SUPREME COURT OF LOUISIANA

No. 12 C 0775

PATRICK E. PHILLIPS, JR., et al.

versus

G & H SEED CO., et al.

On application for writ of certiorari or review
to the Court of Appeal, Third Circuit,
Parish of St. Landry

This application is filed on behalf of defendants Bayer CropScience, LP, Michael G. Redlich, and Allianz Global Risks US Insurance Company

---

Application for Writ of Certiorari or Review

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO._____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Patrick E. Phillips, Jr., et al.

VS.

G & H Seed Co., et al.

Applicant: Bayer CropScience, LP et al. (see addendum)
Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? No
Priority Treatment? No
If so you MUST complete & attach a Priority Form

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Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: not applicable Docket No. _____

Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

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Parish and Judicial District Court: St. Landry Parish, 27th Judicial District Court Docket Number: 00-C-2220

Judge and Section: Hon. Donald W. Hebert, Div. D Date of Ruling/Judgment: 13 Sept. 2010

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Circuit: Third Docket No. CA 10-1405 Action: Reversed

Applicant in Appellate Court: Plaintiffs Seth Abshire et al. Filing Date: 11 Oct. 2010

Ruling Date: 7 March 2012 Panel of Judges: en banc (except Genovese, J., recused) En Banc: ☑

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Applicant: not applicable Date Filed: _____ Action on Rehearing: _____

Ruling Date: _____ Panel of Judges: _____ En Banc: ☐

PRESENT STATUS

☑ Pre-Trial, Hearing/Trial Scheduled date: _____, ☐ Trial in Progress, ☐ Post Trial

Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No

If so, explain briefly _____

_____.

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

5 April 2012
DATE

/s/ Raymond P. Ward
SIGNATURE

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Statement of Rule X § 1(a) Writ Grant Considerations

The issues raised in this writ application overlap with those raised in a prior writ application by the same applicants in this case. This Court granted that writ application and remanded 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, 2011 La. LEXIS 2872. But rather than address applicants' arguments on remand—including arguments on significant intervening developments in caselaw—the en banc court simply adopted verbatim the court of appeal's prior erroneous panel decision—the same one that prompted this Court to grant the prior writ application.[1]

To applicants' knowledge, the court of appeal's decision is the first ever in Louisiana that would allow plaintiffs to recover for purely economic damages caused by tortious damage to property, where the plaintiffs neither owned the damaged property nor were subrogated to the owners' rights. In fact, the court of appeal's decision makes the plaintiffs' lack of a proprietary interest in the damaged property irrelevant. The decision is thus contrary to the holding of *PPG Industries, Inc. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), and to numerous Louisiana decisions interpreting and applying *PPG*.

The court of appeal's decision is also contrary to this Court's recent decision in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So. 3d 246, 2011 La. LEXIS 2588, *reh'g denied* 2010-2267 (La. 1/13/12), 2012 La. LEXIS 677. *Eagle Pipe*—decided more than four months before the court of appeal's decision here—teaches that the basis for a tort claim in a property-damage case is disturbance of the claimant's real right in the damaged property. *Eagle Pipe* further defines *real right* as ownership and its various dismemberments, and explains that *real right* is synonymous with

[1] *See infra* p. A33 et seq. ("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 ….")

proprietary interest. Here, plaintiffs never had any real right or proprietary interest in the damaged property. Therefore, under *Eagle Pipe*, they cannot possibly have a tort claim for damage to that property.

Though the parties briefed the en banc court of appeal on the import of *Eagle Pipe*, the court of appeal made no attempt to reconcile its decision with *Eagle Pipe*. In fact, the court of appeal's decision does not even cite *Eagle Pipe*.

The court of appeal's decision is also the first ever in Louisiana that would, in effect, allow a claim for negligent interference with prospective contracts. In this respect, the decision goes far beyond the limited cause of action for intentional interference with contract recognized in *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989). The decision is also contrary to several decisions since *9 to 5 Fashions*, all holding that Louisiana does not recognize a cause of action for negligent interference with contract. *See, e.g., Great Southwest Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 969–70 (La. 1990); *Crockett v. Cardona*, 97-2346 pp. 10–11 (La. App. 4 Cir. 5/26/98), 713 So. 2d 802, 805–06; and *Carter v. Smith*, 607 So. 2d 6 (La. App. 2 Cir. 1992).

Applicants briefed the negligent-interference issue in their prior writ application and in their en banc brief in the court of appeal. Yet the court of appeal failed to acknowledge or address this argument and failed to explain how its decision can co-exist with otherwise uniform Louisiana caselaw rejecting any claim for negligent interference with contract.

For these reasons, this case meets the writ-grant criterion of Rule X § 1(a)(1) (conflicting decisions).

Memorandum

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, which was designed to combat the rice water weevil and other pests that attack rice crops. Icon's active ingredient was fipronil, which had long been used safely in other applications (e.g. controlling pests in turf, fleas and ticks on house pets, and termites). It 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.

Icon's advantage over competing products was that it was designed to be applied to rice seed before planting, thus eliminating the need to apply insecticide by repeated crop dusting. And because the chemical was already coated on the rice seed, aerial application of both the seed and the insecticide could be accomplished in one step. Finally, because rice seed is heavier than aerosolized insecticide, the problem of overspray was dramatically reduced.

Any insecticide effective against the rice water weevil will be toxic to crawfish. Icon was no exception—any crawfish that ate an Icon-coated rice seed would die. But studies conducted by the LSU AgCenter and separate studies commissioned by Bayer's predecessor showed that crawfish can thrive and reproduce in rice fields sown with Icon, as long as the farmer allows a suitable waiting period between planting the Icon-coated rice seed and introducing crawfish into the rice field.

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, yields 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 the drought, but by the unintended effects of Icon-coated rice seed.

The first round of lawsuits culminated in a class action on behalf of crawfish farmers—the actual 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 present plaintiffs are not suing as crawfish farmers, but as persons in the business of buying crawfish from crawfish farmers or other crawfish wholesalers and reselling the crawfish for profit. They claim that the decline in crawfish production

impaired their suppliers' ability to sell crawfish to them, which in turn adversely affected their businesses.

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

The litigation began as a purported class action on behalf of Patrick Phillips (d/b/a Phillips Seafood) and Atchafalaya Processors, Inc., individually and on behalf of the proposed plaintiff class of "buyers-processors" of crawfish. Defendants included Aventis CropScience USA Holdings, Inc., f/k/a Rhone Poulenc, Inc. (Bayer's predecessor), and several defendants named as representatives of a proposed defendant class of rice-seed sellers: G & H Seed Co., Crowley Grain Drier, Inc., Delhi Seed Co., Inc., Terral Seed Co., Inc., and Mamou Rice Drier & Warehouse, Inc.

Plaintiffs eventually abandoned their efforts to certify either a plaintiff or a defendant class. Instead, through a series of supplemental and amending petitions and interventions, the case proceeded as a cumulation of individual actions by some 72 buyers-processors.

Bayer responded with various exceptions, including no cause of action. Bayer contended (and still contends) that the scope of duty to avoid damaging another's property does not extend to third parties having business relations with the owner of the damaged property. In pre-trial litigation, the trial court overruled Bayer's exception of no cause of action, and both the court of appeal and this Court denied supervisory writs.

As it would have been chaotic to attempt to try all 72 actions at once, the trial court, after considerable study and debate, decided to try the actions of four bellwether plaintiffs: three to be chosen by plaintiffs and one to be chosen by defendants. This number was eventually reduced to three: James Bernard (d/b/a J. Bernard Seafood Processors, Inc.), Patrick Phillips (d/b/a Phillips Seafood), and Lisa Guidry (d/b/a Guidry's Crawfish).

Trial of these three plaintiffs' claims began on July 2, 2007, culminating in a verdict on August 2, 2007 in their favor. The jury found Bayer liable under the Louisiana Products Liability Act, specifically under two LPLA theories: failure to provide an adequate warning and failure of the product to conform to an express warranty. The jury also imposed liability on Bayer employee Michael Redlich under the LPLA and, alternatively, for negligent misrepresentation. The jury assigned 94% fault or causation to Bayer, 1% to Redlich, and 5% to the drought, and awarded damages to each of the three plaintiffs.

Bayer and Redlich appealed. Their principle argument on appeal was that any duty they had to avoid damaging the crawfish did not extend to these plaintiffs, who did not own the crawfish and who, instead, suffered purely economic losses caused by their suppliers' inability to supply them with crawfish. Bayer and Redlich based their argument on this Court's decision in *PPG Industries, Inc. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984). In *PPG*, this Court held "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." 447 So. 2d at 1059–60. By the same token, Bayer and Redlich argued, damages to the economic interests of the contract purchasers of crawfish, caused by negligence that prevented the crawfish farmers' performance of prospective contracts to supply crawfish to the purchasers, do not fall within the scope of protection intended by the law's imposition of the duty to avoid damaging the crawfish negligently. Bayer and Redlich further supported their argument with several Louisiana cases applying *PPG* to deny recovery for purely economic

losses caused by property damage when the plaintiff neither owned the damaged property nor was subrogated to the property owner's rights.

The appeal was originally argued before a three-judge panel, then re-argued before a five-judge panel. The result was a 4:1 reversal. *Phillips v. G & H Seed Co.*, 08-934 (La. App. 3 Cir. 4/8/09), 10 So. 3d 339 (*Phillips I*). Judges Pickett, Decuir, Sullivan, and Ezell formed the majority, while Judge Saunders dissented. The *Phillips I* court decided the scope-of-duty issue in defendants' favor by applying the holding of *PPG* directly to this case, because both cases involved "the issue of recovery of economic damages in a supply chain system …." *Phillips I*, p. 3, 10 So. 3d at 342.

In further support of its decision, the *Phillips I* court cited its own recent precedent in *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. *Louisiana Crawfish Producers* involved the claims of crawfishermen who alleged that defendants' conduct caused environmental damage, which in turn impaired their ability to catch crawfish. The court in that case denied recovery because the crawfishermen did not have a proprietary interest in the uncaught crawfish or the land allegedly damaged by defendants' conduct. "Similarly," the *Phillips I* court found, "plaintiffs in this case have failed to prove a proprietary interest in the crawfish crop destroyed by the use of ICON. Therefore, the plaintiff's cause must fail." *Phillips I* p. 7, 10 So. 3d at 344.

After the *Phillips I* court denied plaintiffs' applications for panel rehearing and rehearing en banc, the plaintiffs applied to this Court for a writ. In a 4-2 vote (Justice Knoll recused), this Court denied writs. *Phillips v. G & H Seed Co.*, 2009-1504 (La. 10/30/09), 21 So. 3d 284.

4. Proceedings culminating in the en banc decision.

After *Phillips I* had become 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.[2] 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 *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 many plaintiffs testified that they bought crawfish from crawfish farmers, depositions offered by defendants showed that at least some plaintiffs buy all their crawfish from other buyers-processors, and that others buy crawfish from both farmers and other buyers-processors.[3] All of them said that, in the season after Icon was

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[2] 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.

[3] 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

Footnote continued on next page.

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."[4]

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. He defined "supply chain" as a term used in economics to describe close, relatively long-term relationships between suppliers of raw materials and buyers-processors of those raw materials.

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 an increasingly common feature of 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.

The trial court, though sympathetic to plaintiffs' arguments, recognized that it was duty-bound 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

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Footnote continued from previous page.
Randol, estimated that his company, Randol, Inc., bought 75% of its crawfish from other buyer-processors and only 25% directly from farmers.)

Some plaintiffs, who describe themselves as "hybrids," have both crawfish-farming businesses and crawfish buying/processing businesses. But any claims they had for damage to their crawfish-farming businesses were concluded by the *West* class-action settlement. They appear as plaintiffs in this litigation seeking to recover for economic damage to their buying/processing businesses. The trial court agreed with defendants that these "hybrids" cannot use their status as crawfish farmers to recovery for economic damage to their separate buying/processing businesses. *See infra* p. A26.

[4] Ex. P-4, Lamb affidavit, attached Apr. 30, 2007 report, p. 2 ¶ 5.2.

not yet purchased, the trial court followed *Phillips I* and granted summary judgment.[5]

Plaintiffs appealed. On the panel for their appeal (*Phillips II*) were two judges not on the *Phillips I* panel (Chief Judge Thibodeaux and Judge Cooks) and the judge who had dissented in *Phillips I* (Judge Saunders). The result: reversal. The *Phillips II* panel rendered a decision directly contrary to *Phillips I*, opining that *Phillips I* was wrongly decided. *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 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 circumstances 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

[5] *See infra* pp. A1–A21 (judgments); A24–A27 (transcribed oral reasons for judgment).

> 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, 2011 La. LEXIS 2872.

On remand, defendants briefed the en banc court of appeal on two significant decisions rendered after *Phillips II*. One was *Wiltz v. Bayer CropScience LP*, 645 F.3d 690 (5th Cir. 2011), in which the U.S. Fifth Circuit affirmed summary judgment dismissing claims identical to those of plaintiffs here. The *Wiltz* court followed *Phillips I* and declined to follow *Phillips II*.

The other significant intervening decision was *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So. 3d 246, 2011 La. LEXIS 2588, *reh'g denied* 2010-2267 (La. 1/13/12) 2012 La. LEXIS 677. *Eagle Pipe* validates *Phillips I* and undermines *Phillips II*. It teaches that the legal basis for a tort claim in a property-damage case is disturbance of the plaintiff's real right or proprietary interest in the damaged property. It necessarily follows from *Eagle Pipe* that a person lacking a real right or proprietary interest in the damaged property has no tort claim for damage to that property.

Despite the intervening decisions in *Wiltz* and *Eagle Pipe*, 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); 2012 La. App. LEXIS 292 (en banc).[6] In so ruling, the majority failed to address the intervening decisions in *Wiltz* and *Eagle Pipe*.

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.[7] 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.[8]

Assignment of Errors

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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[6] "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), 2012 La. App. LEXIS 292, *4 (page A33 *infra*).

[7] *Infra* pp. A49–A51.

[8] *Infra* p. A52.

Summary of the Argument

In *PPG Industries v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), this Court held that the duty not to damage someone else's property does not encompass the risk that someone having a contract with the property owner will suffer purely economic damages. Applied here, *PPG*'s holding dictates that defendants' duty to avoid damaging farm-raised crawfish does not encompass the risk that persons who expected to purchase the crawfish from the crawfish farmers would suffer business losses. *Phillips I* recognizes this fact, and that decision's result and reasoning accord with a line of Louisiana cases interpreting and applying *PPG*. The en banc decision, on the other hand, while purporting to follow *PPG*, disregards *PPG*'s holding and, without distinguishing *PPG*, allows the opposite result. The en banc decision thus conflicts not only with *PPG* itself, but with a consistent line of Louisiana decisions interpreting and applying *PPG*.

The court of appeal's decision also conflicts with this Court's recent decision in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.,* 2010-2267 (La. 10/25/11), 79 So. 3d 246, 2011 La. LEXIS 2588, *reh'g denied*, 2010-2267 (La. 1/13/12), 2012 La. LEXIS 677. *Eagle Pipe* teaches that the legal basis for a tort claim in a property-damage case is disturbance of the claimant's real right, i.e. proprietary interest, in the damaged property. Here, plaintiffs had no real right or proprietary interest in crawfish that they had not purchased. Therefore, under *Eagle Pipe*'s reasoning, they cannot possibly have a tort claim for damage to those crawfish.

Moreover, the court of appeal's en banc decision, left undisturbed, would allow claims for negligent interference with prospective contracts to survive summary judgment. The en banc decision thus conflicts with unanimous Louisiana caselaw refusing to recognize such a cause of action.

These conflicts would have been avoided if the en banc court had treated *Phillips I* as law of the case. Failure to apply law of the case is itself a

legal error. To dispense with law of the case, a court must find that its prior decision was not merely erroneous, but palpably erroneous. Whatever one thinks of *Phillips I*, *Phillips I* cannot possibly be deemed palpably erroneous. Of the total 15 appellate judges who have made decisions in this case or the companion *Wiltz* case, 8 have opined that *Phillips I* is correct. A decision cannot be palpably erroneous if it represents the majority opinion of appellate judges who have ruled in these related cases.

Argument

1. 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.[9] *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.

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[9] *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.

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.[10] The *Wiltz* court then turned to Louisiana's own version of the 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.[11] 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.[12]

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.*

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[10] *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).").

[11] *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.").

[12] Ironically, the court of appeal's en banc decision, while failing to cite the U.S. 5th Circuit's decision in *Wiltz*, nonetheless quotes a lengthy passage from the district court's proceedings in that case, in which the district judge, in granting summary judgment, urged plaintiffs to take an appeal. *See infra* pp. A37–A38 n. 1. The en banc decision fails to mention the outcome of that appeal.

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.[13] 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. 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.

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[13] *Infra* pp. A42–A43.

2. 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, 2011 La. LEXIS 2588, *reh'g denied*, 2010-2267 (La. 01/13/12), 2012 La. LEXIS 677. 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.[14] 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 plaintiffs have professed not to know what that term means.[15] As explained in *Eagle Pipe*, the term is synonymous with "real right," and both terms refer to "a species of ownership." *Id.* p. 12, 2011 La. LEXIS 2588 at *23. 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, 2011 La. LEXIS 2588 at *20–21. *Eagle Pipe* did not create this explanation for "proprietary interest," but rather drew it directly from the Civil Code.[16]

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[14] 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.").

[15] *See*, *e.g.*, plaintiffs' opposition to writ application No. 2011-C-1861 pp. 13–16.

[16] *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 ….").

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.

Id. p. 20, 2011 La. LEXIS 2588 at *37.[17] 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.[18]

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.

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[17] *See also id.* p. 37, 2011 La. LEXIS 2588 at *71 ("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.").

[18] 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.").

Id. p. 43, 2011 La. LEXIS 2588 at *82–83.

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 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*.

In briefing the case to the en banc court of appeal, both sides argued the import of *Eagle Pipe*. Yet the court of appeal failed to address these arguments. In fact, the en banc decision does not even mention *Eagle Pipe*.

3. 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—including this one—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. 5/26/98), 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.

In briefing the case to the en banc court of appeal, applicants argued that extending the scope of duty to encompass these plaintiffs would be tantamount to recognizing a claim for negligent interference with prospective contracts. Yet the court of appeal failed to acknowledge or address this argument. The resulting en banc decision cannot be reconciled with uniform Louisiana caselaw rejecting a cause of action for negligent interference with contract.

4. 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. 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.[19] Whether or not *Phillips I*'s correctness is debatable, *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 dismissed by final, definitive judgments. 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.

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[19] 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.

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 grant a writ of certiorari or review.

Respectfully submitted:

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