STATE OF MICHIGAN

COURT OF APPEALS

RUTH ANN WEBB,

Plaintiff-Appellant,

v

DAVID ERIC WILLIAMS, L.L.C., d/b/a ADRIAN DODGE, CHRYSLER, PLYMOUTH, JEEP, and PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendants-Appellees,

and

DON MILLER,

Defendant.

UNPUBLISHED
October 22, 2009

No. 284338
Lenawee Circuit Court
LC No. 06-002159-NZ

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff Ruth Ann Webb appeals by leave granted the circuit court's November 7, 2007, order granting summary disposition to defendant David Eric Williams, L.L.C. ("Adrian Dodge"). The court granted Adrian Dodge summary disposition on the basis of res judicata and collateral estoppel, finding that plaintiff's claim was precluded by a prior small claims judgment. Plaintiff also appeals the court's February 8, 2008, order denying her motion to strike defendant Progressive Michigan Insurance Company's ("Progressive") notice naming Adrian Dodge as a nonparty at fault. We reverse and remand for further proceedings.

I. Facts and Procedural History

In May 2004, while driving her 2001 PT Cruiser, plaintiff hit a large object in the road. She was not injured in the accident, but her vehicle sustained lower, front-end damage. Plaintiff testified that after the accident, the vehicle shook and overheated when driven. Plaintiff reported the accident to her insurer, Progressive, the day after the accident. Thereafter, the vehicle was towed to Adrian Dodge for repairs. Progressive adjustor Don Miller inspected the vehicle and wrote a repair estimate indicating that the front bumper cover and front body floor cross member needed replacing. Progressive adjustor Barbara Bailey testified that Miller would have

instructed Adrian Dodge to make the repairs recorded on the estimate and "to tear down the vehicle to determine if there were any . . . additional damages."

After "tearing down" plaintiff's vehicle, Adrian Dodge found additional damage and contacted Progressive. Progressive adjustor Shannon Stoetzel inspected the vehicle and confirmed Adrian Dodge's conclusion that the front air deflector [attached to the upper tie bar], front core support, and top insulators needed replacing. Stoetzel wrote a supplemental repair estimate authorizing the additional repairs and the repairs were made. Adrian Dodge manager Dan Logan testified that no one employed by Adrian Dodge inspected the underbody of plaintiff's vehicle because Progressive did not request that they do so.

On June 4, 2004, Adrian Dodge informed plaintiff that it had finished repairing her vehicle and she picked it up from the dealership. Thereafter, however, plaintiff complained to Adrian Dodge about the vehicle overheating. Adrian Dodge discovered a problem with the cooling fan and fixed it. She also complained that the vehicle vibrated when driven and that there was no vibration before the accident. It is unclear when plaintiff complained to Adrian Dodge about the vibration and how frequently she complained. Adrian Dodge manager Dan Logan testified at his deposition that when plaintiff telephoned to complain about the vibration, he asked her to contact Progressive directly because "they [Progressive] paid the bill; they determined what's wrong with the car." Logan testified that he did not hear anything further about plaintiff's vehicle until a Progressive adjustor telephoned Adrian Dodge and indicated that he would be inspecting the vehicle at the dealership. Plaintiff, on the other hand, testified at the small claims hearing and alleged in her complaint that she took her vehicle back to Adrian Dodge and complained about the vibration, and an Adrian Dodge employee told her that the tires were out of balance.

According to plaintiff, she continued driving the vehicle and when the vibration worsened, she took it to Vulcan Tire. A Vulcan Tire employee informed her that the tires did not need to be balanced and then referred her to Lenawee Tire. At Lenawee Tire, service manager Fred Mort told plaintiff there was damage to the front axle and the front motor mount was loose. Mort indicated that it was unusual for such a new vehicle to have a damaged axle due to ordinary wear and tear.

On August 5, 2004, plaintiff contacted Progressive about the vibration and the opinion of Mort that the front axle was problematic. She asked that Progressive re-inspect the vehicle and Bailey agreed. Four days later, plaintiff took the vehicle to Adrian Dodge and Miller inspected it, noting that the reason for the inspection was vibration. Miller specifically looked for damage underneath the vehicle, but found nothing wrong and only recommended that plaintiff balance and rotate the tires. Thereafter, Progressive denied plaintiff's request for additional repairs, concluding that any vibration must have been caused by ordinary wear and tear.

At her deposition, Bailey further described the August inspection of plaintiff's vehicle:

> *A*. It looks like Don [Miller] spoke with her [plaintiff]. The shop [Adrian Dodge] said that the manager was to call her once Don was there, that she wouldn't authorize any teardown and that Progressive should pay for all the costs. And Don had called her, I guess, and said the vehicle would need to be torn down,

that she would need to bring the vehicle in right now since he was there and that they could put it up on a hoist to check for visible damages.

* * *

Q. Did you determine what the cause of the vibration was?

A. From my recollection it looks like Don had said [plaintiff] stated the vibration was coming from the left side axle due to what Lenawee Tire Company had told her. And Don had called Lenawee Tire Company and spoken with Fred [Mort], asked him if he seen damage to the left axle. Fred had said no. . . .

Q. Okay. I just want the answer to did you determine what was causing the vibration?

A. No.

Q. It's my understanding that there was a determination that the vibration was due to wear and tear; is that correct?

A. That was what the final partial denial was for, because no–neither Don nor Adrian Dodge could find what she or Lenawee Tire Company was claiming to be a problem.

Q. So . . . how did Progressive come to the conclusion that it was wear and tear?

A. From my discussion with [plaintiff], and it–on the 10th we–I had done a three-way call with Dan [Logan] from the shop and [plaintiff], and Dan had told [plaintiff] that neither him nor Don from Progressive could see that the axles had any physical damage to them at all or how the right side damage would be related to this accident in any way if the impact was to the left. I don't know what the right side damage was. Apparently there was something wrong with the right motor mount, and anytime that anyone claims damages that are not–that we cannot specifically relate to that particular accident, then they won't be covered under that accident.

* * *

Q. But my question is, Progressive denied the claim specifically for wear and tear; correct?

A. Correct. As far as I remember.

Logan testified that when plaintiff dropped her vehicle off at Adrian Dodge for Miller to inspect it, no one from the dealership inspected it because plaintiff refused their offers to do so. According to Logan, plaintiff was informed that she would be charged a fee to have an Adrian Dodge mechanic perform the inspection and she did not want to pay the fee. She believed that Progressive should pay for any inspections and repairs because the vibration was accident-related.

On September 24, 2004, plaintiff filed a claim against Adrian Dodge in the small claims division of the district court. Plaintiff asserted that Adrian Dodge owed her $1750 because, "In Good Faith, [Adrian Dodge's] Body Shop Dept Failed To Complete Fixing the damages To [her] car. Caused by an Accident." Adrian Dodge defended on the ground that Progressive, not it, decided which damages were accident-related. On November 1, 2004, an attorney-magistrate held a hearing on plaintiff's claim. The magistrate allowed plaintiff to explain the basis of her claim and then asked plaintiff why she believed Adrian Dodge owed her money. Plaintiff responded:

> . . . I told them . . . and left several messages from the day I dropped off the car, what was wrong with the car. It was warmin' up, it was shakin' . . . . [T]hey're the one[s] that are the professional mechanics of the car and I told 'em what was wrong with it and when I left it, it was still shakin' when I still left the dealership. They're the ones that could of told Progressive this–I mean they're the mechanics. Bottom line, they're the mechanics, my car is a Chrysler and they are the professionals on the mechanics of my car.

Plaintiff's husband added that Adrian Dodge inspected and repaired the vehicle and then claimed there was nothing else wrong with it. But, when Lenawee Tire hoisted up the vehicle, "you could clearly see it was out of round–where it was on both sides . . . ." Plaintiff's husband claimed that Adrian Dodge was liable because it erroneously informed Progressive that there was nothing wrong with plaintiff's vehicle when there was clearly damage to the vehicle that had not been fixed. Plaintiff then presented the magistrate with a written statement from Vulcan Tire indicating that plaintiff's tires did not need to be balanced and a written statement from Mort of Lenawee Tire indicating that he observed damages on plaintiff's vehicle.

On behalf of Adrian Dodge, Logan testified:

> . . . She basically did bring it in for an accident. . . . She did . . . mention the vibration and the over-heating. We couldn't find anything at all wrong with anything in the front-end, but I told her as a courtesy, I would inspect the one front tire and have it rebalanced but my technician found it was way off balance. We balanced it. Progressive would not cover it. Progressive is her insurance company. Their adjuster looks at the car, determined what he pays for and what they don't pay for. What's related, what isn't related.
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> We fixed the car and gave it back to her. She brought it back for a cooling fan problem. . . . She still complained about a vibration. That went on and on and on so we felt it would be best if the Progressive adjustor meet her there and inspect the vehicle. When the Progressive adjustor was there, he reviewed what we had done and what we had gotten paid for by Progressive and I asked, is everything that's on the sheet what you paid us to do done properly? He said yes.
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> Then you have the issue of vibration. [Progressive] looked for stuff that's accident related. They found no marks, impacts, scrapes or anything at all on the front drive axles that she's saying that Lenawee Tire says is bad. Axles can be out of round if you go up and down a little bit. Whether they're worn, the issue here is is it accident related, but once again Progressive determines that. Their

adjustor said no, it isn't. She wanted it further checked out and serviced. Well for services to check it out, we do charge a fee 'cause you put a mechanic on the repair and take it apart and inspect and she said she would not pay for it so we preferred–you know, didn't do anything more to it.

Progressive's opinion is, who is their insurance company, it's not accident related and they will not pay for it. How it involves Adrian Dodge, I don't know.

At the conclusion of the hearing, the magistrate denied plaintiff's claim, stating:

> [T]o be perfectly honest with you, the statement from, I believe it was Lenawee Tire, if I was looking at this and trying to determine what was wrong with this vehicle . . . I can't tell. . . .
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> . . . What this whole claim boils down to is you believe there's damage to the axles on your vehicle and you believe that it was caused by the accident and you think that somebody should pay to have that fixed. That–I understand that. Your–your claim was that somehow Adrian Dodge has told your insurance company that there was nothing wrong with the axles. It appears from the letter [from Progressive] that even if there were something wrong . . . they've made a determination that it's–it's wear and tear and not covered by your policy. So [Progressive] did investigate it, they did look at it and they've made a determination that they're not covering it. And I don't think that had anything to do with Adrian Dodge . . . .
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> * * *
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> If you have any kind of claim at all, I would think it would be against your insurance company. Certainly, Adrian Dodge . . . [is] not gonna fix something that they've not been authorized to fix by the insurance company because that's who's picking up the tab here. And unless you've made some other arrangement to pay for that, the–they're not gonna do work that they've not been hired to do.

The magistrate subsequently entered a judgment for no cause of action.

On November 12, 2004, plaintiff was in another accident in her PT Cruiser. She lost control of the vehicle when it began to shake. The vehicle veered off the road into a ditch and flipped over. Plaintiff suffered severe injuries as a result of the accident, including cervical fractures and a traumatic brain injury. Approximately one month later, mechanic William Wilson inspected plaintiff's vehicle. Wilson concluded that the accident resulted from the left tie rod socket disengaging from the ball stud, which is attached to the left steering knuckle, causing a loss of steering control. He further concluded that the left tie rod and ball stud were damaged in plaintiff's initial accident in May 2004. According to Wilson, a proper inspection of the steering system, even to do an alignment, would have revealed the damaged tie rod and ball stud, and the steering/suspension system should have been properly checked if plaintiff complained of vibration.

On March 10, 2006, plaintiff brought a negligence action against Adrian Dodge in the circuit court, seeking personal injury damages. Adrian Dodge subsequently filed a motion for summary disposition under MCR 2.116(C)(7) on the basis of res judicata, arguing that plaintiff's claim was barred because the issue of its liability regarding the inspection and repair of plaintiff's vehicle had already been decided in small claims court. The circuit court denied Adrian Dodge's motion in an order dated December 7, 2006.

On March 5, 2007, plaintiff filed a first amended complaint adding Progressive and Miller as defendants. As to Adrian Dodge, plaintiff alleged:

> 24. At all applicable times, Defendant [Adrian Dodge] owed Plaintiff, Ruth Ann Webb the duty to use reasonable care in:
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> a. The inspection and repairs of Plaintiff's vehicle, to ensure that the vehicle was reasonably safe for its intended, anticipated or reasonably foreseeable use.
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> b. Repairing the vehicle so it was safe to operate.
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> c. Warning Plaintiff of any defects in the vehicle, which Defendant knew of, or in the exercise of reasonable care, should have known of;
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> d. Consulting with Plaintiff's insurer to ensure that all covered damages were authorized for repair;
>
> e. Other obligations as shall be revealed in discovery.
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> 25. Defendant, Adrian Dodge, breached its duties in one or more ways, so far as is presently known:
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> a. Failing to use reasonable care in the inspection of Plaintiff's vehicle;
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> b. Failing to use reasonable care in making complete repairs to Plaintiff's vehicle;
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> c. Failing to use reasonable care in warning Plaintiff of defects to Plaintiff's vehicle, of which it knew or should have known;
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> d. Failing to exercise reasonable care in monitoring the inspections performed by Co-Defendant, to ensure that the said inspections were completed appropriately;
>
> e. Failing to exercise reasonable care in consulting with Plaintiff's insurer to ensure that all covered damages were authorized for repair;
>
> f. Other failings as shall be revealed in discovery.

Thereafter, Adrian Dodge filed a second motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Adrian Dodge renewed its res judicata argument and further argued that plaintiff's claim was barred by collateral estoppel, neither plaintiff nor Progressive ever authorized Adrian Dodge to inspect or repair the alleged front-end vibrations associated with plaintiff's vehicle, and Adrian Dodge had no duty, contractual or otherwise, to inspect or repair the vehicle gratuitously. The circuit court granted Adrian Dodge's motion in an order dated November 2, 2007. At the hearing on the motion, the court held:

> However, the issues that were litigated in small claims court do fall under the concept of res judicata and collateral estoppel. In this particular case, [plaintiff] chose to file litigation in small claims court against Adrian Dodge. And the issues that were litigated in that case were whether or not they had a duty to repair the damage and, also, what the damages were.
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> The damages–if you read the transcript, it's replete with information that there was damage to the axle, that that was acknowledged by both the insurance company and Adrian Dodge, and it was not as a result of the accident. That's what it says, 90 days prior to the time that she had an accident.

At that point, the court quoted at length from the transcript of the small claims proceeding and then stated:

> So I'm going to grant summary disposition and dismiss [Adrian Dodge] from the case because [plaintiff has] already litigated the issue as to whether or not they had the responsibility to fix it and whether or not your client was informed that there was damage to the vehicle. And she was. And she was informed by the magistrate at the very least. That's what the magistrate found in her opinion. She didn't appeal this in the District Court, which she had a right to do.
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> The other claims, she didn't have a requirement to join. She didn't have a requirement to join the insurance company. So if you want to litigate against the insurance company, have at it. But you're not going to litigate it against Adrian Dodge. That's already been done.[1]

On October 25, 2007, Progressive filed a notice naming Adrian Dodge as a nonparty at fault. Plaintiff objected and then filed a motion to strike Progressive's notice, arguing that Adrian Dodge could not be named as a nonparty at fault because the circuit court adopted, by way of res judicata and collateral estoppel, the small claims court's ruling that Adrian Dodge owed no duty to plaintiff and if plaintiff had a claim, it was against Progressive. The circuit court denied plaintiff's motion to strike.

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[1] The circuit court did not specify at the hearing or in its November 2, 2007, order under which subrule it was granting Adrian Dodge summary disposition. Based on the court's statements regarding res judicata and collateral estoppel, however, we must conclude that the court granted summary disposition under MCR 2.116(C)(7).

Plaintiff filed a delayed application for leave to appeal the circuit court's orders granting summary disposition to Adrian Dodge and denying plaintiff's motion to strike Progressive's notice naming Adrian Dodge as a nonparty at fault. This Court granted plaintiff's application. *Webb v David Eric Williams, LLC*, unpublished order of the Court of Appeals, entered July 25, 2008 (Docket No. 284338).

II. Res Judicata and Collateral Estoppel

Plaintiff first argues that her claim against Adrian Dodge is not barred by the doctrines of res judicata or collateral estoppel. Assuming without deciding that small claims judgments can invoke application of res judicata and collateral estoppel, we find that neither doctrine applies here.[2] The circuit erred in holding otherwise and granting Adrian Dodge summary disposition under MCR 2.116(C)(7).

We review a trial court's award of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by a prior judgment, such as by res judicata or collateral estoppel. A party may, but is not required to, support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other admissible documentary evidence. *Id.* at 119. If such material is submitted, the court must consider it. *Id.*, citing MCR 2.116(G)(5). All well-pleaded factual allegations must be accepted as true and construed in favor of the nonmoving party, unless the movant contradicts them with documentation. *Id.*; *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993). Summary disposition should not be granted under MCR 2.116(C)(7) unless no factual development could provide a basis for recovery. *Jones*, *supra* at 397. The applicability of both collateral estoppel and res judicata are also questions of law that we review de novo. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006). The purpose of res judicata is to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Id.* "Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Id.* at 531. It bars litigation in the second action not only of those claims actually litigated in the first action, but every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not. *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004).

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[2] Because we find that neither doctrine applies under the circumstances presented, we need not address whether res judicata or collateral estoppel apply to small claims judgments in Michigan.

Res judicata does not bar plaintiff's claim against Adrian Dodge because the claim was not and could not have been resolved in the small claims proceeding. *Id.*; *Richards*, *supra* at 531. Plaintiff filed a claim against Adrian Dodge in small claims court on September 24, 2004. She asserted that Adrian Dodge owed her $1750 in repair costs because it ". . . Failed To Complete Fixing the damages To [her] car. Caused by an Accident," i.e., plaintiff's first accident. The magistrate entered a judgment for no cause of action on November 1, 2004. After her second accident, plaintiff brought this negligence claim against Adrian Dodge in the circuit court. Plaintiff asserted that Adrian Dodge breached its duty to exercise reasonable care in inspecting and repairing her vehicle after her first accident, directly and proximately causing the personal injuries she sustained in her second accident. Given that plaintiff's second accident did not occur until November 12, 2004, she could not have raised her claim for personal injury damages in the prior small claims action. The facts and evidence essential to plaintiff's negligence action were not identical to the facts and evidence essential to the prior action, *Richards*, *supra* at 530, and a second action is not barred if there are changed or new facts essential to the action, *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997), overruled in part on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). Therefore, res judicata does not apply here.

Collateral estoppel is distinct from res judicata in that it concerns issue preclusion, and not claim preclusion. See *People v Gates*, 434 Mich 146, 155 n 7; 452 NW2d 627 (1990). "[C]ollateral estoppel must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims." *Storey v Meijer, Inc*, 431 Mich 368, 372; 429 NW2d 169 (1988). It "precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

Collateral estoppel does not bar plaintiff's claim against Adrian Dodge. Adrian Dodge argues that plaintiff had a full and fair opportunity to litigate the issue of its duty to her in the small claims proceeding. Contrary to Adrian Dodge's argument, however, that issue was not actually and necessarily determined by the small claims magistrate. To be necessarily determined in the first action, the issue must have been essential to the resulting judgment. *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). In plaintiff's small claims action, she claimed only that Adrian Dodge failed to complete its repairs of her vehicle and sought to recover the cost of the necessary repairs. At the small claims hearing, the magistrate stated that the evidence plaintiff presented, including the documentation from Lenawee Tire, did not clearly identify the damages requiring repair, Progressive had already inspected the vehicle and determined that there were no accident-related damages, and if plaintiff had a claim, it was against Progressive, because she declined to pay for additional services. Although the magistrate may have considered the issue of duty in reaching her decision, she did not specifically address whether Adrian Dodge owed plaintiff a duty or the scope of that duty on the record. "Collateral estoppel applies only when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained." *Ditmore*, *supra* at 578. Moreover, because plaintiff did not bring a negligence action in small claims court, it was unnecessary for the magistrate to determine whether Adrian Dodge owed

plaintiff a duty of reasonable care in inspecting and repairing her vehicle. It was not an issue essential to the judgment. *Id*. at 577; *Eaton Co Rd Comm'rs*, *supra*. Therefore, collateral estoppel does not apply here. The circuit court's order granting Adrian Dodge summary disposition under MCR 2.116(C)(7) must be reversed.

III. Duty

Adrian Dodge moved for summary disposition under MCR 2.116(C)(8) and (C)(10) in the circuit court, arguing that it owed no duty to plaintiff. Because a genuine issue of material fact exists regarding the duty, if any, Adrian Dodge owed plaintiff, Adrian Dodge is not entitled to summary disposition on that basis.

On appeal, plaintiff argues that Adrian Dodge owed her a duty to exercise reasonable care in inspecting and repairing her vehicle. Adrian Dodge argued that it owed no duty to plaintiff when it moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and reiterates that argument on appeal. The circuit court did not specifically rule on this issue. "Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court. However, where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005) (citations omitted). Because the record here contains the necessary facts, Adrian Dodge has responded on appeal by arguing that it owed no duty to plaintiff, and this issue was presented by Adrian Dodge to the circuit court, we consider it to determine if Adrian Dodge has shown an alternative basis for affirmance. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden*, *supra* at 119. The motion should be granted only where the claim is so legally deficient that recovery would be impossible even if all well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Id*. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 119-120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(G)(6).

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006). Ordinarily, whether a duty exists is a question of law for the court. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). If there is no duty, summary disposition is proper. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). However, if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the factfinder. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996), aff'd 457 Mich 871 (1998).

Duty can arise from a statute, a contract, or by application of the basic rule of common

law, which imposes an obligation to use due care or to act so as not to unreasonably endanger the person or property of others. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). Even in circumstances in which a person has no duty to act, he is bound to use reasonable care if he chooses to act. A person who undertakes to render a service has the obligation to use due care so as not to unreasonably endanger another or the property of another. *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991); *Schenk v Mercury Marine Div*, 155 Mich App 20, 25; 399 NW2d 428 (1986). In *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 401-402; 418 NW2d 478 (1988), this Court cited, with approval, Restatement Torts, 2d, § 323, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Adrian Dodge argues that it owed no duty to plaintiff because at her follow-up visit to the dealership in August 2004, Progressive inspected the vehicle, could not determine the cause of the vehicle's shaking, and stated that no repairs were necessary, other than balancing and rotating the tires, and plaintiff then refused to pay for Adrian Dodge to conduct its own inspection of the vehicle. In so arguing, Adrian Dodge overlooks the fact that, according to at least some of the evidence presented, it inspected and repaired plaintiff's vehicle more than once between June 2004 and August 2004 and informed plaintiff that it could not explain the vehicle's shaking. At the small claims hearing, plaintiff testified that she complained about the vehicle overheating and vibrating when it was first towed to Adrian Dodge on May 28 and again after it was returned to her on June 4, because neither problem had been resolved. Plaintiff alleged in her complaint that she returned to Adrian Dodge to complain on June 5, the day after she picked up the vehicle. According to the small claims court testimony of plaintiff and Logan, and the deposition testimony of Bailey, Adrian Dodge inspected plaintiff's vehicle and resolved the overheating problem by repairing the cooling fan. But, it was unable to resolve the shaking problem. Plaintiff testified at the small claims hearing and alleged in her complaint that when she asked about the shaking, an Adrian Dodge employee told her that there was nothing wrong with the vehicle and suggested that she have the tires balanced. Logan testified at his deposition that when plaintiff returned to Adrian Dodge in August for Progressive to inspect the vehicle, no one from the dealership conducted an inspection because of plaintiff's refusal to pay. But, Bailey's deposition testimony suggests that Logan did, in fact, inspect the vehicle in an attempt to determine the reason for the shaking. Bailey testified that Progressive partially denied plaintiff's claim for damages because neither Progressive nor Adrian Dodge could find the damage allegedly discovered by Lenawee Tire, which plaintiff claimed was causing the shaking. Bailey further testified that the day after the August inspection, she had a three-way telephone conversation with Logan and plaintiff, in which Logan explained to plaintiff that neither he nor Progressive could find the reported damage.

A genuine issue of material fact exists regarding the existence and scope of Adrian Dodge's duty to plaintiff. While we do not suggest that Adrian Dodge had a duty to inspect and

repair plaintiff's vehicle for free, and acknowledge Logan's deposition testimony that plaintiff refused to pay for Adrian Dodge to inspect her vehicle in August, other evidence establishes that plaintiff repeatedly complained to Adrian Dodge about the vibration and on more than one occasion, including at plaintiff's follow-up visit in August, Adrian Dodge inspected her vehicle for the purpose of discovering the cause of the vibration, but without success. After conducting its inspections, Adrian Dodge informed plaintiff that there was nothing wrong with her vehicle and plaintiff testified that she relied on its representation. Based on at least some of the evidence presented by the parties, a reasonable jury could conclude that Adrian Dodge undertook inspections of plaintiff's vehicle to discover the reason for the complained-of vibration and, therefore, that Adrian Dodge owed plaintiff a duty to exercise reasonable care in inspecting and/or repairing the vehicle. See *Terrell*, *supra*; *Schenk*, *supra*; Restatement Torts, 2d, § 323.

We are not persuaded by Adrian Dodge's assertion that it owed no duty to plaintiff because it could not conduct any inspections or repairs without first being specifically authorized by Progressive. Adrian Dodge asserts that without such prior, specific authorization, it had no guarantee of payment. First, as indicated, a reasonable jury could conclude that Adrian Dodge undertook inspections of plaintiff's vehicle and, therefore, owed plaintiff in particular a duty to conduct its inspections and any necessary repairs with reasonable care, so as not to unreasonably endanger plaintiff or plaintiff's property. See *Terrell*, *supra*; *Schenk*, *supra*. There is also evidence that Adrian Dodge owed plaintiff a contractual duty to exercise reasonable care in inspecting and repairing her vehicle, regardless whether Progressive first authorized particular inspections and repairs. '"[A]ccompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . a negligent performance constitutes a tort as well as a breach of contract."' *Fultz v Union-Commerce Assocs*, 470 Mich 460, 465; 683 NW2d 587 (2004) (citation omitted). As plaintiff describes on appeal, there is ample evidence on the record that Adrian Dodge contracted with plaintiff to inspect and repair her vehicle.[3] Plaintiff selected Adrian Dodge to work on her vehicle, she was listed on Adrian Dodge's invoices as its customer, she paid Adrian Dodge by endorsing checks from Progressive, and Adrian Dodge was required to obtain plaintiff's approval before repairing the vehicle. Furthermore, evidence presented by the parties indicates that Adrian Dodge did, in fact, conduct inspections and repairs on plaintiff's vehicle not specifically authorized by Progressive. Bailey testified that Miller would have instructed Adrian Dodge to make the repairs on Progressive's

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[3] In regard to the contractual duty owed to plaintiff, Adrian Dodge argues: "Under [MCL 257.1332], any 'motor vehicle repair facility' must provide a written estimate of the repair cost to its customer as a predicate for undertaking any repair. The customer must approve the estimated amount and must specifically approve any repairs that exceed the estimate. Given these rules, the written estimate is a condition precedent to any contractual duty to make a repair. Adrian Dodge could not have any duty to perform the repairs that plaintiff sought unless someone–either plaintiff or Progressive–accepted a written estimate for them. . . . [T]he absence of any written estimate of repairs for the problems identified in August 2004 confirms that Adrian Dodge did not have a contractual duty to perform any repairs beyond those that it competed in June 2004." While Adrian Dodge is correct that MCL 257.1332 requires repair facilities to provide written repair estimates, there is no support for its assertion that the failure to provide such an estimate extinguishes a repair facility's contractual duty of reasonable care.

estimate and "to tear down the vehicle to determine if there were any . . . additional damages." Bailey explained that any repair shop "would make sure there were no internal . . . damages" in the area "where the damage from the accident occurred." After "tearing down" plaintiff's vehicle, Adrian Dodge found additional damages, informed Progressive, and made the repairs. Later, when plaintiff complained to Adrian Dodge about her vehicle continuing to overheat and vibrate, Adrian Dodge inspected the vehicle, discovered a problem with the cooling fan, and fixed it, without specific authorization from Progressive.

Viewing the evidence in the light most favorable to plaintiff, her claim is not so legally deficient that recovery would be impossible. There is a genuine issue of material fact regarding the existence and scope of Adrian Dodge's duty to plaintiff. Therefore, Adrian Dodge is not entitled to summary disposition under MCR 2.116(C)(8) or (C)(10).

Given our conclusions on the first two issues, we need not address plaintiff's claim that the circuit court erroneously denied her motion to strike Progressive's notice naming Adrian Dodge as a nonparty at fault. The circuit court's orders granting Adrian Dodge summary disposition and denying plaintiff's motion to strike must be reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering