STEVEN BROWN and	:	IN THE COURT OF COMMON PLEAS OF
NICHOLE BROWN,	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 02-00,640
	:	
EDWARD BRESNOCK and	:	CIVIL ACTION - LAW
RUTH BRESNOCK,	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: March 31, 2003

OPINION and ORDER

I. Procedural Background and Factual Statement

Before the Court for determination is Defendants Edward and Ruth Bresnock's Motion for Summary Judgment filed February 13, 2003. The evidence of record upon which this Court's opinion is based consists of the pleadings as well as the information submitted in support of the summary judgment motion which consisted of exhibits attached to the brief filed February 13, 2003; specifically, the deposition of Plaintiff Steven Brown November 4, 2002, (Exhibit B) of Plaintiff Nichole Brown November 4, 2003 (Exhibit D), Defendant Edward Bresnock January 9, 2003 (Exhibit F); Defendant Ruth Bresnock January 9, 2003 (Exhibit I), transcript of recorded interview of Ruth Bresnock dated October 13, 2001. From these exhibits, the following are the relevant and undisputed facts.

On Halloween night October 31, 2000, the Plaintiffs Steven Brown and Nicole Brown were engaged in an argument. At the time of the argument and throughout the course of the evening, Steven Brown was intoxicated. The argument escalated and Nicole Brown contacted local law enforcement to have Steven Brown removed from the home. Steven Brown had left the residence before the police arrived. Later, Steven Brown returned to the

residence and the argument between him and his wife resumed. The argument became more heated, and at some point it was suggested that the Defendant Edward Bresnock be contacted. Nicole Brown contacted Edward Bresnock via telephone. During the initial stages of the phone call, Steven Brown was reticent to speak with Edward Bresnock. However, he did eventually converse with Edward Bresnock. Following the telephone conversation, both Edward Bresnock and his wife, Ruth, arrived at the Brown residence. After a period of time, Steven Brown accompanied the Bresnocks out to their truck and entered the vehicle. Bresnocks were going to take Steven Brown to their residence so he could spend the night. Bresnocks sat in the front seat of their truck and Steven Brown sat alone in the rear seat adjacent to the rear passenger door. While in route, Steven Brown exited the vehicle when Ruth Bresnock executed a turn off Lycoming Creek Road onto Beauty's Run Road. Steven Brown has suffered extensive injuries resulting form this incident.

Steven and Nichole Brown have instituted the present action against Bresnocks alleging that Bresnocks' negligence caused the injuries suffered by Steven Brown. Browns have alleged that "[w]hile the Defendants were transporting Plaintiff Steven Brown to their residence, Plaintiff Steven Brown either fell, or in the alternative jumped, from the vehicle, sustaining serious permanent injuries." Plaintiffs' Complaint, ***Brown v. Bresnock*** (02-00,640), at ¶17. Browns allege that the injuries suffered as a result of this fall or, in the alternative, jump were the results of Bresnocks' negligent actions. ***Id***. at ¶20.

Browns allege several ways in which Bresnocks were negligent. First, Bresnocks "[f]ailed to accompany plaintiff Steven Brown in the back seat of the vehicle even though they had knowledge that he was intoxicated and did not desire to be transported from

his home." Plaintiffs' Complaint, at ¶20a. Secondly, Bresnocks "[f]ailed to safely secure Plaintiff Steven Brown in the back seat of their vehicle despite knowledge that Plaintiff Steven Brown was intoxicated and did not desire to be transported from his home." ***Id***. at ¶20b. Thirdly, they [f]ailed to insure that the vehicle door which Plaintiff Steven Brown had access was locked." ***Id***. at ¶20c. Fourthly, Bresnocks "[o]perated their vehicle at an excessive rate of speed, causing an unrestrained intoxicated passenger to fall from said vehicle." ***Id***. at ¶20d. Finally, Bresnocks "[f]ailed to adequately supervise Plaintiff Steven Brown in order to prevent him from falling, or in the alternative jumping, from Defendant's moving vehicle." ***Id***. at ¶20e.

In their motion for summary judgment, Bresnocks assert three grounds for granting their motion. Bresnocks argue that the motion should be granted because Browns have failed to file a response to the motion, that Browns have failed to present evidence that could establish a *prima facie* case of negligence against Bresnocks, and that Browns' claims are barred by the contributory negligence of Steven Brown jumping form the vehicle. Bresnocks contend that Browns have not proffered any evidence to support the claim that excessive speed caused Steven Brown to fall out of the vehicle. Bresnocks point to the deposition testimony of Steven Brown in which he states that he has no recollection of the events that evening. Bresnocks also assert that the deposition testimony of Nichole Brown is not supporting of this claim either. In her deposition testimony, Nichole Brown states that she had no personal knowledge of what happened during the transport. Further, Bresnocks assert that Browns have failed to produce independent evidence of the vehicle being operated at an excessive rate of speed.

Bresnocks also argue that Browns have failed to produce evidence that their actions or inactions failed to prevent Steven Brown from jumping from the vehicle. Bresnocks again assert that Steven Brown has testified that he has no recollection of the events. Bresnocks also argue that Steven Brown could not be characterized as helpless on the night in question considering his ability to continue arguing with his wife, to evade the police, to request to speak with Edward Bresnock to diffuse the situation, and to walk to the Bresnocks' vehicle unassisted.

Finally, Bresnocks assert that Browns' claims are barred by the contributory negligence of Steven Brown jumping from the vehicle. Bresnocks argue that the Browns have failed to provide evidence to support their claims that Bresnocks acted negligently in transporting Steven Brown to their home. It is because of this that Bresnocks argue that the claim that Steven Brown jumped from the vehicle would not permit any reasonable minds to differ on the conclusion that the claims are barred by Steven Brown's contributory negligence.

In response, Browns assert that they have proffered evidence that could establish a *prima facie* case of negligence against Bresnocks and that their claims are not barred by any contributory negligence on the part of Steven Brown. Browns assert that Bresnocks owed Steven Brown a duty to safely transport him to their home once they volunteered to do so. Browns argue that Bresnocks did not act reasonably under the circumstances to prevent Steven Brown from jumping out of the vehicle. Browns assert that Steven Brown did not want to leave his home and this was made known to Bresnocks. Browns argue that one of Bresnocks should have sat in the back with Steven Brown in light of his dissatisfaction about leaving his home in order to prevent Steven Brown from attempting to leave the vehicle and return home.

Browns also assert that Bresnocks should have slowed down or stopped the vehicle when it became apparent that Steven Brown might try to exit the vehicle. Browns contend that there is sufficient evidence that could establish a *prima facie* case of negligence against Bresnocks for failing to sit in the back with Steven Brown or stop the vehicle.

II. Discussion

There are three issues before the Court. The first is whether Bresnocks motion for summary judgment should be granted because Browns failed to file a response in conformity with the Pennsylvania Rules of Civil Procedure that identifies facts essential to support their cause of action. The second is whether Browns have proffered sufficient evidence that could establish a *prima facie* case of negligence against Bresnocks. The third issue is whether Browns' claims are barred by the contributory negligence of Steven Brown jumping from the vehicle. Two of these issues are substantive and the other is procedural. The Court will address the substantive issues first.

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The party making the motion has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " 'in the light most favorable to the non-moving party accepting as true all

well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.'" ***Godlewski***, 597 A.2d at 107 (quoting ***Hower v. Whitmak Assoc.***, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that "are free and clear from doubt" and any "doubt must be resolved against the moving party." ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record "either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." ***Rauch***, 783 A.2d at 823-24. If the defendant is the moving party bringing the motion for summary judgment under Pa.R.C.P. 1035.2(2), "he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an element of his cause of action." ***Id***. at 824. "Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could retain a verdict favorable to the [plaintiff]." ***Ibid.*** If the plaintiff fails to establish a prima facie case, then summary judgment is proper as a matter of law. ***Ack. v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995). In this case, the Court must of course be aware that Bresnocks' Motion for Summary Judgment cannot be granted based only on the oral testimony of the moving party. ***Nanty-Glo Borough v. American Surety Co.***, 163 A. 523 (Pa. 1932).

The mere occurrence of an accident does not prove negligence just as a negligent act does not necessarily result in liability. ***Hamil v. Bashline***, 392 A.2d 1280, 1284 (Pa. 1978); ***Watkins v. Hospital of the Univ. of Pennsylvania***, 737 A.2d 263, 265 (Pa. Super. 1999). In order to establish a claim for negligence, a plaintiff must prove that "(1) a duty or

obligation recognized by law requires an actor to conform his actions to a standard of conduct for the protection of others against unreasonable risks; (2) failure on the part of the defendant to conform to the standard of conduct, i.e. a breach of duty; (3) a reasonably close causal connection between the breach of duty and the injury sustained; and (4) actual loss or damage that resulted from the breach." ***Gutteridge v. A.P. Green Servs., Inc.***, 804 A.2d 643, 654 (Pa. Super. 2002), *see also*, ***Brisbine v. Outside in School Of Experimental Educ., Inc.***, 799 A.2d 89, 93 (Pa. Super. 2002). If a person undertakes, gratuitously or for consideration, to render services to another for the protection of that person or his things, then that person has a duty to exercise reasonable care to perform that undertaking. ***Hamil v. Bashline***, 392 A.2d 1280, 1284 (Pa 1978) (citing Restatement (Second) of Torts §323)); ***Filter v. McCabe***, 733 A.2d 1274, 1276 (Pa. Super. 1999). Said person is liable for any physical harm resulting from his failure to exercise reasonable care if the failure increased the risk of harm or the harm suffered is "because of the other's reliance upon the undertaking." ***Filter***, 733A.2d at 1276.

To avoid acting negligently, a person must conform his conduct to the standard of care that would be reasonably required under the circumstances of the given situation. *See*, ***Dunn v. Teti***, 421 A.2d 782 (Pa. Super. 1980); ***Fredericks v. Castora***, 360 A.2d 696, 698 (Pa. Super. 1976). Negligence is doing what a reasonably prudent man would not do under the circumstances or failing to do what a reasonably prudent man would do under the circumstances. *See*, ***Gift v. Palmer***, 141 A.2d 408, 409 (Pa. 1958); ***Schentzel v. Philadelphia Nat'l League Club***, 96 A.2d 181, 184 (Pa. 1953). Therefore, a person breaches a duty he owes if he acts unreasonable under the circumstances of a given situation. The existence of a duty is a question of law, while the question of whether that duty has been breached is generally for the

jury to decide. ***Emerich v. Philadelphia Ctr. For Human Dev.***, 720 A.2d 1032, 1044 (Pa. 1998); ***Duquesne Light Co. v. Woodland Hills Sch. Dist.***, 700 A.2d 1038, 1047 (Pa. Cmwlth. 1997), *app. denied*, 724 A.2d 936 (Pa. 1998). However, the issue of whether a particular act or failure to act constitutes a breach of duty can be decided by the court as a matter of law if the case is free from doubt and there is no possibility that a reasonable jury could disagree. ***Emerich***, 720 A.2d at 1044.

The Court concludes that Browns have failed to produce any evidence that could prove that Bresnocks operated the vehicle at an excessive rate of speed that would have caused Steven Brown to fall out or be ejected from the vehicle. On this point reasonable minds could not differ so it is appropriate for the Court to reach this conclusion. Steven Brown cannot testify as to what transpired during the transportation to the Bresnocks' residence because he has no recollection of the events that transpired that evening. Deposition of Steven Brown, at 43 –50. His knowledge of what transpired comes from what he has been told by his wife and from subsequent conversations with Bresnocks. ***Id***. at 43, 55, 56. These conversations, as testified to by Steven Brown, do not contain any acknowledgement of speeding nor other improper driving. Steven Brown also acknowledges that he does not know if he fell or jumped from the truck. ***Id***. at 49. Also, Nichole Brown lacks any personal knowledge regarding the manner in which the Bresnocks' vehicle was operated on the night in question since she was not present in the vehicle during the transport or at the time of the accident. Deposition of Nichole Brown, at 48. The mere fact that Steven Brown came to exit the vehicle while it was moving does not establish that the vehicle was operated in a negligent manner and would result in such an occurrence. With no eye witness accounts, Browns have also failed to provide

independent outside evidence that could prove that Bresnocks operated the vehicle in a negligent manner such that would cause Steven Brown to be ejected or fall from the vehicle.

The Court concludes that Browns have not produced sufficient evidence that could establish a *prima facie* case of negligence under the theory that Bresnocks operated the vehicle in a negligent manner by driving at an excessive speed causing Steven Brown to fall or be ejected from the vehicle. Bresnocks' summary judgment as to that theory is granted and any claim brought under that theory will be dismissed.

However, the Court cannot say that reasonable minds could not differ as to the reasonableness of Bresnocks' actions as it would relate to preventing Steven Brown from jumping from the vehicle. Browns have alleged that Bresnocks were negligent in failing to prevent Steven Brown from jumping from the vehicle. Browns have produced evidence that could establish a *prima facie* case of negligence for preventing Steven Brown from jumping out of the vehicle. Nichole Brown has testified in her deposition that Steven Brown was adamant about not leaving his home and that he did not want to go with Bresnocks. Deposition of Nichole Brown, at 13, 29. Ruth Bresnock stated in her deposition that he was loud and obnoxious in response to a question of how she knew Steven Brown was intoxicated. Deposition of Ruth Bresnock, at 14. The evidence also indicates that Steven Brown has been engaged in a heated argument with his wife throughout a greater part of the evening in question.

Ruth Bresnock has stated in her deposition that Steven Brown wanted to stop at a Uni-Mart and get some papers. Deposition of Ruth Bresnock, at 20. She has testified that "the quicker I got home the better off I would be." ***Id***. at 30. Ruth Bresnock testified in her

deposition that she slowed down at a red light so it could turn green to allow her to keep moving. ***Id***. at 20. From this it could be inferred that Ruth Bresnock had a concern that if she stopped Steven Brown might try to exit the vehicle. She also stated that she did not know what to expect from Brown, that she did not know what he was capable of, or if her and Ed Bresnock were in any danger. ***Id***. at 29-30. She said Steven Brown erupted when he found out his door was locked and yelled, " 'Oh, you guys think your really cool lockin' me in here … Oh you didn't trust me. You think I'd jump.'" Recorded Interview Transcript of Ruth Bresnock, at lines 313-320.

Viewing the evidence in the light most favorable to the Browns, it is unclear whether Bresnocks acted unreasonably by not having one of them sit with Steven Brown so he could not jump when he was adamant about not leaving and was in a volatile mood. The resolution of this question is best left to the jury. Especially, when it may come down to a credibility determination between Bresnocks and Nichole Brown as to whether or not Steven Brown had in fact made his desire to stay home and not leave with Bresnocks clear.[1]

With the evidence of Steven Brown's demeanor and intentions in mind, Browns have also provided sufficient evidence that could raise a jury question as to the reasonableness of Bresnocks failure to stop the vehicle in order to keep Steven Brown from jumping. Under the factual circumstances before us, whether it was unreasonable not to stop the vehicle in order to keep Steven Brown from jumping is also a question to be left for the jury to determine. There is no testimony or evidence which we can consider at this stage of the proceedings as to

[1] Bresnocks have testified I their depositions that Steven Brown agreed to go with them and made no indication of his desire to stay at his home on the evening of October 21, 2000. Deposition of Edward Bresnock, at 38; Deposition of Ruth Bresnock, at 16-17.

whether or not Stephen Brown was seat belted at any time in the journey nor if the door he had access to was unlocked, except the circumstance that at the time of exiting the vehicle he obviously and admittedly was not seat belted and the door was not then locked. Bresnocks' assertions, based on their oral testimony, as to seat belting Steven Brown and locking the door cannot be considered under the ***Nancy-Glo*** doctrine. Ruth Bresnock acknowledged she knew the door was capable of being unlocked by Steven Brown. Deposition of Ruth Bresnock at p. 40, The deposition also indicates neither of the Bresnocks were supervising Steven Brown closely enough to be aware he was in the process of exiting the vehicle until they heard a rush of air from the open door as Steven Brown was in the door opening. Deposition of Ruth Bresnock at p. 23; *see also* Deposition of Edward Bresnock's at p. 42. Therefore, Browns have produced sufficient evidence that could establish a *prima facie* case of negligence against Bresnocks for not stopping the vehicle under the circumstances.

The second question the Court must address is whether the Browns' claims are barred by any contributory negligence of Steven Brown. Since the passage of 42 Pa.C.S.A. §7101[2], simple contributory negligence no longer acts as a complete bar to the plaintiff's recovery for injury to person or property. ***Seewagen v. Vanderkluet***, 488 A.2d 21, 24 (Pa. Super. 1985). "Pennsylvania's comparative negligence statute does not bar recovery by the plaintiff as long as the plaintiff's causal negligence is not greater then that of the defendant." ***Terwilliger v. Kitchen***, 781 A.2d 1201, 1209 (Pa. Super. 2001). However, "any damages

[2] "In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar recovery by the plaintiff or his legal representative where such negligence was not greater than the casual negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff." 42 Pa.C.S.A. §7102(a).

sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff." 42 Pa.C.S.A. §7102 (a).

The Court cannot hold as a matter of law that Steven Brown's alleged negligence outweighs the alleged negligence of the Bresnocks. It is up to the jury to determine if Bresnocks and Steven Brown were negligent. Following this determination, the jury will then assign percentage of fault. It is not until this point that a determination can be made as to whether Steven Brown's negligence is greater then the Bresnocks. Therefore, any alleged negligence of the part of Steven Brown does not bar the claims of the Browns at this point in time.

The final issue this Court must resolve is whether this Court should dismiss Browns' action by granting the summary judgment on the basis that Browns have failed to file a response to the motion. Pa. R.C.P. 1035.3 makes it clear that plaintiff cannot rest on the allegations of the pleadings but must file a response to a summary judgment motion within thirty days after the motion is served identifying one or more issues of fact arising from the evidence that controverts the evidence cited by the defendant or which challenges the credibility of a witness who testifies in support of the motion, or evidence on the record that establishes facts essential to the cause or action, or defense, which the motions cites as not having been produced.

Paragraph (c) of Rule 1035.3 says that the Court may rule upon the motion for judgment or permit affidavits or depositions to be supplied or enter such other order as just. Subparagraph (d) provides that summary judgment "may" be entered against a party who does not respond. Here, the only response is Browns' oral argument (the Court notes that we did not

issue an order requiring that briefs be filed in this case). In determining what is just, it is clear that since Browns did not respond the Court could not consider any evidence that Browns may have suggested at oral argument existed, outside of the material furnished by Bresnocks with their motion for summary judgment. In entering an order that is just, this Court believes that despite Browns' failure to respond we must look in total at the evidence submitted by Bresnocks in support of the motion for summary judgment and apply the law to that evidence.

As set forth in our discussion as to the merits of Bresnocks' Motion, the statements and evidence relied upon by Bresnocks do not on their face establish that Browns have not proffered evidence that could establish a *prima facie* case for negligence against Bresnocks. In that regard, this Court does not believe it to be just or appropriate to enter summary judgment against Plaintiffs solely because Plaintiffs did not respond.

Far to often, as in this case, the Court finds that parties fail to abide by the responsive pleading and evidentiary rule relating to summary judgment motions. This Court must hasten to go on and say that it certainly does not approve the practice of plaintiffs generally not responding to summary judgment motions. It is only by the very narrowest of margins that Browns have survived this particular summary judgment motion. Browns were able to achieve this solely because of Bresnocks' acknowledgement of their awareness of the state of intoxication, Steven Brown's antagonism, Steven Brown's desire to stop in route to the Bresnocks', and an expression of some statement of intent by Steven Brown of getting out of the vehicle.

III. Conclusion

The Court will grant and deny in part Bresnocks' motion for summary judgment. The motion is to be granted as to the claim that the Bresnocks operated the vehicle negligently at an excessive speed causing Steven Brown to fall or be ejected from the vehicle. The Browns have presented no evidence to support a *prima facie* case of negligence against the Bresnocks on this theory. The motion is denied as to whether the Bresnocks acted negligently by failing to keep Steven Brown from jumping from the vehicle by not sitting in the back seat with him and by not stopping the vehicle. Browns have presented sufficient evidence to allow a jury to determine whether Bresnocks acted reasonably in this regard. Under these circumstances, the Court cannot say as a matter of law that in exercising their duty to render safe transportation to Steven Brown, in his intoxicated condition, that Bresnocks acted reasonably by not having one of them sit in the back with Steven Brown or else brought the vehicle to a stop at some point in the journey prior to the point where Steven Brown exited the vehicle. Any contributory negligence on the part of Steven Brown will not bar the claims of Browns at this time. His negligence and whether it outweighs Bresnocks are questions for the jury to answer. Thus the motion will be granted and denied in part.

O R D E R

It is hereby ORDERED that Defendants Edward and Ruth Bresnock's Motion for Summary Judgment filed February 13, 2003 is granted and denied in part.

The claim that Bresnocks operated the vehicle at an excessive speed causing Steven Brown to fall out or be ejected as set forth in paragraph 20d. of the Complaint is dismissed.

The motion is denied insofar as to the claims that Bresnocks otherwise acted negligently in preventing Steven Brown from falling or jumping from the vehicle as set forth in paragraphs 20a., b., c., and e. of the Complaint.

BY THE COURT:

William S. Kieser, Judge

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