NOT DESIGNATED FOR PUBLICATION

DR. DAVID C. BLYTHE, JR.	*	**NO. 2002-C-1070**
VERSUS	*	**COURT OF APPEAL**
KATHRYN FLUCKE, WIFE OF JAMES D. DANNER, D/B/A OLIVER HOUSE HOTEL AND UNITED NATIONAL INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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WRIT APPLICATION DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-520, DIVISION "C"
Honorable Roland L. Belsome, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

WALTZER, J. CONCURS IN THE RESULT.

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WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED

On April 26, 2002, the trial court heard Defendants' Exception of No Cause of Action, and on May 14, 2002, the trial court entered judgment denying the exception. The relators now seek supervisory review of the trial court's denial of their Exception of No Cause of Action.

FACTS

On September 7, 2001, Dr. David C. Blythe, Jr. ("Blythe") sustained injuries as a result of a fall on the stairs at the Olivier House Hotel in New Orleans ("Hotel"). As a result of the accident, Blythe filed a lawsuit against the owners of the Hotel, Kathryn Flucke and James D. Danner, and their insurance company, United National Insurance Company (collectively "Relators"). Subsequently, David C. Blythe, Jr., D.D.S., a Professional

Corporation (“Blythe Corporation”), filed a Petition of Intervention as a party plaintiff, seeking damages for all losses it sustained as a result of the injuries suffered by Blythe. Defendant filed an Exception of No Cause of Action, claiming that Louisiana law does not recognize a cause of action in favor of a third party such as the Blythe Corporation for indirect economic loss caused by an alleged tortfeasor’s negligent conduct. The trial court denied the exception, and the relators now seek supervisory review.

DISCUSSION

The issue before this Court is whether a professional corporation has a cause of action for recovery of damages the corporation suffered as a result of injuries to the plaintiff who is the corporation’s sole employee and shareholder. The function of the peremptory exception of no cause of action is to determine the legal sufficiency of the petition. It questions whether the petition sufficiently alleges grievances for which the law affords a remedy. All well pleaded factual allegations must be accepted as true. The exception of no cause of action is decided upon the face of the petition. Hoskin v. Plaquemines Parish Government, 98-1825, p. 10 (La. App. 4 Cir. 8/4/99) 743 So.2d 736, 742. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931. The Louisiana Supreme Court has stated that "an exception

of no cause of action must be overruled unless the allegations of the petition exclude every reasonable hypothesis other than the premise upon which the defense is based; that is, unless the plaintiff has no cause of action under any evidence admissible under the pleadings." Roberts v. Sewerage and Water Bd. of New Orleans, 92-2048, p. 1 (La.3/21/94), 634 So.2d 341, 343. Stated differently, an exception of no cause of action is likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief. City of New Orleans v. Board of Directors of Louisiana State Museum, 98-1170, p. 10 (La. 3/2/99), 739 So.2d 748, 756.

While the relators urge this Court to exercise its supervisory authority and reverse the trial court's denial of their exception of no cause of action, Plaintiffs argue that there would be no irreparable harm if the Court were to decline to grant the application for writs. This issue could be reviewed on appeal if the Blythe Corporation is awarded damages.

The relators rely on several cases from other circuits, including Domingue v. Reliance Insurance Company, 619 So.2d 1220, 1224 (La. App. 3 Cir. 6/2/93), in which the Third Circuit held as follows:

> It is well settled that La.C.C. art. 2315 does not encompass a cause of action in favor of a third party for indirect economic loss caused by a tortfeasor's negligent conduct. PPG Industries, Inc. v. Bean Dredging, 447 So.2d 1058 (La. 1984). A corporation cannot recover damages from a tortfeasor resulting

> from an employee's injuries. Such injuries are too remote, speculative, and indirectly consequential of the accident to be the subject of an action *ex delicto.* Peterson v. Western World Insurance Company, 491 So.2d 78 (La.App. 1 Cir.1986); Baughman Surgical Associates, LTD v. Aetna Casualty and Surety Company, 302 So.2d 316 (La.App. 1 Cir. 1974).

The employer in Domingue, a corporation, could not recover for lost profits from the driver allegedly responsible for injuries to the corporation's employee. Plaintiffs point out that Domingue is distinguishable in that the Blythe Corporation is a professional corporation with only one income producing employee/ shareholder. The relators argue that the Domingue analysis would apply equally to medical or dental corporations, as evidenced by the Third Circuit's reliance on the Baughman case in Domingue:

> The possible loss of key personnel to employers though tortious or natural causes is ever present. An employer is permitted under our law to contract with insurers for protection against such losses, but the recovery *ex delicto* is restricted to those included within the law.

Domingue, 619 So. 2d at 1224, *quoting* Baughman Surgical Associates, Ltd. v. Aetna Casualty & Surety Company, 302 So. 2d 316, 318-319 (La. 1 Cir. 1974), *followed* in Fuksman v. General Motors Corp., 447 So.2d 74 (La. App. 4 Cir. 1984).

Plaintiffs also rely on a case in which the First Circuit held that in the case of injury to a president and sole shareholder of a corporation, the business losses due to his personal injury were too remote and indirect to be

the subject of an action *in delicto*. Peterson v. Western World Insurance Company, 491 So. 2d 78, 80 (La. App. 1 Cir. 6/24/86). In Peterson, the president and sole shareholder of Peterson's Air Conditioning was injured while performing routine maintenance on property owned by the defendant, a hunting club. Peterson, 491 So.2d at 79. Mr. Peterson filed suit, seeking damages for his personal injuries, and the petition also attempted to state a cause of action on behalf of Peterson's Air Conditioning for damages it sustained or would sustain as a result of impairment to Mr. Peterson's past, present, and future earning capacity. In granting the defendants' exception of no cause of action, the trial court explained its decision in terms of the duty and risk involved:

> [T]he duty allegedly violated by the defendant hunting club does not encompass the particular risk of injury of indirect economic loss allegedly sustained by Peterson's Air Conditioning and does not intend protection from this particular loss for which recovery is sought in the petition. Such indirect economic damage as is sought in the present case is too remote and indirect to be the subject of an action *ex delicto* under the facts of the present case.

Peterson, 491 So.2d at 80.

The First Circuit relied on the duty-risk analysis performed by the Louisiana Supreme Court in PPG Industries, Inc. v. Bean Dredging, 447 So.2d 1058, 1059 (La. 2/27/84). PPG raised the broad question of recovery of an indirect economic loss incurred by a party who had a contractual

relationship with the owner of property negligently damaged by a tortfeasor. PPG, 447 So. 2d 1058, 1059. The Supreme Court concluded in PPG that "while the situation giving rise to the question in this case falls literally within the expansive terms of La.C.C.Art. 2315, in that the dredging contractor's 'act . . . cause[d] damage to another', the customer cannot recover his indirect economic loss." The Supreme Court based its decision on policy reasons stated in a duty-risk analysis, explaining that "the rule of law which prohibits negligent damage to property does not necessarily require that a party who negligently causes injury to property must be held legally responsible to all persons for all damages flowing in a "but for" sequence from the negligent conduct." PPG, 447 So.2d 1058, 1061.

Although not relied upon directly by the relators, this Circuit has addressed this issue and affirmed an exception of no cause of action in Fuksman v. General Motors Corp., 447 So.2d 74 (La. App. 4 Cir. 3/14/84), *citing* Baughman Surgical Associates v. Aetna Casualty & Surety Co., 302 So 2d 316 (La. App. 3 Cir. 1974). In Fuksman, this court agreed with the reasoning employed by the Third Circuit in Baughman. The court in Baughman concluded that the damages claimed by the employer, a medical association consisting of two surgeons, including the injured party, were "too remote, too speculative and evasive to prove and are merely

consequential of the accident, and are not included within the purview of LSA-C.C. Article 2315." Baughman, 302 So.2d 316, 319. This Circuit in Fuksman, relying on the reasoning in Baughman, held that a corporation did not have a cause of action for the wrongful death of its owner and operator. Fuksman, 447 So.2d at 74.

Turning to the facts of the instant case, the Blythe Corporation is a professional corporation with a single shareholder and income-producing employee. Accordingly, this case is controlled by this Circuit's ruling in Fuksman. As in Fuksman, there is no cause of action for the corporation as a result of injury to its owner and operator, as damages would be too remote, speculative, and evasive to prove. Accordingly, we grant this writ and reverse the trial court's judgment denying the exception of no cause of action.