

DA 14-0359

IN THE SUPREME COURT OF THE STATE OF MONTANA

2015 MT 66N

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PAMELA EISNER and JEFF EISNER, SR.,

Plaintiffs and Appellants,

v.

NORTHWEST AUTOBODY & TOWING, INC.,  
and MELVIN J. DONENFELD,

Defendants, Counterplaintiffs, and Appellees,

v.

JEFF EISNER, SR.,

Counterdefendant.

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APPEAL FROM: District Court of the Nineteenth Judicial District,  
In and For the County of Lincoln, Cause No. DV 13-51  
Honorable James B. Wheelis, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

S. Charles Sprinkle, Sprinkle Law Firm, PC; Libby, Montana

For Appellees:

Susan Moriarity Miltko, Amanda Z. Duman, Williams Law Firm, P.C.;  
Missoula, Montana

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Submitted on Briefs: February 4, 2015  
Decided: February 24, 2015

Filed:



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Clerk

Justice Michael E Wheat delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of nonciteable cases published in the Pacific Reporter and Montana Reports.

¶2 Pamela and Jeff Eisner appeal from the order of the Montana Nineteenth Judicial District Court, Lincoln County, granting summary judgment in favor of Northwest Autobody and Towing, Inc. and Melvin Donenfeld. We affirm.

¶3 On July 28, 2010, Northwest Autobody, at the Eisners' request, used its Ford F-650 truck to transport the Eisners and their disabled vehicle to Libby, Montana. Pamela entered the truck via the rear driver-side door. She sat in the back seat of the truck during the trip to Libby, and upon arrival, she exited via the rear passenger-side door.

¶4 As she exited the vehicle, Pamela fell to the ground, sustaining multiple injuries. She claims that this was because she expected to step down to a running board before stepping to the ground. Leaving the vehicle without looking, she found no running board and was unable to arrest her fall.

¶5 The Eisners subsequently sued Northwest Autobody and its owner, Melvin Donenfeld, claiming that Pamela's fall and injuries were due to the negligence of Northwest Autobody. The District Court granted Northwest Autobody's motion for summary judgment, and the Eisners appealed.

¶6 We review a decision granting summary judgment using M. R. Civ. P. 56(c)(3), the same rule that a district court applies. We will affirm a decision granting summary judgment

if there are no genuine issues of material fact and judgment as a matter of law is appropriate.

*Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶¶ 36-37, 345 Mont. 12, 192 P.3d 186.

¶7 The Eisners contend that Pamela’s injuries were caused by Northwest Autobody’s negligent failure to modify its truck, by failing to install handles and a running board on the passenger-side exit. The District Court held that there was no duty of care that Northwest Autobody breached, thus Pamela’s injuries were not a result of Northwest Autobody’s negligence. We agree.

¶8 The Eisners argue that the duty to install handles and a running board is evidenced by their expert’s report, which states that: “If Northwest [Autobody] . . . provided steps and handles . . . along with clear instructions for untrained riders, Pamela Eisner would not have fallen.” However, this statement, like the rest of the expert’s report does not establish a duty to install handles and a running board. *See Abraham v. Nelson*, 2002 MT 94, ¶ 11, 309 Mont. 366, 46 P.3d 628 (identifying “existence of a duty” and “causation” as distinct elements that must be proven for a negligence claim to be successful).

¶9 The Eisners also argue that the lack of handles and a running board was a hidden or lurking danger, based on Pamela’s reasonable expectation of consistency between the passenger-side and driver-side doors. They contend that Northwest Autobody had a duty, therefore, to either install handles and a running board or to warn Pamela of their absence. However, as the District Court correctly noted: “[A] person is presumed to see that which he could see by looking. He will not be permitted to say that he did not see what he must have seen, had he looked.” *Accord Boepple v. Mohalt*, 101 Mont. 417, 435, 54 P.2d 857, 862 (1936). The absence of handles and a running board would have been clear upon inspection;

this was not a hidden danger. Pamela should have realized that they were absent and taken appropriate care exiting the vehicle.

¶10 For the foregoing reasons, we agree with the District Court that Northwest Autobody did not have a duty to install handles or a running board or to warn Pamela of their absence. Thus, it did not breach any duty of care by failing to do so, and Pamela's injuries were not the result of Northwest Autobody's negligence. The District Court was correct to grant summary judgment.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our Internal Operating Rules, which provides for nonciteable memorandum opinions. The issues in this case are legal and are controlled by settled Montana law, which the District Court correctly interpreted. Affirmed.

/S/ MICHAEL E WHEAT

We Concur:

/S/ JIM RICE

/S/ BETH BAKER

/S/ PATRICIA COTTER

/S/ JAMES JEREMIAH SHEA