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NOT RECOMMENDED FOR PUBLICATION

No. 21-6083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANGELA JANE JOHNSON, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
VICTORIA FIRE AND CASUALTY COMPANY,	)	TENNESSEE
	)	
Defendant-Appellee.	)	

ORDER

Before: SILER, COLE, and DAVIS, Circuit Judges.

Angela Jane Johnson and her daughter, Audrey Angel Johnson-Duncan, citizens of Tennessee proceeding pro se, appeal the district court's grant of summary judgment in their civil action against Victoria Fire and Casualty Company ("Victoria"), a subsidiary of Nationwide Insurance that is incorporated and headquartered in Iowa. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons that follow, we will affirm the district court's judgment.

Johnson owned a 2010 Volkswagen Jetta with an insurance policy from Victoria. Around October 2016, the vehicle was involved in two accidents. A body shop estimated repair costs to be about $4,000. Determining that the estimate exceeded the Jetta's value, Victoria offered $2,000 in exchange for the title to the car. Johnson refused the offer. From 2017 to 2019 no progress was made on a resolution, and Johnson continued to drive the Jetta as she dealt with different representatives of the insurance company after Nationwide acquired Victoria. In July 2019, while the plaintiffs were on a trip from Oklahoma back to Tennessee, the Jetta's engine "blew up" on a highway in Arkansas. Johnson alleged that a crack in the antifreeze line was caused by the 2016 accidents, even though prior to the trip Johnson had an oil change and antifreeze fill-up that did

not detect any leaks. After this incident, Nationwide paid "a few thousand dollars for the car" in exchange for the title.

In July 2020, the plaintiffs filed a complaint with the Madison County Circuit Court. They claimed that the insurance company should have made timely repairs to the Jetta. The plaintiffs sought "a brand new 2020 or 2021 black VW Jetta" as well as damages of $1 million for each plaintiff "for life endangerment due to negligence to payout, endangering our lives." The plaintiffs also sought the revocation of any state license or authorization for Nationwide to operate in the insurance industry within Tennessee.

Victoria removed the case to federal court in September 2020 as a diversity action. *See* 28 U.S.C. § 1332. The parties consented to proceed before a magistrate judge through the entry of judgment. Following the close of discovery, Victoria filed a motion for summary judgment. The company argued that no breach occurred because it performed pursuant to the contract by offering payment for the Jetta at its actual cash value, which Johnson ultimately accepted. Victoria also argued that it was not liable for negligence because there was no evidence of injury to the plaintiffs, a breach of any duty, or a causal connection between the failure to make repairs after the 2016 accidents and the engine failure in 2019. The magistrate judge granted the motion for summary judgment. The plaintiffs filed a timely notice of appeal.

We review de novo the district court's grant of summary judgment. *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 361 (6th Cir. 2010). Summary judgment is appropriate when "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). Once the movant has met its burden of production, the non-movant cannot rest on the pleadings but must "cit[e] to particular parts of materials in the record" showing that there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c). In resolving a summary judgment motion, we view the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The plaintiffs did not challenge Victoria's assertion that the policy was issued in Missouri, and, under Tennessee law, Missouri law therefore governs the enforcement of the contract. *See*

Ohio Cas. Ins. v. Travelers Indem. Co., 493 S.W.2d 465, 467 (Tenn. 1973). A claim for breach of contract in Missouri requires "(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Keveney v. Mo. Mil. Acad.*, 304 S.W.3d 98, 104 (Mo. 2010) (en banc).

Johnson has failed to submit any evidence demonstrating a breach of contract. The insurance policy required Victoria to pay Johnson, at most, the actual cash value of the Jetta upon a loss caused by an accident, based on the car's fair market value, age, and condition at the time of the accident. The policy further states, "LOSS SETTLEMENT" followed by, "[a]t our option, we may . . . pay you directly for a loss." In 2019, Victoria offered Johnson $2,986.33 in settlement of the total value of the Jetta, and Johnson accepted the offer and received payment. Thus, the district court properly granted summary judgement to Victoria on Johnson's breach-of-contract claim.

In Tennessee, a claim of negligence requires establishing "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)).

Johnson has failed to submit any evidence demonstrating negligence. The plaintiffs conceded that no injury resulted from the engine failure but argued that the negligence claim was viable based on the potential to suffer an injury. Without any case authority to support this contention, an unrealized potential injury is, indeed, no injury at all. Nor is there any evidence that Victoria owed Johnson a duty to repair the Jetta rather than pay its cash value, or that failure to make repairs after the prior accidents actually or proximately caused the accident in 2019. Thus, the district court properly granted summary judgement to Victoria on Johnson's negligence claim.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-6083

ANGELA JANE JOHNSON, et at.,

Plaintiffs-Appellants,

v.

VICTORIA FIRE AND CASUALTY COMPANY,

Defendant-Appellee.

Before: SILER, COLE, and DAVIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Jackson.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT 1 of 2

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

ANGELA JANE JOHNSON and AUDREY ANGEL JOHNSON-DUNCAN,	)	
Plaintiffs,	)	
v.	)	No. 1:20-CV-01208-jay
VICTORIA'S INSURANCE, NOW NATIONWIDE INSURANCE,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the August 4, 2021, Motion for Summary Judgment filed by Defendant, Victoria's Insurance, now Nationwide Insurance ("Defendant"), (Mot. For Summ. J., Docket Entry ("D.E.") 26), along with a statement of facts in support of the motion, (Def.'s Stat. of Undisputed Facts, D.E. 26-2). Plaintiffs, Angela Johnson and Audrey Johnson-Duncan, (collectively, "Plaintiffs"), filed a response. (D.E. 27.) Defendant then filed a reply. (D.E. 29.) The parties have consented to the jurisdiction of the United States Magistrate Judge. (D.E. 21.) For the reasons set forth below, Defendant's Motion for Summary Judgment is **GRANTED**.

I. FINDINGS OF FACT

The Court finds that the following facts are undisputed for purposes of this Motion for Summary Judgment. The allegations set forth in Plaintiffs' *pro se* complaint stem from two accidents around October 2016, involving Plaintiffs' 2010 Volkswagen Jetta ("Vehicle"). (Def.'s Stat. of Undisputed Facts ¶ ¶ 1-2, D.E. 26-2). David White Body Shop prepared an estimate for repairs of the Vehicle totaling approximately $4,000.00. (*Id.* at ¶ 3.) Due to the value of the

Vehicle compared to the estimated repairs, Defendant offered to pay the total loss in settlement of the claim, which Plaintiffs initially refused but accepted three years later. (*Id.* at ¶¶ 4-5; Johnson Depo., D.E. 26-2, PageID 121.)

In July of 2019, and after Plaintiffs had accepted Defendant's settlement of the claims arising from the 2016 accidents involving the Vehicle, the Vehicle's engine "blew up" on Interstate 40 near Ozark, Arkansas, due to a leak in the antifreeze line. (*Id.* at ¶ 6.) Neither Plaintiff was injured during the July 2019 incident on Interstate 40. (*Id.* at ¶ 10.) The Vehicle had been driven between 45,000 and 60,000 miles without any apparent leakage of fluids between 2016 and July 2019. (*Id.* at ¶ 11.) Plaintiffs then filed suit seeking damages equivalent to a 2020 or 2021 Volkswagen Jetta plus $1,000,000.00 each for life endangerment. (*Id.* at ¶ 8.)

II. CONCLUSIONS OF LAW

Legal Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate "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); *see also LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland Cty. Bd. of Alcohol, Drug Addiction & Mental Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curium); *Berry v. Specialized Loan Servicing, LLC*, No. 18-cv-2721-SHL-dkv, 2020 U.S. Dist. LEXIS 146583, at *6 (W.D. Tenn. Mar. 18, 2020); *Berry v. Citi Credit Bureau*, No. 2:18-cv-2654-SHL-dkv, 2020 U.S. Dist. LEXIS 144547, at *25 (W.D. Tenn. Mar. 30, 2020). The moving party has the burden of showing that there are no genuine issues of material fact in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by pointing out to the court that the non-moving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986);

Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989); *Moore. v. Brennan*, No. 18-cv-2881-SHL-dkv, 2020 U.S. Dist. LEXIS 140717, at *15 (W.D. Tenn. Apr. 16, 2020).

In response, the non-moving party must go beyond the pleadings and present significant probative evidence to demonstrate that there is more than "some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 378 (6th Cir. 1993). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *LaPointe*, 8 F.3d at 378; *Touchmark Nat'l Bank v. Escue*, No. 1:19-cv-02354-JDB-jay, 2021 U.S. Dist. LEXIS 30270, at *3 (W.D. Tenn. Feb. 18, 2021).

In deciding a motion for summary judgment, the "[c]ourt must determine 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.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-52). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Patton*, 8 F.3d at 346; *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Ashraf v. Adventist Health Sys.*, No. 2:17-cv-02839-SHM-dkv, 2019 U.S. Dist. LEXIS 149679, at *14 (W.D. Tenn. Aug. 13, 2019). However, to defeat a motion for summary judgment, "[t]he mere existence of a scintilla [is] insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 252; *LaPointe*, 8 F.3d at 37; *Ashraft*, 2019 U.S. Dist. LEXIS 149679, at *15. Finally, a court considering a motion for summary judgment may not weigh evidence [to] make credibility determinations. *Anderson*,

477 U.S. at 255; *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994); *Berry*, 2020 U.S. Dist. LEXIS 144547, at 26.

Analysis

In Defendant's Motion for Summary Judgment, Defendant argues that Plaintiff cannot establish a *prima facie* case of breach of contract. Defendant agrees that an enforceable contract was in existence. However, Defendant contends that Plaintiffs cannot establish Defendant's nonperformance under the contract because performance was satisfied when Defendant offered to pay for the actual cash value of the Vehicle after the October 2016 accidents and that Plaintiff Angela Johnson accepted payment for the value of the Vehicle about a year prior to this suit.

Defendant also contends that, to the extent Plaintiffs' claim arises from a negligence cause of action, summary judgment is still appropriate. Defendant argues that Plaintiffs cannot establish a negligence cause of action because Defendant did not owe a duty of care beyond the contract, neither Plaintiff was injured as a result of the Vehicle's engine failure in the July 2019 accident, Plaintiffs have not established a causal connection between the lack of repairs concerning the 2016 accidents and the engine failure in 2019, and Plaintiffs accepted payment for the 2016 losses to satisfy any existing duty. Furthermore, Defendants argue that Plaintiffs cannot establish the element of causation because when the Vehicle was taken for an oil change shortly before the engine failed, there were no indications of any leaks.

Defendant sets forth eleven undisputed facts in its statement of material undisputed facts. (D.E. 26-2.) Plaintiffs dispute four of these facts in the response. However, Plaintiffs' disputes are not supported with citations to materials in the record as required by Fed. R. Civ. P. 56(c). Moreover, "[a]lthough Rule 56(c) requires a non-moving party to cite to materials in the record including affidavits and responses to interrogatories, to survive summary judgment, it does not

follow that such evidence will necessarily be sufficient." *Huffman v. Dish Network, LLC*, 2016 WL 3906816, at *3 (W.D. Tenn. July 14, 2016). Here, although Plaintiffs dispute four facts by stating "denies" in the response, Plaintiffs fail to cite to materials in the record as evidence that there is a genuine dispute as to a material fact.

A. Breach of Contract Claim

In the response, Plaintiffs allege an "absolute breach of contract." (D.E. 27, PageID 133.) However, Plaintiffs do not meet the burden of showing a *prima facie* cause of action for breach of contract. "When a party claims a breach of contract, state law applies." *GTP Structures I, LLC v. Wisper II, LLC*, 153 F Supp. 3d 983, 987 (W.D. Tenn. 2015). In Tennessee, "a contract is presumed to be governed by the law of the jurisdiction in which it was executed absent a contrary intent. *Creative Bus. v. Covington Specialty Ins. Co.*, No. 2:20-cv-02452-JTF-atc, 2021 U.S. Dis. LEXIS 176869, at *8 (W.D. Tenn. Sept. 9, 2021) (citing *Williams v. Smith*, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014). Here, the contract at issue is the insurance policy, which was executed in Missouri. Under Missouri law, a court will interpret a contract by ascertaining the parties' intent and do so by relying on the plain and ordinary meaning of the words in the contract and considering the document as a whole. *State v. Nationwide Life Ins. Co.*, 340 S.W.3d 161, 182 (Mo. App. W.D. 2011). Additionally, in Missouri, "[a] breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) [a party] performed or tendered performance pursuant to the contract; (3) [a] breach of contract [occurred]; and (4) damaged suffered." *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 294 (Mo. Ct. App.

2017) (citing *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. Banc 2010) (internal quotation marks omitted)).[1]

There is no genuine issue of material fact as to whether an enforceable contract exists because Defendant agrees that the insurance policy is an enforceable contract, and Plaintiff does not dispute this fact. Concerning the element of performance, Plaintiffs broadly argue that Defendant's settlement offer, and subsequent accepted payment, was not sufficient for the cost of repairs and that Defendant should have paid for the repair of the Vehicle rather than pay for the value of the Vehicle based on total loss. However, after reviewing the insurance policy by its plain and ordinary meaning, the contract only required Defendant to pay the actual cash value of the Vehicle. Plaintiffs do not present evidence sufficient to show a genuine issue as to this fact.

Furthermore, Plaintiffs state in the response that they neither agree or deny Defendant's undisputed fact that Plaintiffs accepted Defendant's original offer to pay for the actual cash value of the car. Plaintiff Angela Johnson stated in her deposition that she accepted Defendant's settlement payment of $2,986.33. (D.E. 26-2, PageID 121-22.) Thus, Defendant offered a settlement payment according to these requirements, Plaintiffs accepted the payment, and performance was satisfied. Plaintiffs fail to cite to materials in the record as evidence that there is a genuine issue of fact regarding performance. Accordingly, this Court finds that Defendant is entitled to summary judgment on a breach of contract claim because Plaintiff has not presented a genuine issue of material fact as to whether Defendants performed under the contract.

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[1] Defendant cites to the essential elements of a breach of contract claim under Tennessee law, which closely follow Missouri law. (D.E. 26-1, PageID 111-12) ("Under Tennessee law, the essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." (Citing *Evans v. Walgreen Co.*, 813 F. Supp. 2d 897, 941-42 (W.D. Tenn. 2011)).

B. Negligence Claim

Plaintiffs allege that Defendant owed a "duty of care to us as patrons." (D.E. 27, PageID 133.) The Court construes Plaintiffs' claim as a negligence cause of action. Plaintiffs do not meet the burden of showing a *prima facie* cause of action for negligence. "Tennessee, which defines negligence as basically 'the failure to exercise reasonable care,' requires the demonstration of the following elements: '(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.'" *Sandlin v. Citimortgage, Inc.*, No. 2:19-cv-02368-JTF-atc, 2021 U.S. Dist. LEXIS 59552, at *27 (W.D. Tenn. Mar. 1, 2021) (citing *Smith v. Marten Transp. Ltd.*, No. 2:19-cv-02135-TLP-dkv, 2020 U.S. Dist. LEXIS 113401, at *6 (W.D. Tenn. Mar. 23, 2020).

Defendant argues that there is no evidence to establish a claim for negligence because, to the extent that Defendant owed a duty arising out of the contract, Plaintiffs accepted the settlement payment in satisfaction of this duty. Additionally, Defendant argues that Plaintiffs have not established the causation element between the lack of repairs in 2016 and the engine failure in 2019. Finally, Defendant asserts that Plaintiffs readily admit that neither suffered an injury or loss as a result of the engine failure in July 2019 and that Defendant is entitled to summary judgment on this claim, regardless of whether causation is met.

As an initial matter, Plaintiffs do not cite to materials in the record as to whether there is a genuine issue of material fact regarding any essential element of negligence. In fact, Plaintiffs do not establish a genuine issue of material fact regarding any essential element of a negligence claim. Plaintiffs broadly allege that Defendant had a "duty of care to us as patrons" to fix the Vehicle and that Defendants breached by not doing so. However, Plaintiffs do not address whether there is a

genuine issue of material fact that any duty owed was satisfied by accepting Defendant's settlement payment.

Additionally, Plaintiffs do not allege facts to establish the essential element of causation in how the 2019 engine failure was caused by the lack of repairs in 2016. Plaintiffs only state that a crack in the antifreeze line caused the engine failure. However, Plaintiffs have not presented sufficient evidence to show a genuine issue as to whether a crack in the antifreeze line was a result of the 2016 accidents or the lack of repairs from those accidents. In fact, Plaintiffs admit that the Vehicle was taken for an oil change shortly before the engine failed and that there were no indications of any leaks.

Finally, as it pertains to the damages element, Defendant has established that damages to the Vehicle have been resolved via settlement. Plaintiffs, however, attempt to claim damage based on the potential harm that was present. Plaintiffs admit that neither suffered injury as a result, but instead argue that this element is a genuine issue of material fact because there was a *potential* to be injured. Plaintiffs assert that although they were not injured, their lives were endangered and they "could have been killed." (D.E. 27, Page ID 133.) A potential injury that essentially "could have been" is not a cognizable injury to satisfy the requirements of a negligence cause of action. *See Steffey v. Beechmont Invs., Inc.*, No. 3:16-cv-223, 2017 WL 3754443, at *6 (E.D. Tenn. Aug. 29, 2017) ("But of course, a negligent act alone . . . is not actionable if it does not result in injury to a plaintiff."); *see also Poynter v. General Motors Corp.*, 476 F. Supp. 2d 854, 858-89 (E.D. Tenn 2007) (noting that a plaintiff must prove that she has suffered an injury or loss to state a claim of negligence).

Because Plaintiffs do not dispute the lack of injury, Plaintiffs do not present a genuine issue of material fact as to whether an injury occurred, an essential element for a negligence cause

of action. Thus, even when viewing the facts in the light most favorable to Plaintiffs, Plaintiffs lack sufficient proof that a jury could find for Plaintiffs on a negligence claim because Plaintiffs fail to allege the essential element of injury, which is fatal to this claim.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

The pretrial conference and jury trial set for November 5, 2021, and November 15, 2021, respectively, are hereby CANCELLED.

The Clerk of the Court is DIRECTED to enter judgment in accordance with this Order.

IT IS SO ORDERED this 14th day of October 2021.

s/ Jon A. York
U.S. MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.