiff responded in opposition (ECF No. 118.), and Defendant replied. (ECF Nos. 119–20.) For the reasons below, the Court DENIES Defendant's motion for summary judgment.

BACKGROUND

This case turns on whether Defendant's claims-settlement process violates Tennessee's automobile insurance regulations. Plaintiff's vehicle, insured by Defendant, suffered a total loss in May 2019. (ECF Nos. 68-1 at PageID 665; 91 at PageID 1063.) Then Defendant sent Plaintiff a total loss valuation of her vehicle based on a software-generated valuation report.

(ECF Nos. 68-1 at PageID 666; 91 at PageID 1064.) The software program applied a "typical negotiation" deduction[1] to the base value of vehicles comparable to the insured's. (*Id.*) This reduced those base values by about 5%. (*Id.*) And the software program used those reduced values to calculate the "actual cash value" of an insured's total loss vehicle. (ECF No. 1-1 at PageID 13.) Using this process, Defendant provided Plaintiff with her vehicle's total loss valuation—$14,490. (*Id.* at PageID 20.) Plaintiff then sued on behalf of herself and Defendant's other Tennessee customers or former customers. (*Id.* at PageID 12.)

In her class action complaint, Plaintiff alleges that Defendant violates its insurance contracts and Tennessee law when it applies this typical negotiation deduction. (ECF No. 1-1 at PageID 13.) She claims that the contract requires Defendant to cover the total loss of her vehicle, and that Defendant can do so either by replacing it or giving Plaintiff the "actual cash value" of the loss vehicle. (ECF Nos. 68-1 at PageID 666–67; 91 at PageID 1065.) And when Defendant applies this negotiation reduction, it pays its insureds less than the actual cash value of their loss vehicles. (*Id.*) Plaintiff thus sues Defendant for breach of contract, breach of the covenant of good faith and fair dealing, and for a declaratory judgment that Defendant's actions breached its insurance contracts and violated Tennessee law. (*Id.*)

This Court denied Defendant's motion to dismiss, then Defendant moved for summary judgment. (ECF No. 68.) In the alternative, Defendant moved the Court to compel appraisal under Plaintiff's insurance policy (Policy) and stay the case. (*Id.*) The Court denied Defendant's

[1] This reduction is allegedly based on a hypothetical amount that a seller would deduct from a vehicle after negotiating the price of that vehicle with a potential buyer. (*See* ECF No. 1-1 at PageID 13.) Plaintiff refers to this as Defendant's "Typical Negotiation Adjustment." (*Id.*) And Defendant often borrows this phrase, too. (*See, e.g.*, ECF No. 108-1 at PageID 1588.) But because it is undisputed that Defendant used this typical negotiation amount to reduce the value of comparable vehicles in its claims-settlement process, the Court refers to this amount as a "typical negotiation deduction."

motion for summary judgment. (ECF No. 99.) But the Court granted Defendant's motion to compel appraisal, finding that the appraisal provision was valid, was not unconscionable, was not too expensive, and that there was no lack of mutuality. (*Id.* at PageID 1263–70.) The Court also found that Defendant did not waive appraisal and that Defendant was not estopped from invoking the provision. (*Id*. at PageID 1270–74.) Still, the Court found that the Policy did not make appraisal a condition precedent to Plaintiff's suit. (*Id.* at PageID 1274–76.) The Court also stayed the case pending appraisal. (*Id.* at PageID 1286.)

Under the Policy's appraisal provision,[2] both parties picked an appraiser, and this Court selected a third. (ECF Nos. 108-1 at PageID 1587; 118 at PageID 2379–81.) Then each appraiser valued Plaintiff's totaled vehicle, assigning an "actual cash value" to it. (*Id.*) Defendant's appraiser found that the actual cash value of Plaintiff's totaled vehicle was $14,432.

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[2] The Policy contains a mandatory appraisal provision which provides:

> (1) The owner of the ***covered vehicle*** and ***we*** must agree upon the actual cash value of the ***covered vehicle***. If there is disagreement as to the actual cash value of the ***covered vehicle***, then the disagreement will be resolved by appraisal upon written request of the owner or ***us***, using the following procedures:
>
> (a) The owner and ***we*** will each select a competent appraiser.
>
> (b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or ***we*** may petition a court that has jurisdiction to select the third appraiser.
>
> (c) Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.
>
> (d) The appraisers shall only determine the actual cash value of the ***covered vehicle***. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class representative basis.
>
> (e) A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at their appraisal, will be binding on the owner of the ***covered vehicle*** and ***us***.

(ECF No. 68-5 at PageID 757.) "We" and "us" refer to Defendant.

(*Id.*) Plaintiff's appraiser found that the actual cash value of her totaled vehicle was $17,756.69. (*Id.*) And the Court-appointed appraiser found that the actual cash value of Plaintiff's vehicle was $18,476.13. (*Id.*) Plaintiff's appraiser and the Court-appointed appraiser then agreed to an appraisal award of $18,476.13. (*Id.*) And under the Policy, this amount was "binding" on the parties. (ECF No. 99 at PageID 1269.) So Defendant paid Plaintiff the difference between the initial software-generated value and the appraisal award, plus sales tax. (ECF Nos. 108-1 at PageID 1587; 118 at PageID 2379–81.) With appraisal complete, Defendant now argues that it is entitled to summary judgment on Plaintiff's breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment claims. (ECF No. 108-1 at PageID 1587–89.)

LEGAL STANDARDS AND ANALYSIS

Defendant argues that the Court should grant summary judgment on each of Plaintiff's claims. A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if "proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Lousiville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012) (citing *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984)). And courts construe all reasonable inferences in favor of the nonmoving party when it considers a motion for summary judgment. *Robertson v. Lucas*, 753 F.3d 606, 614 (6th Cir. 2014) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 587 (1986)).

In its motion for summary judgment, the moving party must first show that there is not a genuine issue of material fact. *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the moving party can satisfy this initial burden, then "the burden shifts to the nonmoving party to set forth specific facts showing a

triable issue of material fact." *Id.* at 448–49; *Matushita*, 475 U.S. at 587. And if the nonmoving party "fails to make a sufficient showing of an essential element of [her] case on which [she] bears the burden of proof," then the moving party is entitled to "judgment as a matter of law and summary judgment is proper." *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 914 (6th Cir. 2013) (quoting *Chapman v. United Auto Workers Loc. 1005*, 670 F.3d 677, 680 (6th Cir. 2012) (en banc)); *see also Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 469 (6th Cir. 2012).

Parties must proffer evidence to satisfy their burdens of proof. In fact, "both parties are required to either cite to particular parts of materials in the record or show that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Bruederle*, 687 F.3d at 776 (internal quotations and citations omitted); *see also Mosholder*, 679 F.3d at 448 ("To support its motion, the moving party may show 'that there is an absence of evidence to support the nonmoving party's case.'" (quoting *Celotex*, 477 U.S. at 325)). But "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Martinez*, 703 F.3d at 914 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The court therefore must consider the cited materials, but it may also consider other evidence in the record. Fed. R. Civ. P. 56(c)(3).

One question remains after the parties present their evidence. That is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015) (quoting *Liberty Lobby*, 477 U.S. at 251–52). But "a mere 'scintilla' of evidence" in support of the nonmoving party's argument will not defeat

summary judgment; instead, the nonmoving party "must present evidence upon which a reasonable jury could find in her favor." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (quoting *Liberty Lobby*, 477 U.S. at 251). And statements in affidavits that are "nothing more than rumors, conclusory allegations and subjective beliefs" are insufficient evidence. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584–85 (6th Cir. 1992). Now the Court turns to analyze Plaintiff's claims under this standard.

I. Plaintiff's Breach of Contract Claim Survives Summary Judgment

Tennessee law applies to Plaintiff's breach of contract claim. This is because the Court has diversity jurisdiction to hear this claim under 28 U.S.C. § 1332. So the Court "must apply the law of the forum state, Tennessee, in interpreting the parties' contract and its provisions." *Glob. Aerospace, Inc. v. Phillips & Jordan, Inc.*, No. 3:15-CV-105-PLR-CCS, 2015 WL 5514627, at *2 (E.D. Tenn. Sept. 17, 2015); *see also Hall v. State Farm Mut. Auto. Ins. Co.*, 215 F. App'x 423, 428 (6th Cir. 2007) (applying the law of the state where the court with CAFA jurisdiction is sitting). What is more, the Policy has a choice of law provision explaining that Tennessee law controls "the interpretation and application of any provision of this policy." (ECF No. 68-5 at PageID 767.) Thus, the Court applies Tennessee law to the questions about the parties' insurance contract.

To establish her breach of contract claim, Plaintiff must prove: (1) the existence of a valid, enforceable contract; (2) a deficiency in Defendant's performance amounting to a breach; and (3) damages caused by the breach. *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011). Here, the parties do not dispute that a valid contract existed between them. (*See* ECF No. 99 at PageID 1255.) But Defendant argues that Plaintiff cannot "establish breach of the insurance policy or injury or damages." (ECF No. 108-1 at PageID 1587.) And in response Plaintiff cites evidence supporting her argument that Defendant violated Tennessee Law, thereby

breaching the Policy and causing her injury. (ECF No. 118 at PageID 2378.) The Court considers next whether triable issues of fact remain about Defendant's alleged breach and, if so, whether that breach injured Plaintiff.

A. A reasonable jury could find that Defendant's performance breaches the Policy.

Tennessee courts construe insurance policies under the same rules that govern the construction of any other contract. *Garrison v. Bickford*, 377 S.W.3d 659, 664 (Tenn. 2012). And "contracts of insurance are strictly construed in favor of the insured, and if the disputed provision is susceptible to more than one plausible meaning, the meaning favorable to the insured control." *Id.*

Relevant statutes and regulations also become a part of insurance policies in Tennessee. "[A]ny statute applicable to an insurance policy becomes part of the policy and such statutory provisions override and supersede anything in the policy repugnant to the provisions of the statute." *Hermitage Health & Life Ins. Co. v. Cagle*, 420 S.W.2d 591, 594 (Tenn. Ct. App. 1967). And "rules and regulations promulgated pursuant to statutory directive and not inconsistent with such statutes have the force of law." *Kogan v. Tenn. Bd. of Dentistry*, No. M2003-00291-COA-R3-CV, 2003 WL 23093863 at *5 (Tenn. Ct. App. Dec. 30, 2003).

Plaintiff argues here that Defendant breached the Policy by violating Tennessee Rule and Regulation 0780-01-05-.09 ("Equitable Settlements Regulation" or the "Regulation"). Subsection (1)(b) of that Regulation gives guidance on how insurers must calculate the "actual cash value" of an insured's total loss claim:

> (1) When the insurance policy provides for the adjustment and settlement of first party automobile total losses on the basis of actual cash value or replacement with another of like kind and quality, one of the following methods shall apply at the discretion of the insurer:

> . . . .
>
> (b) The Insurer may elect a cash settlement based upon the actual cost, less any deductible provided in the policy, to purchase a comparable automobile including all applicable taxes, license fees and other fees incident to transfer of evidence of ownership of a comparable automobile.

Tenn. Comp. R. & Regs. Equitable Settlements Regulation § (1)(b) (2017). If an insurer elects to pay an insured such a cash settlement for her total loss, then Subsection (1)(b) further provides that the insurer may calculate the "actual cost" in one of four ways. *See id.* at §§ (1)(b)1.–4. The first two methods are relevant here.

First, an insurer may determine the actual cost of "two or more comparable automobiles in the local market area when comparable automobiles are available or were available within the last ninety (90) days to consumers in the local market area." *Id.* at § (1)(b)1. Second, an insurer may determine the cost of "two (2) or more comparable automobiles in areas proximate to the local market area, including the closest major metropolitan areas within or without the state, that are available or were available within the last ninety (90) days to consumers when comparable automobiles are not available in the local market area pursuant to . . . [Subsection (1)(b)1.] . . . ." *Id.* at § (1)(b)2.

Defendant's chosen software program determined the actual cost of Plaintiff's total loss vehicle using a so-called "Multiple Comparable valuation methodology." (ECF No. 1-4 at PageID 55.) And on its face, this methodology appears to comply with Subsection (1)(b)1. and Regulation (1)(b)2. Still, if the insurer makes deductions from the total loss valuation, Subsection (1)(c) requires insurers to show their work:

> When a first party claimant's automobile total loss is settled on a basis which deviates from the methods described in subparagraphs 0780-01-05-.09(1)(a) and (1)(b), the deviation must be supported by documentation giving particulars of the automobile condition. Any deductions from the cost, including deduction for salvage, must be as specific as reasonable possible, and specific and appropriate as to dollar amount, and shall be documented in the claim file as required by rule 0780-

> 01-05-.05. The basis for settlement shall be fully explained to the first party claimant.

Id. at § (1)(c). What is more, Tennessee statutes authorized the commissioner of insurance to promulgate Subsection (1)(b), and there is no evidence to suggest the Regulation, or its subsections, conflicts with those statutes. *See* Tenn. Code Ann. § 56-2-301 (2008); *id.* at §§ 56-8-101 to -120, -105, -108, -110 (2009); *see also Kogan*, 2003 WL 23093863 at *5 (holding that regulations promulgated under a statute have the force of law).

Defendant argues there is no genuine issue of material fact about whether it breached the Policy. (ECF No. 108-1 at PageID 1587, 1597.) To that end, Defendant contends that an insurer does not breach an insurance contract when it pays what is owed an insured after an appraisal. (*Id.* at PageID 1597 (citing *Scalise v. Allstate Tex. Lloyds*, No. 7:13-CV-178, 2013 WL 6835248, at *4 (S.D. Tex. Dec. 20, 2013)). And it argues that when an insurer tenders the amount owed under an appraisal clause, the insured is estopped from brining a breach of contract claim. (*Id*. (citing *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 845 (Tex. Ct. App. 2017)). Defendant then cites a flurry of cases[3] supporting its argument that "[c]ourts throughout the

[3] *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 258 (5th Cir. 2017) ("Courts have thus repeatedly rejected breach of contract claims when an insurer timely paid an appraisal award." (citing cases)); *Blakely v. USAA Cas. Ins. Co.*, 633 F.3d 944, 948 (10th Cir. 2011) (affirming the district court's order granting summary judgment for an insurer on contract claim because "the policy provided for a mechanism—the appraisal process—to determine the amount of loss when USAA and the insured could not reach an agreement," and "USAA complied with that provision and timely paid the [the plaintiffs] in accordance with the clause"); *Thomas v. State Farm Fire & Cas. Co.*, No. C20-5982, 2022 WL 73880, at *2–3 (W.D. Wash. Jan. 7, 2022) (holding that the plaintiff has "no viable, outstanding breach of contract claim" because "[a]fter the complaint was filed and the parties proceeded through Appraisal, State Farm fully paid the amounts calculated by the Appraisal Panel"); *Bonbeck Parker, LLC v. Travelers Indem. Co. of Am.*, No. 1:14-cv-02059-RM, 2020 WL 533733, at *5–6 (D. Colo. Feb. 3, 2020) (granting summary judgment in the insurer's favor on breach of contract claim because the insurer paid the appraisal award); *Fuchs v. State Farm Gen. Ins. Co.*, No. CV 16-01844, 2017 WL 3579431, at *4 (C.D. Cal. July 3, 2017) (granting summary judgment in the insurer's favor on the plaintiff's breach of contract claim because the insurer timely paid an appraisal award); *Pinney v. Am. Fam. Mut. Ins. Co.*, No. C11-175, 2012 WL 584961, at *3 (W.D. Wash. Feb. 22, 2012) (granting

country routinely grant summary judgment on breach of contract claims following the insurer's payment of an appraisal award." (*Id.* at PageID 1597–98.)

Defendant's argument seems to suggest that summary judgment is appropriate because appraisal amounts to binding arbitration. All of that may be true, but this is not the law in Tennessee. In Tennessee, "an appraisal [is] just that—an appraisal, not binding arbitration." *Merrimack Mut. Fire Ins. v. Batts*, 59 S.W.3d 142, 145 (Tenn. Ct. App. 2001). And so, an insured is not estopped from raising a breach of contract claim in Tennessee just because she has agreed to an appraisal provision with an insurer. *Id.*; *see also Thomas v. Standard Fire Ins. Co.*, No E201501224COAR3CV, 2016 WL 638559, at *3 (Tenn. Ct. App. Feb. 17, 2016). For example, in *Hill v. Auto-Owners (Mutual) Insurance Co.*, the court analyzed a homeowner insurance policy's appraisal provision[4] like the provision here. No. 4:19-cv-78, 2020 WL

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summary judgment on the plaintiff's contract claim because "the appraisers determined the amount of loss and American Family paid the awards"; and so, "[a]ll contractual issues have been resolved").

[4] In *Hill* the appraisal clause of the insurance policy read:

> If you and we fail to agree on the actual cash value or amount of loss covered by this policy, either party may make written demand for an appraisal. Each party will select a competent and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire.
>
> The appraisers shall then appraise the loss, stating separately the actual cash value and loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the actual cash value or amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the actual cash value or amount of loss.
>
> Each party will pay the appraiser it chooses, and equally pay the umpire and all other expenses of the appraisal.
>
> We retain our right to deny the claim in the event there is an appraisal.

7034231, at *2 (E.D. Tenn. Nov. 30, 2020). And the *Hill* court found that the appraisal provision provided "a mechanism for resolving the 'actual cash value or amount of loss covered by' the policy; however, it does not furnish a similar mechanism for resolving coverage disputes. In the absence of an express agreement, resolution of such disputes 'rests with the courts.'" *Id.* at *9.

The parties do not dispute the actual cash value of Plaintiff's total loss vehicle now that they have finished the appraisal process. The issue here instead is whether Defendant knowingly and without explanation reduced the cash value for Plaintiff's total loss vehicle using a single line-item deduction in its routine claims-settlement practice. This practice left Plaintiff, and other Tennessee insureds, with a choice either to accept less than the actual cash value for her vehicle or spend the money required to invoke the appraisal provision. So it is not the invocation of the appraisal provision alone that breaches the Policy. As Plaintiff asserts, but for Defendant's practice of covertly applying the typical negotiation deduction, the valuations would have been accurate.

This case differs from Defendant's cited cases.[5] The main reason is because the cases do not address whether an insurer's alleged violation of a state's claims-settlement regulation breaches the insurance contract. Plaintiff's evidence here could lead a reasonable jury to find that Defendant violated Subsections (1)(b)–(c) of the Regulation, thereby breaching the Policy. First, two appraisers here valued Plaintiff's total loss vehicle for more than Defendant's initial valuation. (ECF Nos. 108-1 at PageID 1587–88; 116 at PageID 1875–76.) Second, the three appraisers here did not apply a typical negotiation deduction to Plaintiff's total loss vehicle.

Hill v. Auto-Owners (Mut.) Ins. Co., No. 4:19-cv-78, 2020 WL 7034231, at *2 (E.D. Tenn. Nov. 30, 2020).

[5] *See* cases cited *supra* note 3.

(ECF No. 116 at PageID 1876.) And this tends to show that such a deduction is not within the definition of "actual cash value" or "actual value" under Subsections (1)(b)–(c). Third, Plaintiff's expert witnesses explain that Defendant deviated from Tennessee's required process for valuing total losses when it applied a typical negotiation deduction. (ECF Nos. 91 & 92.) Fourth, Subsection 1(c) requires specificity when an insurer deviates from paying an insured the actual cash value for their total loss. And a reasonable jury could find that Defendant's claims-settlement process—including its typical negotiation deduction—did not meet Tennessee's specificity requirements.

This Court finds that Plaintiff has presented far more than "a mere 'scintilla' of evidence" tending to show Defendant breached the Policy. *See Tingle*, 692 F.3d at 529. The Court therefore finds that there is a triable issue about whether Defendant's use of the software to allegedly deduct from the actual cash value deviated from Tennessee's settlement valuation process and therefore breached the Policy.

B. A reasonable jury could find that Plaintiff suffered damages caused by Defendant's breach.

Should a jury find Defendant breached the Policy, it could also reasonably find that Defendant's breach injured Plaintiff. Tennessee contract law says that a person may recover "all damages that are the reasonably foreseeable consequence of a breach of the contract." *Wilson v. Dealy*, 434 S.W.2d 835, 838 (Tenn. 1968). And this can include indirect economic losses—also called consequential damages—"within the reasonable contemplation of both parties, at the time the contract was made." *Turner v. Benson*, 672 S.W.2d 752, 754–55 (Tenn. 1984).

Defendant argues that Plaintiff cannot establish injury or damages. Plaintiff alleged that she "would have been paid an additional $913.64 for her total loss" if Defendant had not applied

the typical negotiation deduction. (ECF No. 92. at PageID 1138.) And when it paid Plaintiff an additional $4,265.16 to satisfy the difference between appraisal and Defendant's original valuation, Defendant argues it resolved any injury Plaintiff suffered. (ECF No. 108-1 at PageID 1600–01.)

But this deficiency is not the total of Plaintiff's alleged damages. She also seeks the cost of appraisal as consequential damages. (ECF No. 118 PageID 2394.) And Plaintiff provides evidence that she paid $750 for her own appraiser and $162.38 for the court-appointed appraiser. (ECF No. 116-1 at PageID 1888.) What is more, Plaintiff argues she is also entitled to litigation costs, attorney's fees, and prejudgment interest. (ECF No. 118 at PageID 2394.) And she presents evidence that she incurred such costs. (ECF No. 116-1 at PageID 1888–89.) A reasonable jury therefore could find that Plaintiff suffered these alleged consequential damages. So the Court finds that there is a triable issue of fact about whether Defendant's breach, if any, injured Plaintiff.

II. Plaintiff's Implied Covenant of Good Faith and Fair Dealing Claim Survives Summary Judgment

Besides her breach of contract claim, Plaintiff also alleges that Defendant breached the Policy's implied covenant of good faith and fair dealing. (ECF No. 1-1 at PageID 24.) The covenant of good faith and fair dealing is implied in every contract in Tennessee. *Wallace v. Nat'l Bank of Com.*, 938 S.W.2d 684, 686 (Tenn. 1996). And this covenant has two purposes: (1) "it honors the contracting parties' reasonable expectations"; and (2) "it protects the rights of the parties to receive the benefits of the agreement they entered into." *Goot v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2003-02013-COA-R3-CV, 2005 WL 3031638 at *7 (Tenn. Ct. App. 2005). And "[i]nsurance policies are contracts of the utmost good faith and must be

administered and performed as such by the insurer." *MFA Mut. Ins. Co. v. Flint*, 574 S.W.2d 718, 720 (Tenn. 1978). Even more to the point for a motion for summary judgment, whether a party to an insurance contracted acted in good faith is a question of fact. *See Lamar Advert. Co. v. By-Pass Partners*, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009).

Defendant makes only one argument that Plaintiff's breach of the implied covenant of good faith and fair dealing claim cannot survive summary judgment. (ECF No. 108-1 at PageID 1601). Defendant argues that such a claim cannot stand on its own but must be a part of an overall breach of contract claim. *See, e.g.*, *Cadence Bank, N.A. v. The Alpha Tr.*, 473 S.W.3d 756, 773 (Tenn. Ct. App. 2015). Again, Defendant's argument hinges on Plaintiff's inability to prove her breach of contract claim. Without that claim, Defendant argues "her claim for breach of the implied covenant of good faith and fair dealing 'necessarily fails.'" (ECF No. 108-1 at PageID 1602.)

The Court explained above that there is a triable issue of fact about whether Plaintiff can prove the breach and damages elements of her breach of contract claim. And Plaintiff's supporting evidence of these elements could also persuade a reasonable jury that Defendant failed to act in good faith under the Policy. So Plaintiff raises a genuine issue of material fact about Defendant's breach of the implied covenant of good faith and fair dealing here.

III. Plaintiff's Declaratory Judgment Claim is Justiciable

Defendant next argues that this Court should grant summary judgment on Plaintiff's declaratory judgment claim because Plaintiff lacks standing. (ECF No. 108-1 at PageID 1603.) Plaintiff seeks: (1) a declaration that Defendant breached the Policy; and (2) an order enjoining Defendant from applying a typical negotiation deduction to its valuation of comparable vehicles

when making total loss payments to insureds. (ECF No. 1-1.) The Court finds that Plaintiff has standing to bring her declaratory judgment claim. So her claim survives summary judgment.

Defendant argues Plaintiff lacks standing to bring her declaratory judgment claim here. Standing generally requires a plaintiff show that:

> (1) he or she has "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Fieger v. Ferry, 471 F.3d 637, 643 (6th Cir. 2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Allegations of only a past injury cannot confer standing in the declaratory judgment context. *Id.* A plaintiff instead must show or allege "actual present harm or a significant possibility of future harm." *Id.* (quoting *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998)).

The Court earlier found that Plaintiff had standing to sue for a declaratory judgment for two reasons. First, "Plaintiff has shown that Defendant applied a typical negotiation adjustment during the valuation of her total loss vehicle." *Clippinger v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv02482-TLP-cgc, 2021 WL 4887984, at *16 (W.D. Tenn. Oct. 19, 2021). And second, "Plaintiff has alleged that this harm is ongoing," and there was "no evidence that Defendant has stopped applying the typical negotiation adjustment in its valuations." *Id.* Defendant now contends that neither basis for standing still exists. (ECF No. 108-1 at PageID 1603.)

Defendant argues Plaintiff suffered no actual present harm because "[t]he evidence is undisputed that [Defendant] did not breach the insurance policy. . . ." But the Court has dealt with this above. Defendant contends that because Plaintiff's recent appraisal award of $18,476.13 did not include a typical negotiation deduction, it has not injured Plaintiff. But this argument also depends on the success or failure of Plaintiff's breach of contract claim. Because

a reasonable jury could find Defendant injured Plaintiff by breaching the Policy, Plaintiff has standing to pursue her declaratory judgment claim.

Defendant also argues that Plaintiff cannot show a significant possibility of future harm, citing *Mack v. USAA Casualty Insurance Co.* for support. 994 F.3d 1353, 1357 (11th Cir. 2021). There the Eleventh Circuit held that an insured lacks standing to bring a declaratory judgment action when she relies only on the possibility that she may suffer another total loss under the same or similar policy. *Id.* Defendant also contends that its recent change of appraisal software vendor moots[6] this action. After this Court's previous order, Defendant began using an appraisal software vendor that did not apply a typical negotiation deduction to insureds' total loss valuations. (ECF No. 108-1 at PageID 1588, 1594–95.) All that may be true, but Plaintiff here is not relying on a future possibility of harm alone.

As noted above, Plaintiff has presented a triable issue of fact about Defendants potential breach of the Policy. And so, a jury could find Plaintiff has suffered actual, present harm. The Court therefore finds that Plaintiff has a justiciable declaratory judgment claim.

CONCLUSION

The Court finds that there is a triable issue of fact about whether Defendant breached the policy, and if so, whether that breach injured Plaintiff. Similarly, there is a triable issue of fact about whether Defendant breached the Policy's implied covenant of good faith and fair dealing. And because there is a triable issue of fact as to these two claims, Plaintiff has standing to bring

[6] Defendant characterizes this argument as Plaintiff lacking standing. But the Court agrees with Plaintiff that Defendant's argument is better characterized under the mootness doctrine—in other words, Defendant argues that Plaintiff no longer retains a stake in this litigation. Cleveland Branch, NAACP v. City of Parma, Ohio, 263 F.3d 513, 525 (6th Cir. 2001) ("[S]tanding concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct was occurring at the time the complaint was filed . . . while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation." (internal quotation omitted)).

her declaratory judgment action. With all this in mind, the Court **DENIES** Defendant's motion for summary judgment.

SO ORDERED, this 26th day of September, 2022.

s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE