SUPREME COURT OF LOUISIANA

2012-C-0775

Patrick E. Phillips, Jr., et al.
versus
G&H Seed Co., et al.

Writ of Review to the Court of Appeal, Third Circuit,
Parish of St. Landry

Brief of Defendants-Applicants, Bayer CropScience LP, Michael G. Redlich, and Allianz Global Risks US Insurance Co.

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Key to Record Citations in This Brief

The record from the court of appeal includes not only the current 6-volume record from the most recent appeal in this case (No. CA 10-1405), but also the 36-volume record from a prior appeal (No. CA 08-934). The 6 volumes of the current record include 3 volumes of pleadings and 3 volumes of exhibits.

Citation to pleadings in record no. CA 10-1405 are by volume number, the abbreviation "R.," and page number. Citations to the exhibits are by volume number, the abbreviation "Ex.," and page number.

Citations to record no. CA 08-934 are by the designation "CA 08-934" followed by the volume number, the abbreviation "R.," and the page number.

For example:

- **1 R. 160** refers to the record in this appeal (CA 10-1405), volume 1, page 160.
- **3 Ex. 473** refers to the exhibits in this appeal (CA 10-1405), volume 3, page 473.
- **CA 08-934, 22 R. 5015** refers to record no. CA 08-934, volume 22, page 5015.

Statement of the Case

1. Overview.

The issue in this case is whether plaintiffs in a products-liability and negligent-misrepresentation case can recover for indirect economic damages, absent any injury to their own persons or property.

The defendants-applicants are Bayer CropScience LP, Bayer's employee Michael G. Redlich, and Bayer's excess insurer, Allianz Global Risks US Insurance Company. Bayer's predecessor marketed the insecticide Icon in Louisiana to protect Louisiana's rice crops from the rice water weevil. Defendants G & H Seed Co., Inc., Crowley Grain Drier, Inc., Nolan J. Guillot, Inc., and Mamou Rice Drier and Warehouse, Inc., purchased Icon, applied it to rice seed, and sold the Icon-coated rice seed to Louisiana rice farmers. Many of these rice farmers also raised crawfish in their rice ponds, and plaintiffs allege that Icon killed the crawfish.

But plaintiffs are not suing as crawfish farmers; instead they describe themselves as "buyers-processors" of crawfish. They are in the business of buying crawfish from crawfish farmers or other crawfish wholesalers and reselling the crawfish for profit, sometimes processing the crawfish and selling the tail meat. They allege purely economic injury to their businesses caused by their suppliers' inability to supply them with crawfish, which they in turn blame on Icon.

2. Factual background.

In 1998 the Environmental Protection Agency issued a conditional registration for a new product, Icon, designed to combat the rice water weevil and other pests that attack rice crops.[1] Icon's active ingredient was the chemical fipronil, which had been in long use in other applications (e.g.

[1] CA 08-934, 22 R. 5015 (Redlich).

controlling pests in turf, fleas and ticks on house pets, and termites).[2] Icon was developed at the urging of the EPA, which had determined that the dominant product for this purpose (Furadan) was too toxic to remain on the market.[3]

Bayer's predecessors marketed Icon in Louisiana through their employee Michael Redlich. Former defendants G&H Seed Co., Inc., Crowley Grain Drier, Inc., Nolan J. Guillot, Inc., and Mamou Rice Drier and Warehouse, Inc., purchased Icon, applied it to rice seed, and sold the Icon-coated rice seed to rice farmers.

Icon had many advantages over competing products. Because it was applied to the rice seed itself before planting, it eliminated the need for repeated aerial spraying of insecticide. And because the rice seed was treated before planting, aerial application of both the seed and the insecticide could be done in one step. Finally, because rice seed is heavier than aerosolized insecticide, the problem with overspray was dramatically reduced.[4]

Many Louisiana rice farmers also raise crawfish in their rice ponds, and plaintiffs allege that the Icon killed the crawfish. Indeed, any insecticide effective against the rice water weevil will necessarily be toxic to crawfish. Icon is no exception; if a crawfish eats an Icon-coated rice seed, it will die.[5] But studies conducted by the LSU AgCenter and separate studies commissioned by Bayer's predecessors showed that crawfish can thrive and reproduce in rice fields sown with Icon, as long as the farmer allows a

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[2] CA 08-934, 22 R. 5046–48 (Redlich); *id.* 36 R. 8459–60 (Peter McCahon, environmental toxicologist employed by Bayer).

[3] CA 08-934, 35 R. 8190–92 (Bobby Simoneaux, La. Dept. of Agriculture and Forestry, Director of Pesticide Environmental Programs).

[4] CA 08-934, 22 R. 5064–65 (Redlich).

[5] CA 08-934, 34 R. 7965 (defense toxicologist Ron Biever). *See also id.,* 22 R. 5105 (Redlich); *id.* 35 R. 8219, 8234 (Simoneaux); *id.* 36 R. 8478 (McCahon).

suitable waiting period between planting the Icon-treated rice seed and introducing crawfish into the rice field.[6]

The introduction of Icon coincided, unfortunately, with a record-breaking drought in southwest Louisiana. Without the usual spring rainfall, both wild and pond-raised crawfish yields fell dramatically, though within a year or two, they returned to historical levels. Despite the clear connection between the drought and the decline in crawfish production, litigation soon ensued, claiming that the decline was caused not by drought but by unintended effects of Icon.

The first round of lawsuits was a class action on behalf of crawfish farmers; i.e., the owners of the crops claimed to have been damaged by Icon. That litigation, styled *Craig West, et al. v. G&H Seed Co., et al.*, was settled years ago for $45 million.

The *Phillips* litigation is brought not by crawfish farmers, but by crawfish buyers, processors, and resellers—middlemen in the crawfish-distribution chain. They are in the business of buying crawfish from crawfish farmers and selling them to others, sometimes processing the crawfish or the tail meat before resale. They allege that the decline in crawfish production allegedly caused by Icon crimped their supply of crawfish, thus adversely affected their businesses.

3. Proceedings culminating in the *Phillips I* decision.

This litigation began as a purported class action by Patrick Phillips (d/b/a Phillips Seafood) and Atchafalaya Processors, Inc., individually and on behalf of all others similarly situated. Named as defendants were G&H Seed Co., Crowley Grain Drier, Inc., Delhi Seed Co., Inc., Terral Seed Co., Inc.,

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[6] *See generally* testimony of Ron Biever, CA 08-934, 33 R. 7926 through 34 R. 8059, particularly conclusions stated at *id.*, 34 R. 7947, 7953–55, and 7975–77. *See also* McCahon's testimony at *id.*, 36 R. 8473–75 (describing tests commissioned by Bayer).

Mamou Rice Drier & Warehouse, Inc., and Aventis CropScience USA Holdings, Inc., f/k/a Rhone Poulenc, Inc., Bayer CropScience's predecessor. Plaintiffs later amended their petitions to substitute Bayer CropScience as Aventis's successor.

Eventually, plaintiffs abandoned their efforts to certify a plaintiff class. Thereafter, through a series of supplemental and amending petitions and interventions, the matter proceeded as a cumulation of individual actions comprising the claims of approximately 72 individual crawfish buyers/re-sellers and processors.[7]

Because trying all 72 actions at once would have been chaotic, the trial court decided to try the actions of four bellwether or "test" plaintiffs, three to be chosen by plaintiffs and one chosen by the defense.[8] This number eventually was reduced to three plaintiffs: James Bernard, Patrick Phillips, and Lisa Guidry.

Trial of these three plaintiffs' claims began on July 2, 2007 and ended on August 2, 2007. The jury found in favor of each of the three plaintiffs, assigning 94% fault or causation to Bayer, 1% to Bayer salesman Redlich, and 5% to the drought, and awarding varying amounts of damages to the three trial plaintiffs.[9]

Bayer and Redlich appealed, and a five-judge panel of the court of appeal voted 4-1 to reverse. *Phillips v. G & H Seed Co.*, 08-934 (La. App. 3 Cir. 4/8/09), 10 So. 3d 339, *writ denied*, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (*Phillips I*). The *Phillips I* court based its decision on this Court's decision in *PPG Industries, Inc. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), quoting six paragraphs of that decision. 08-934 pp. 4–5, 10 So. 3d at 342–43. The

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[7] *See* 1 R. 56 and CA 08-934, 3 R. 523 (Fourth Amended and Consolidated Petition for Damages).

[8] CA 08-934, 6 R. 1239.

[9] CA 08-934, 13 R. 2848–49.

Phillips I court found further support for its decision in its own precedent, *Louisiana Crawfish Producers Association – West v. Amerada Hess Corp.*, 05-1156 (La. App. 3 Cir. 7/12/06), 935 So. 2d 380, *writ denied*, 06-2301 (La. 12/8/06), 943 So. 2d 1094, which held that a defendant's duty to avoid damaging land and wild crawfish on it did not extend to crawfishermen who had no proprietary interest in the land or the crawfish. "Similarly," the *Phillips I* court reasoned, "we find that plaintiffs in this case have failed to prove a proprietary interest in the crawfish crop destroyed by the use of ICON. Therefore, the plaintiffs' cause must fail." 08-934 p. 7, 10 So. 3d at 344.

Plaintiffs applied to this Court to review *Phillips I*, but this Court denied their application. *Phillips v. G&H Seed Co.*, 2009-1504 (La. 10/30/09), 21 So. 3d 284. *Phillips I* thus became final and definitive. La. Code Civ. P. art. 2166(E).

4. Proceedings culminating in the en banc decision.

After *Phillips I* became final and definitive, defendants filed a series of summary-judgment motions in the trial court. In July and August 2009, defendants filed nine motions for summary judgment seeking, respectively, dismissal of the claims of nine plaintiffs whose depositions had been taken.[10] In November 2009, they filed a motion for summary judgment seeking dismissal of all other remaining plaintiffs' claims. With respect to all plaintiffs, defendants argued that, according to *PPG* as interpreted by

[10] These included the following: (1) Andrew Blanchard, individually and d/b/a Blanchard's Crawfish Co.; (2) Ronald Noel, individually and as president of Atchafalaya Crawfish Processors, Inc.; (3) Russ Mabile, d/b/a Mabile Seafood; (4) Vernon Alleman, individually and d/b/a Vernon Alleman Seafood; (5) Daniel Hardee IV, individually and as manager of Hardee Seafood LLC; (6) Grady, Eric, and Gerald Alleman, individually and d/b/a Alleman's Seafood; (7) Larre Butler, individually and d/b/a Butler Crawfish; (8) Lynn Blanchard Sr., individually and d/b/a Lynn Blanchard's Crawfish; and (9) Frank Randol, individually and as president of Randol, Inc. The Mabile claim was settled while the summary-judgment motions were pending.

Phillips I, the plaintiffs are outside the scope of defendants' duty to avoid damaging the crawfish crops because they lacked a proprietary interest in crawfish that they had not yet purchased.

In opposition to these motions, plaintiffs argued that *Phillips I* was wrongly decided and should not be followed. They also offered affidavits from each remaining plaintiff and an affidavit with attached expert reports from their economist, Russell Lamb, Ph.D.

The plaintiffs' affidavits established that each was in the business of buying farm-raised crawfish for resale. While most plaintiffs testified that they bought crawfish from crawfish farmers, depositions offered by defendants showed that several plaintiffs buy all their crawfish from other buyers-processors, and that others buy crawfish from both farmers and other buyers-processors.[11] All of them said that, in the season after Icon was introduced into Louisiana's rice-crawfish fields, crawfish production fell dramatically. Dr. Lamb described the nature of their resulting claims: "The plaintiffs in this case were harmed in that they lost sales of Louisiana crawfish because they were unable to obtain adequate supplies of crawfish from their suppliers to meet demand."[12]

Dr. Lamb also described the economic relationship between the crawfish farmers and the buyers-processors. According to Dr. Lamb, the buyers-processors serve as a link in the supply chain between the crawfish farmers and the final consumer.[13] He defined "supply chain" as a term used

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[11] These include Andrew Blanchard d/b/a Blanchard Crawfish Co.; Daniel Hardee IV and his company, Hardee Seafood LLC; Lynn Blanchard d/b/a Lynn Blanchard's Crawfish; and Vernon Alleman d/b/a Vernon Alleman Seafood. Another, Frank Randol, estimated that his company, Randol, Inc., bought 75% of its crawfish from other buyer-processors and only 25% directly from farmers.)

[12] 3 Ex. 475, Lamb report ¶ 5.2 (Apr. 30, 2007); *see also* 3 Ex. 508, Lamb report ¶ 9 (Oct. 15, 2009).

[13] 3 Ex. 474, Lamb report ¶ 4 (Apr. 30, 2007).

in economics to describe close, relatively long-term relationships between suppliers of raw materials and buyers-processors of those raw materials.[14]

Supply chains are not unique to crawfish distribution. Dr. Lamb said that, while many other agricultural products are distributed on a "spot" market or commodities market, supply chains have become increasingly common in food markets. They have evolved for various reasons: concerns over quality, assurance that certain production practices are followed, and reduction of the uncertainty inherent in the marketplace.[15]

The trial court, though sympathetic to plaintiffs' arguments, recognized its duty to follow *Phillips I*. Because plaintiffs' affidavits failed to distinguish their claims from those decided in *Phillips I*, and because they failed to show a proprietary interest in crawfish they had not yet purchased, the trial court followed *Phillips I* and granted summary judgment.

Plaintiffs appealed, and a three-judge panel of the court of appeal reversed the trial court's judgment. *Phillips v. G & H Seed Co.*, 10-1405 (La. App. 3 Cir. 05/11/11), 66 So. 3d 507 (*Phillips II*). The *Phillips II* panel rendered a decision directly contrary to *Phillips I*, opining that *Phillips I* was wrongly decided. The *Phillips II* panel criticized the *Phillips I* panel for "fail[ing] to perform [a] duty-risk analysis, and instead conclud[ing] the 'plaintiffs' cause must fail' because they failed to prove a proprietary interest in the damaged property.'" *Id.* p. 3, 66 So. 2d at 510. Language in the *Phillips II* decision suggests that, under *PPG*, plaintiffs' lack of a proprietary interest in the crawfish is irrelevant:

> PPG clearly shows the supreme court did not intend to close the door to recovery for all claims of economic harm arising out of damage to what is technically a third person's property, i.e. "proprietary interest." It made such recovery available in certain circum-

[14] 3 Ex. 478–49, Lamb report ¶ 12 (Apr. 30, 2007).

[15] 3 Ex. 512, Lamb report n. 32 (Oct. 15, 2009); 3 Ex. 512–13, Lamb report ¶ 18 (Oct. 15, 2009); 3 Ex. 479–80, Lamb report ¶ 15 (Apr. 30, 2007).

> stances for limited groups of people with a special interest in or relationship with the damaged property, whose damages were a particularly foreseeable result of the tortious conduct of the defendant.

Id. p. 14, 66 So. 3d at 516.

The only limit that *Phillips II* placed on the scope of duty in property-damage cases is the court's own *ad hoc* "policy decision":

> The court in *PPG* did caution that a party who negligently causes injury to property will not always be held legally responsible to all persons for all damages flowing in a "but for" sequence, because the list of possible victims might be "expanded indefinitely." Thus, the court must "necessarily make a policy decision on the limitation of recovery of damages." [*PPG*, 447 So. 2d] at 1061–62.

Id. p. 10, 66 So. 3d at 514.

In a concurring opinion, Chief Judge Thibodeaux opined that, on remand, plaintiffs may attempt to prove a proprietary interest, "if they choose to do so, as an additional *supplement* to a duty-risk analysis." *Id.*, 66 So. 3d at 516 (Thibodeaux, C.J., concurring) (emphasis in original).

Defendants applied for en banc rehearing or, in the alternative, panel rehearing, but the court of appeal denied rehearing. Defendants then applied to this Court for a writ of certiorari or review. This Court granted their application and granted peremptory relief, remanding the case to the court of appeal for en banc briefing, argument, and decision. *Phillips v. G & H Seed Co.*, 2011-1861 (La. 11/18/11), 75 So. 3d 460.

On remand, a seven-judge majority of the en banc court of appeal decided the case by simply adopting *Phillips II* verbatim as the en banc court's decision. *Phillips v. G & H Seed Co.*, 10-1405 (La. App. 3 Cir. 03/07/12); 86 So. 3d 773 (en banc).[16]

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[16] "After *en banc* consideration, a majority of the judges vote to adopt *Phillips II* as the controlling opinion from this Court, which we reissue this date …." *Phillips v. G & H Seed Co.*, 10-1405 p. 2 (La. App. 3 Cir. 3/7/12), 86 So. 3d 773, 775, writ app. p. A33.

Four judges in the court of appeal dissented. Judge Decuir, joined by Judges Pickett, Ezell, and Gremillion, believed that the holding of *PPG* required the court to affirm summary judgment.[17] Judge Pickett, joined by Judges Decuir, Ezell, and Gremillion, believed that *Phillips I* was correctly decided and that the trial court was correct in following *Phillips I* and granting summary judgment.[18]

Defendants again applied to this Court for a writ of review, and this Court granted their application.

Specification of Error

The court of appeal erred in reversing the summary judgments granted by the trial court. In reaching this erroneous result, the court of appeal committed the following errors in its analysis:

1. Failing to follow the holding of *PPG*, and misinterpreting *PPG* to the point of rendering plaintiff's lack of a proprietary interest in damaged property irrelevant in tort cases involving property damage.

2. Failing to address this Court's recent *Eagle Pipe* decision, which required a proprietary interest in damaged property to support a tort claim for damage to that property.

3. Allowing claims for negligent interference with prospective contracts to survive summary judgment.

4. Failing to treat *Phillips I* as law of the case.

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[17] 86 So. 3d at 783 (Decuir, J., dissenting), writ app. pp. A49–A51.

[18] 86 So. 3d at 784 (Pickett, J., dissenting), writ app. p. A52.

Argument

1. Louisiana law does not allow recovery of purely economic losses in a product-liability case absent any injury to the claimant or the claimant's property.

A. Before the court of appeal's decision here, no Louisiana court ever allowed recovery for purely economic losses caused by damage to another's property.

In purporting to follow *PPG Industries v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), the court of appeal has disregarded its holding. *PPG* addressed "the broad question of recovery of indirect economic loss incurred by a party who had a contractual relationship with the owner of property negligently damaged by a tortfeasor," *id.* at 1059—exactly the nature of plaintiff's claims here. The *PPG* court's holding is "that the damages to the economic interest of the contract purchaser of natural gas, caused by a dredging contractor's negligent injury to property which prevents the pipeline owner's performance of the contract to supply natural gas to the purchaser, do not fall within the scope of the protection intended by the law's imposition of a duty on dredging contractors not to damage pipelines negligently." *Id.* at 1059–60.

Thus, the holding of *PPG* was denial of purely economic losses caused by damage to another's property. This Court itself characterized *PPG* as "finding that the duty not to damage someone else's property did not encompass the risk that the other party's business arrangements would be affected." *Roberts v. Benoit*, 605 So. 2d 1032, 1056 (La. 1992) (on rehearing). Applying that holding directly to this case, *Phillips I* denied recovery. Yet the en banc court of appeal, purporting to follow *PPG*, reached a result contrary to *PPG*'s holding.

The court of appeal's en banc decision conflicts not only with *PPG* itself, but also with every Louisiana decision on point since *PPG*. No Louisiana case before or since *PPG* has allowed a plaintiff to recover for

purely economic losses caused by damage to another's property. Instead, Louisiana courts have consistently rejected such a recovery. Examples include the following cases:

- Salt-mine employees lost their jobs and suffered economic losses because of the flooding of their employer's salt mine, caused by defendant's negligence. The court, applying both *PPG* and its predecessor, *Forcum-James Co., Inc. v. Duke Transportation Co.*, 231 La. 953, 93 So. 2d 228 (1957), affirmed summary judgment dismissing the employees' claims. *Babin v. Texaco, Inc.*, 449 So. 2d 718 (La. App. 3 Cir.), *writ denied*, 456 So. 2d 165 (La. 1984).

- A defendant committed conversion by unloading the cargo of a railroad tank car. The railroad, which did not own the cargo, sued for economic loss caused by the defendant's conversion. The trial court sustained an exception of no right of action, and the court of appeal affirmed. The court of appeal held that "the trial court acted properly in maintaining the exception of no right of action because (1) [the railroad] … fell prey to the long-standing *Forcum-James* rule that allows recovery only to the owner of damaged goods or its subrogee, [and] (2) a duty risk analysis of [the railroad's] alleged facts and circumstances, in light of *PPG Industries, Inc. v. Bean Dredging* … would not give [the railroad] a right of action …." *Ill. Cent. Gulf R.R. Co. v. Texaco, Inc.*, 467 So. 2d 1141 (La. App. 5 Cir.), *writ denied*, 472 So. 2d 27 (La. 1985).

- Fishermen sued for environmental damage to their traditional fishing site, causing them to suffer economic losses. The trial court granted partial summary judgment dismissing this claim. The court of appeal affirmed, citing *PPG* and the plaintiffs' lack of a proprietary interest in the fishing site or the uncaught fish. *Dempster v. Louis Eymard*

Towing Co., Inc., 503 So. 2d 99, 102 (La. App. 5 Cir.), *writ denied*, 505 So. 2d 1136 (La. 1987).

- Crawfishermen alleged environmental damage to Buffalo Cove, impairing their ability to catch crawfish. The court, citing *Dempster* and other cases, denied recovery because plaintiffs lacked a proprietary interest in either Buffalo Cove or the uncaught crawfish. *La. Crawfish Producers Assn.–West v. Amerada Hess Corp.*, 2005-1156 (La. App. 3 Cir. 7/12/06), 935 So. 2d 380, *writ denied*, 2006-2301 (La. 12/8/06), 943 So. 2d 1094.

Most recently, in *Wiltz v. Bayer CropScience LP*, 645 F.3d 690 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1145, 181 L. Ed. 2d 1019 (2012), the U.S. Fifth Circuit affirmed summary judgment dismissing claims identical to those at issue here.[19] *Wiltz*, like this case, involved the claims of buyers-processors of crawfish, alleging damage by Icon to crawfish crops that they had expected to purchase for resale, which in turn caused them to suffer business losses. The district court granted summary judgment dismissing plaintiffs' claims, and the U.S. Fifth Circuit affirmed.

The *Wiltz* court began its analysis by tracing the "distinguished lineage" of the economic-loss rule: the rule that bars recovery in tort when a party suffers economic loss unaccompanied by harm to his own person or property.[20] The *Wiltz* court then turned to Louisiana's own version of the

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[19] *Wiltz*'s procedural history is intertwined with *Phillips*. After the jury verdict but before the court of appeal's decision in *Phillips I*, Wiltz—represented by the same lawyers representing the *Phillips* plaintiffs—attempted to intervene in the *Phillips* case to convert it into a class action. The trial court denied leave to intervene at that point, whereupon Wiltz filed a purported class-action petition in the 27th JDC. Defendants removed the case to the U.S. District Court for the Western District of Louisiana. The district court thereafter granted summary judgment dismissing plaintiff's claims. The U.S. Fifth Circuit affirmed for reasons discussed in the text above.

[20] *Id.* at 695–97 (history of economic-loss rule); *id.* at 695–96 (noting the rule's "distinguished lineage traceable at least to Justice Holmes's opinion in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308, 48 S. Ct. 134, 72 L. Ed. 290 (1927).").

economic-loss rule embodied in *PPG*. The *Wiltz* court interpreted *PPG* as making the economic-loss rule the general rule in Louisiana, subject to possible and rare case-by-case adjustments.[21] Similar to *Phillips I*, the *Wiltz* court noted the strong resemblance between the facts of this case and those of *PPG*. "The essential facts in this case thus mirror the facts of *PPG*." *Id.* at 699. The court concluded that, "[u]nless there is some convincing reason to distinguish *PPG*, it would seem that the policy considerations at issue in that case would counsel the same result in this case." *Id.*

The *Wiltz* court then undertook a lengthy analysis of plaintiffs' attempts to distinguish *PPG*, found those attempts unconvincing, and did exactly what *Phillips I* did—it applied *PPG*'s holding directly to the buyer-processor's claim. "[W]e think this case is resolved by the Louisiana Supreme Court's clear and controlling decision in *PPG*." *Id.* at 703.

Six years after *PPG*, this Court acknowledged the "general inhibition in negligence law against compensation for purely economic loss not the result of either bodily harm to the claimant or physical injury to property in which the claimant has a proprietary interest." *Great Southwest Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 970 (La. 1990). The cases described above show that, under *PPG*, this same "general inhibition" inhabits Louisiana law.

The contrary en banc decision, adopting *Phillips II* verbatim, cites *Cleco Corp. v. Johnson*, 2001-0175 (La. 9/18/01), 795 So. 2d 302.[22] But in *Cleco*, the plaintiff had a proprietary interest in the damaged property through subrogation to the property owners' rights. In fact, this subrogation interest was decisive in this Court's decision allowing the claim to go forward.

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[21] *Id.* 697 (quoting *PPG* "that it was 'highly unlikely' that the 'duty not to negligently injure property encompass[es] the risk that a third party who has contracted with the owner of the injured property will thereby suffer an economic loss.'"); *id.* (citing "certain language in [*PPG* that] left the door open for case-by-case adjustments.").

[22] *Phillips v. G & H Seed Co.*, 10-1405 pp. 11–12 (La. App. 3 Cir. 3/7/12), 86 So. 3d 780–81 (en banc), writ app. pp. A42–A43.

In *Cleco*, a defendant's negligence damaged the plaintiff electric company's utility pole, causing a power surge that damaged property belonging to plaintiff's customers. The plaintiff sued for this property damage, alleging that it was subrogated to the owners' rights. This Court held that "a cause of action exists for the customers to recover damages to their property resulting from the power surge caused by defendant's negligence," and, for purposes of its opinion, assumed the plaintiff's subrogation to its customers' claims. *Cleco*. 2001-0175 p. 1, 795 So. 2d at 303. Decisive in *Cleco* was plaintiff's status as the holder of a proprietary interest, i.e. a right derived from the property owners. "Cleco is only permitted to bring that claim if it currently holds its customers' claims through an assignment of rights, sale of a litigious right, conventional or legal subrogation, or some other legal theory." *Id.* p. 4, 795 So. 2d at 305.

In fact, aside from subrogation cases like *Cleco*, there is not a single reported Louisiana decision allowing recovery for purely economic losses caused by tortious damage to another's property. In their briefs in the court of appeal and this Court, defendants have repeatedly challenged plaintiffs' able counsel to cite a single such case. They have failed to meet the challenge. Thus, it can be safely said that the en banc decision, adopting *Phillips II*, is contrary to every reported Louisiana decision on point.

B. This Court's recent Eagle Pipe *decision requires a proprietary interest in damaged property to support a tort claim for damage to that property.*

This Court's most recent decision concerning tort recovery in property-damage cases is *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So.3d 246. The issue in *Eagle Pipe* was whether purchasers of immovable property, upon discovering hidden environmental contamination of the property, could recover in tort against third parties responsible for the contamination. This Court answered this question "no"

because the damage occurred before plaintiffs acquired ownership of the property.[23] A plurality of the Court elaborated on this reason, and its analysis applies directly here.

First, *Eagle Pipe* explains what a "proprietary interest" is. This is significant here because the plaintiffs have professed not to know what that term means.[24] As explained in *Eagle Pipe*, the term is synonymous with "real right," and both terms refer to "a species of ownership." *Id.* p. 12, 79 So. 3d at 259. Ownership is itself a real right, as are the "various dismemberments of ownership" such as usufruct, right of habitation, right of use, and servitudes. *Id.* pp. 11–12, 79 So. 3d at 258–59. *Eagle Pipe* did not create this explanation for "proprietary interest," but rather drew it directly from the Civil Code.[25]

Second, *Eagle Pipe* explains that the legal basis for tort recovery in property-damage cases is disturbance of the plaintiff's real right (i.e. proprietary interest) in the damaged property:

> Louisiana law provides that when property is damaged through the actions of another, the owner of the property (obligee) obtains a personal right to demand that the tortfeasor (obligor) repair the damage to the property. La. C.C. art. 2315 ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."). This personal right of the property owner arises because his real rights in the ownership of the property have been disturbed—his use, enjoyment or disposal of the property.

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[23] Three justices (Kimball, Guidry, and Clark) subscribed to a plurality opinion so holding. Justice Victory concurred in the result, "agree[ing] with the majority's conclusion that, under Louisiana law, a subsequent purchaser of property does not have the right to sue a third party for non-apparent property damages inflicted before the sale in the absence of an assignment of or subrogation to that right.").

[24] *See*, *e.g.*, plaintiffs' opp. to writ app. p. 14 (referring to "the nebulous and undefined 'proprietary interest' legal standard").

[25] *See also* Black's Law Dictionary 886 (Bryan A. Garner, ed., 9th ed., West 2009) (defining *proprietary interest* as "[a] property right; specif., the interest held by a property owner together with all appurtenant rights ….").

Id. p. 20, 79 So. 3d at 264.[26] This personal right remains with the owner if the property is sold unless it is assigned to the buyer. The plaintiffs in *Eagle Pipe* had no such assignment.[27]

Because plaintiffs in *Eagle Pipe* lacked a real right (i.e. proprietary interest) in the property when the damage occurred, they could not recover in tort from third parties who caused the damage:

> As we have explained, injury to property must be understood as damage to the real rights in the property. A tortfeasor who causes injury or damage to a real right in property owes an obligation to the owner of the real right. This relationship arises as a matter of law and provides to the owner of the real right a personal right to sue the tortfeasor for damages. In the absence of an assignment or subrogation of this personal right, a subsequent purchaser of the property cannot recover from a third party for property damage inflicted prior to the sale.

Id. p. 43, 79 So. 3d at 279.

The same principles apply even more strongly here. While plaintiffs in *Eagle Pipe* acquired a proprietary interest in the property after the hidden damage was done, here plaintiffs never acquired any proprietary interest in the damaged crawfish crops. Since plaintiffs here never had any proprietary interest in the damaged crawfish crops, they suffered no injury to any real right. Therefore, under *Eagle Pipe*, they have no tort claim against those alleged to have caused the property damage. That tort claim, instead, was a personal right of the property owners: the crawfish farmers, whose claims

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[26] *See also id.* p. 37, 79 So. 3d at 275 ("Damage to property may disturb not only the owner's rights of use of, and enjoyment in, the property (the *usus* and *fructus* rights in ownership), but may also disturb his right to alienate the property, or to dispose of the property, completely and without disturbance (the *abusus* right in ownership). [¶] The property owner at the time the damages were inflicted has a personal right of action against the tortfeasor for the disturbance of his real right in the property.").

[27] This fact distinguishes *Eagle Pipe* from *Cleco*, where the plaintiff electric company alleged subrogation to its customers' rights to recover for damage to their property. *See Cleco* p. 4, 795 So. 2d at 305 ("Cleco is only permitted to bring that claim if it currently holds its customers' claims through an assignment of rights, … subrogation, or some other legal theory.").

were settled and extinguished by the *West* class-action settlement. The court of appeal's en banc decision here cannot be reconciled with *Eagle Pipe*.

C. Left undisturbed, the court of appeal's decision would allow claims for negligent interference with prospective contracts.

Though plaintiffs have denied making claims for negligent interference with prospective contracts, their claims cannot be construed as anything else. Plaintiffs allege that Bayer's product, Icon, damaged crawfish crops that they had expected to purchase from the crawfish farmers, thus impairing the farmers' ability to perform their end of prospective contracts of sale. This, in turn, caused economic harm to plaintiffs' businesses.

This Court has recognized only a very limited cause of action against a corporate officer for intentional interference with contract. *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989). The elements of a *9 to 5* claim are: (1) the existence of a contract or legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the officer's part; and (5) causation of damages to the plaintiff by breach of contract or difficulty of its performance brought about by the officer. *Id.* at 235.

The *9 to 5* court cautioned that it was not opening the door to any and all claims for tortious interference with contract. "It is not our intention … to adopt whole and undigested the fully expanded common law doctrine of interference with contract …. In the present case, we recognize, as set forth particularly herein, only a corporate officer's duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person." *Id.* at 234.

Louisiana courts have heeded this message, refusing to extend this cause of action beyond the parameters of *9 to 5*. *E.g. Brown v. Romero*, 05-1016 pp. 6–7 (La. App. 3 Cir. 2/1/06), 922 So. 2d 742, 747 (recognizing only "a narrowly defined cause of action" under *9 to 5*); *Grocery Supply Co. v. Winterton Food Stores*, 31,114 pp. 5–6 (La. App. 2 Cir. 12/9/98), 722 So. 2d 94, 98 (*9 to 5* "recognized a limited and narrowly defined action …."); *First Downtown Dev. v. Cimochowski*, 613 So. 2d 671, 674 (La. App. 2 Cir. 1993) ("*9 to 5 Fashions* annulled the delictual rule that absolutely barred any action based on tortious interference with contract, but *only* to the extent that the rule conflicts with *9 to 5 Fashions*.") (emphasis by the court); *Lynn v. Berg Mech., Inc.*, 582 So. 2d 902, 912 (La. App. 2 Cir. 1991) ("The *Spurney* cause of action is limited to interference by a corporate officer into a contractual or legally protected relationship that exists between the plaintiff … and that officer's corporation ….").

The criteria of *9 to 5* are not met here. In fact, the very first criterion—existence of a contract—is lacking. While the buyers-processors may have reasonably expected to enter sales contracts with the crawfish farmers, in fact they had no enforceable contracts with the farmers and no claim against the farmers for breach of contract. *See Wiltz*, 645 F.3d at 699–700. Any contracts were, at best, prospective only.

More fundamentally, there is not even an allegation—let alone proof—that defendants intended to interfere in the business relations between the crawfish farmers and the buyers-processors. This absence of intent is fatal to any tortious-interference claim. Every Louisiana court that has spoken on the subject has refused to recognize a cause of action for negligent interference with contract.

In *Great Southwest Fire Insurance Co. v. CNA Insurance Companies*, 557 So. 2d 966 (La. 1990), this Court observed that even the common law shies away from recognizing such a claim:

> Interference with contract, its modern inception lying in "malice," has remained, at common law, almost entirely within the province of intentional torts; and when various forms of negligence have either prevented or rendered more burdensome the performance of a contract, liability has generally not been extended…. The courts have generally followed this policy and, with a few limited and narrow exceptions, have refused to cross the bright line that has traditionally marked negligence claims for economic harm as off limits ….

557 So. 2d at 970. Other Louisiana courts, taking this hint, have flatly refused to recognize a cause of action for negligent interference with contract. *E.g. Brown v. Romero*, 05-1016 p. 7 (La. App. 3 Cir. 2/1/06), 922 So. 2d 742, 747 ("[T]he supreme court has expressly declined to recognize a cause of action for negligent interference with contract."); *Crockett v. Cardona*, 97-2346 p. 7 (La. App. 4 Cir. 5/20/98), 713 So. 2d 802, 806 ("Simply put, Louisiana does not allow and never has allowed recovery for the negligent interference with contractual relations."); *Larsen v. Renard*, 576 So. 2d 1188, 1190 (La. App. 3 Cir. 1991) ("Liability for negligent interference with contractual relations resulting in economic loss is not recognized in Louisiana.").

Here, Bayer and Redlich have not been found guilty of any intentional tort. Rather, the jury at the *Phillips I* trial found them liable under the Louisiana Products Liability Act (La. R.S. 9:2800.51 *et seq.*) for failure to provide an adequate warning and failure of the product to conform to an express warranty. The former legal theory equates to ordinary negligence; the latter equates to strict liability. John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L. Rev. 565, 589 (1989); *id.* at 620; *id.* at 623. The jury also found Redlich liable for negligent misrepresentation. And while plaintiffs have habitually hurled all sorts of invective at Bayer and Redlich, not even plaintiffs allege that defendants intended to harm their

businesses—which is what they would have to prove to establish intentional interference.

Since the jury found defendants guilty of nothing worse than ordinary negligence, any imposition of liability on them for plaintiffs' purely economic losses would amount to recognizing a claim for negligent interference with prospective contracts, contrary to *9 to 5*, *Great Southwest*, and their progeny.

2. Since *Phillips I* is not palpably erroneous, it should have been recognized as law of the case.

The en banc court of appeal failed to recognize *Phillips I* as law of the case. That in itself is another error. While an appellate court sitting en banc may overrule the court's own precedent, it has no more power than a panel of the court to disregard law of the case. *Phillips I*, though decided by a five-judge panel, is a judgment of the court as an institution, the same as an en banc decision. It cannot be disregarded—even by the en banc court—when, as here, the criteria for departing from law of the case are not met.

The law-of-the-case principle relates to (a) the binding force of the trial court's rulings during later stages of trial, (b) the conclusive effects of appellate rulings at the trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case. *In re Sewerage & Water Bd. of New Orleans*, 278 So. 2d 81, 83 (La. 1973); *Keller v. Thompson*, 134 So. 2d 395, 397 (La. App. 3 Cir. 1961) (Tate, J., for the court). Among the reasons for law of the case are the following: avoidance of indefinite relitigation of the same issue; the desirability of consistency of results in the same litigation; and the efficiency, and the essential fairness to both sides, of affording a single opportunity for the argument and decision of the matter at issue. *In re Sewerage & Water Bd. of New Orleans*, 278 So. 2d at 83.

This Court has said that law of the case is discretionary, and that, while it applies despite doubt as to the former ruling's correctness, it does not apply in cases of palpable former error or so mechanically as to accomplish manifest injustice. *Id.* But whether or not one agrees with *Phillips I*, it cannot be validly said that *Phillips I* is **palpably** erroneous.

Phillips I was thoroughly vetted before being issued by the court of appeal. It was the product of rehearing before a five-judge panel of that court, and was issued only after four judges listened to but, in the end, respectfully disagreed with their dissenting colleague. *Cf. Keller v. Thompson*, 134 So. 2d at 398 (law of the case applied despite "forceful dissent on the first appeal").

Phillips I then came before this Court, with plaintiffs' writ application augmented by the names of Professors Maraist and Galligan as co-counsel. This Court nevertheless denied the application and left *Phillips I* undisturbed, allowing it to become final and definitive. *See* La. Code Civ. P. art. 2166(E).

In *Wiltz*, a unanimous three-judge panel of the U.S. Fifth Circuit, faced with both the *Phillips I* and *Phillips II* decisions, chose to follow *Phillips I*. Most recently, four judges in the court of appeal dissented from the en banc decision and determined that *Phillips I* was correctly decided.

To date, between this case and its companion, *Wiltz*, 15 appellate judges (not counting this Court's justices) have confronted the scope-of-duty issue: 12 judges in the court of appeal and 3 in the U.S. Fifth Circuit. An 8:7 majority of those judges have endorsed *Phillips I* and the requirement of a proprietary interest.[28] Whether or not *Phillips I*'s correctness is debatable,

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[28] In the Louisiana Third Circuit, five judges have sided with the *Phillips I* majority decision. Judges Pickett, Decuir, Ezell, and Gremillion dissented from the recent en banc decision, opining that *Phillips I* was correctly decided. In addition, Judge Sullivan (now deceased) joined in the *Phillips I* majority opinion, along with Judges Pickett, Decuir, and Ezell. In the U.S. Fifth Circuit, three judges (Benavides, Wiener, and Stewart) unanimously followed *Phillips I* in *Wiltz*. On the opposite side, seven Louisiana Third Circuit judges joined in the recent en banc decision.

Phillips I cannot possibly be **palpably** erroneous if it enjoys the backing of a majority of the appellate judges who have ruled in these cases.

Applying law of the case here would also achieve consistency of results in the same litigation, thus preserving the courts' institutional integrity. Between *Phillips I* and *Wiltz*, five claims have been decided by final, definitive judgments, and all five have been dismissed. Failure to apply law of the case here would mean that similar claims are judged by different sets of rules depending on the luck of the draw, with various judges making their own "policy decision" in allowing or disallowing any particular claim.

If the legal issue raised by this case is debatable, then law of the case is designed precisely for such an issue. Its very purpose is to resolve debates over difficult issues once and for all in a given case, so that the parties and the courts are spared from endless relitigation of the same issue.

Conclusion

The en banc court of appeal's decision purports to follow *PPG*, yet it is heedless of *PPG*'s holding. As a result, it is the first reported Louisiana decision that would allow recovery for purely economic losses caused by damage to another's property. It is also the first reported Louisiana decision that would, in effect, allow claims for negligent interference with prospective contracts. In both respects, the en banc decision is contrary to this Court's decisions and their Louisiana progeny. And it is irreconcilable with *Eagle Pipe*, this Court's most recent decision on tort recovery in property-damage cases.

For these reasons, defendants-applicants pray that the Court reverse the court of appeal's judgment and reinstate the trial court's grant of summary judgment dismissing the remaining plaintiffs' claims with prejudice.

Respectfully submitted:

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