BARRY LOCKETT	*	**NO. 2018-C-0082**
VERSUS	*	**COURT OF APPEAL**
AMTRUST NORTH AMERICA INSURANCE COMPANY, CFL FURNITURE & ANTIQUES, INC., USAA INSURANCE COMPANY, OSBORNE REAVES AND HERMAN CARTER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOVE, J., DISSENTS

I respectfully dissent from the majority. Unlike the majority, I do not find that the trial court erred and would deny the writ.

La. C.C. art. 2324 was amended in 1996 to eradicate noncontractual solidary liability. However, post-1996, the Louisiana Supreme Court issued an opinion upholding the practice of applying tort indemnity (constructive, passive, derivative). *Nassif v. Sunrise Homes, Inc.*, 98-3193 (La. 6/29/99), 739 So. 2d 183. The sole issue before the Louisiana Supreme Court was to review "whether a defendant, whose liability to a plaintiff for the plaintiff's attorney fees resulted from the actual fault of another, may recover, by way of indemnity, the amount of such attorney fees from the party actually at fault." *Id*., 98-3193, 739 So. 2d at 185. The Court noted:

> Indemnity in its most basic sense means reimbursement, and may lie when one party discharges a liability which another rightfully should have assumed. *Black's Law Dictionary* 769 (6th ed.1990); 42 C.J.S *Indemnity* § 2 (1991). It is based on the principle that everyone is responsible for his own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortious act caused the loss. 42 C.J.S. *Indemnity* at § 32. The obligation to indemnify may be express, as in a contractual provision, or may be implied in law, even in the absence of an indemnity agreement. *Id*. at § 29. An implied contract of indemnity arises only where the

> liability of the person seeking indemnification is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed. *Bewley Furniture Co., Inc. v. Maryland Cas. Co.*, 285 So.2d 216, 219 (La.1973). Thus, because the party seeking indemnification must be without fault, a weighing of the relative fault of tortfeasors has no place in the concept of indemnity. *Id*.

Id. The Supreme Court concluded that "the equitable principle of restitution applies in an action for indemnity to allow a defendant who is only technically or constructively liable for a plaintiff's loss to recover from the party actually at fault the attorney fees it was compelled to pay the plaintiff, even in the absence of a statute or contract of indemnification." *Id*., 98-3193, 739 So. 2d at 186. Further, the Court found that "[t]his measure of relief is in accordance with the long standing principle that '[i]ndemnity shifts the entire loss from a tortfeasor only technically or constructively at fault to one primarily responsible for the act that caused the damage.'" *Id*., 98-3193, 739 So. 2d at 186-87, quoting *Green v. TACA Int'l Airlines*, 304 So. 2d 357, 359 (La. 1974).

In the present matter, the trial court denied the exception stating that "there is a cause of action in this matter and additional discovery is needed to determine whether, United Services Automobile Association and Osborne Reeves contributed in any way, or are responsible for plaintiffs' injuries." I agree. If respondents can prove that they are free from fault and that all of plaintiff's damages were caused by the second accident, then the concept of tort indemnity could possibly apply based on the principles enunciated in *Nassif*.[1] In this procedural posture the task of this Court is limited. *Farmco, Inc. v. W. Baton Rouge Par. Governing Council*, 01-1086, p. 1 (La. 6/15/01), 789 So. 2d 568, 569. Resolving all doubt in favor of respondents, I find that the exception of no cause of action was correctly denied at this stage in the proceedings. I would deny the writ.

[1] This also echoes the policies behind the 1996 revisions to La. C.C. art. 2324 requiring each party to be responsible for his/her own fault.