STATE OF LOUISIANA

SECOND CIRCUIT COURT OF APPEAL

DOCKET NO. 51-371-CA (Civil Proceeding)

JEFF MERCER, LLC

Plaintiff/Appellee

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL

Defendant/Appellant

CIVIL APPEAL FROM THE
FOURTH JUDICIAL DISTRICT COURT
PARISH OF OUACHITA, STATE OF LOUISIANA
DOCKET NO. 73,151
THE HONORABLE J. WILSON RAMBO, PRESIDING

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING, MOTION TO RECUSE, AND TO VACATE THE PANEL'S OPINION ON BEHALF OF PLAINTIFF-APPELLEE JEFF MERCER, LLC

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING, MOTION TO RECUSE AND TO VACATE THE PANEL'S OPINION

May it please the court:

A. CHIEF JUDGE HENRY BROWN, JR. FAILED TO DISCLOSE THAT HIS FATHER WAS A CIVIL ENGINEER FOR THE STATE OF LOUISIANA, FOR FORTY-FOUR (44) YEARS. THE JUDGE'S FAILURE TO DISCLOSE SUCH A CLOSE, PERSONAL RELATIONSHIP WITH DEFENDANT/APPELLANT AND TO RECUSE HIMSELF TAINTS THE ENTIRE DECISION, REQUIRING THE DECISION TO BE VACATED.

Second Circuit Chief Judge Henry N. Brown, Jr. wrote the Panel's decision, reversing a unanimous twelve (12) person jury verdict in favor of Mercer. This case involves claims of governmental corruption against the State of Louisiana DOTD and some of its civil engineers and inspectors. Only after the June 7, 2017 decision did plaintiff/appellee learn that Chief Judge Henry Brown, Jr. failed to disclose the critical fact that his father, Henry N. Brown, Sr., had been a civil engineer for the State of Louisiana in the Shreveport area for forty-four (44) years, per the Wikipedia Article on Henry Newton Brown, Jr. and obituary of Henry N. Brown, Sr.

Mercer has a constitutional right to a fair trial before an impartial judge under both the U. S. Constitution and Louisiana Constitution Article 1 § 22. The United States Supreme Court has held that "trial before an unbiased judge is essential to due process." Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009). In that case, a West Virginia Supreme Court justice refused to recuse himself from a case involving a corporation that had paid for advertising on his campaign. Without questioning the lower court's finding of no actual bias, impartiality or impropriety, the Supreme Court found that *the risk of perceived bias* was so great that due process required recusal. The inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or whether there is an unconstitutional "potential for bias."

To have an impartial trier of fact unconnected to the DOTD at both the trial

and appellate levels was of the utmost importance to plaintiff/appellee in this case. Counsel for plaintiff repeatedly asked each jury venire panel "Have any of your family or friends been employed by the DOTD, Louisiana Department of Transportation and Development?" R. 1922, 2102. Even counsel for the DOTD asked a similar question. R. 2041. That's because it is matter of common sense that someone whose family is so deeply connected to the DOTD should not hear the case out of fundamental fairness. Under the Caperton decision, whether Judge Brown was actually biased or not is irrelevant. The perceived bias for a Judge to write an opinion in favor of the DOTD when his father had worked for them for almost 50 years is overwhelming. Mercer's constitutional due process rights to have an impartial judge have been violated.

In *In re* Cooks, 694 So.2d 892, 902 (La. 1997), the Louisiana Supreme Court held that a judge's conduct should "act at all times in a manner that promotes public confidence in the integrity or impartially of the judiciary." Canon 2 requires a judge to avoid both impropriety and the appearance of impropriety. Canon 3 states that a judge should recuse himself in a proceeding in which the judge's impartiality might be reasonably questioned. In Fla. Pars. Juvenile Justice Comm'n v. Hannist, 2012-1003 (La. App. 1 Cir. 09/06/12); 102 So. 3d 860, the court held that the proper inquiry on recusal is whether it is logical to conclude that the judge would be biased, not a showing of actual bias.

Judge Brown's failure to recuse himself from the case or even disclose this huge potential bias undermines the very fabric of our people's faith in the judicial integrity of the Second Circuit Court of Appeal. This failure erodes public confidence in the integrity or capacity of this judiciary. It is certainly logical to conclude that a judge's father who worked for the State as a civil engineer would be biased in favor of the State and the defendant civil engineers in this case. Further,

Uniform Rule 1 – 5 of the Court of Appeal states that "The court ordinarily will sit in rotating panels, each composed of 3 Judges, *as may be directed by the Chief Judge.*" (emphasis added).

Under Louisiana law, the opinion written by Judge Brown must be vacated. In Tolmas v. Par. of Jefferson, 2012-0555 (La. 4/27/12); 87 So. 3d 855, the Supreme Court held that a ruling of the Fifth Circuit Court of Appeal should be vacated, and that the case should be transferred to the Second Circuit Court of Appeal for a decision. In that case, the plaintiff discovered and alleged that the appellate judge who authored the ruling on its case was biased to such an extent that he was unable to conduct a fair and impartial proceeding. The facts indicated that the judge had an interest in a corporation that was a lessee of commercial property located adjacent to the subject property, placing the corporation in direct commercial competition with the plaintiff. That gave the judge an economic interest in the subject matter in controversy. The court held that "certainly, neighboring land owners and lessees would logically have an interest in the cause and its outcome... therefore, the judge's recusal was warranted pursuant to La. C.C.P. art. 151(A)(4)," and in order to avoid "even the appearance of impropriety" the Supreme Court vacate the appellate decision and transferred the case to the 2nd Circuit Court of Appeal to be heard anew.

Accordingly, the June 7, 2017 opinion should be vacated. Otherwise, the appearance of impropriety is overwhelming. To allow the son of a DOTD civil engineer in the Shreveport area to decide a case against civil engineers of the DOTD from the exact same area is the epitome of the appearance of impropriety to the general public, especially in the wake of a unanimous twelve (12) person jury verdict finding that the plaintiff had proven governmental corruption and conspiracy. The other members of the Panel are also from the Shreveport/Bossier area. A new panel of the Second Circuit untainted by the decision should be chosen or, in the

alternative, the case should be vacated and referred to another independent Circuit Court of Appeal for a fair decision.

B. THE PANEL ERRED IN FINDING A REVERSIBLE ERROR REGARDING THE JURY INSTRUCTIONS AND JURY VERDICT FORM.

The Panel held that Judge Wilson Rambo's jury instructions misled the jury to such an extent that it was prevented from dispensing justice. It is the Second Circuit Panel's decision that is the true travesty of justice, where the Panel ignored clear Louisiana Supreme Court jurisprudence cited in Mercer's brief, where the Supreme Court upheld the same, almost verbatim, jury instructions as Judge Rambo used at trial. The Panel further ignored the defendants lack of specific objections to the jury instructions and held that defense counsel was "caught off-guard" by the court's late ruling on the directed verdict and that "this was not a situation where defendants were making specific objections to the jury instructions and verdict form at a charge conference for which they had adequate time to prepare." Apparently, the Panel did not read the complete court record, which shows these facts are incorrect.

Judge Wilson Rambo did everything humanly possible to present fair and accurate jury instructions and verdict form to the jury in this case. The scheduling order deadline for jury instructions and verdict form was August 17, 2015. R. 1844. The DOTD failed to submit a timely jury verdict form and had only submitted three (3) jury instructions as of the specific deadline of August 17, 2015. The DOTD submitted jury instructions and a verdict form over *two (2) months after the deadline.* R. 1844 – 1845. Judge Rambo, out of an over-abundance of fairness and over the objection of plaintiff's counsel, allowed the DOTD to present their jury form and specific instructions despite their failure to abide by the court's time table. The

DOTD's late submitted jury verdict form are very similar to what Judge Rambo presented to the jury. R. 1520.

The record shows just how diligent Judge Rambo was in trying to make sure the jury verdict form and interrogatories were proper. He held a jury charge conference the Friday before trial began on November 9, 2017. On the morning of closing argument, Friday, December 4, 2015, all counsel met with Judge Rambo at 8:45 a.m. (R. 3913) until the court convened at 10:08 a.m. after the conference. At that time, counsel for the DOTD objected that there should only be one question on the verdict form, and he objected to the jury charges concerning intentional interference with contract. R. 3916. In other words, the DOTD *objected to the inclusion of the very thing it and the Panel are now claiming was an error not to contain.* The jury instructions at that time were amended by counsel for the DOTD to read verbatim the substance of La. C.C. art. 2324 concerning conspiracy. R. 3921. Again, counsel for the DOTD objected to the verdict form that there should only be "one question". *Id.* At that time, closing statements were given. The court was in recess from 12:10 p.m. to 1:57 p.m. Upon reconvening at 1:57 p. m., the Judge ruled on the DOTD's motion for directed verdict dismissing the tortious interference with contract claims of Mercer. Judge Rambo struck those specific instructions from the jury instructions. At no time, either contemporaneously or immediately after deliberation, did the appellants ever object to the Judge taking out those instructions.

The entire purpose of Code of Civil Procedure Article 1793 (C)'s requirement of a contemporaneous objection is to allow the trial court the opportunity to correct an error in the instructions. The defendants/appellants said absolutely nothing about the lack of any instructions on intentional interference with business relations, but rather had previously objected to anything being included on it in the instructions. As a result, appellants cannot later try to claim an erroneous jury verdict on a basis

to which they never objected. That, in and of itself, is fundamentally unfair.

Just before Judge Rambo brought the jury into the courtroom for the reading of the instructions and verdict form, counsel for appellants again objected that the jury verdict form should have only one question. R. 3967.

The Judge tried to get attorney John Saye to state a specific objection:

Mr. Saye: Just for the record, I would make an objection --
The Court: Yes, sir.
Mr. Saye: -- to the questions as they are, to be on the safe side. There's a different verdict form and as they are.
The Court: Uh-huh.
Mr. Saye: And then we can move forward, Your Honor.
The Court: Okay. Your position is question number one should say what?
Mr. Saye: I just think it ought to be one question.
The Court: Well, but what should it say? You know, if it says just was there loss resulting from a conspiracy, is that adequate?
Mr. Saye: Well, the only problem I have is if we've got a directed verdict on intentional interference, then --
The Court: And it's not stated -- yeah. It's not stated --
Mr. Saye: -- it's stated again.
The Court: It's still on the verdict form, I understand, but it's not on there as a cause of action as a basis for recovery. It's on there as an example of an overt act that the jury --
Mr. Saye: And that's the window that you see, and I just objected.
The Court: Yeah. So, but if I were just to put -- Mr. Saye, if I just had number one listed, did the LLC suffer loss resulting from conspiracy, if yes, the go to question three, give damages? Doesn't that -- I'm just saying, to me that skips a step, but I'm just asking you is that what you position is, that's what you would like the verdict form to be?
Mr. Saye: I think it ought to be one question and, you know, the question is was there a conspiracy ***as it states***, and its employees to intentionally harm the plaintiff.
The Court: Okay.
Mr. Saye: If they decide that, then they --
The Court: All right. All right. So --
Mr. Saye: That's my thoughts.
The Court: I understand your position, but, you know, and that's why I'm asking you, you would think -- you say that would be proper and not have any -- any sort of determination that can be, what, quantified, that can be looked at, can be determined if they actually found that people did stuff in furtherance of the agreement, for lack of a better way to put it.
Mr. Saye: Right. R. 3967-3969. (emphasis added)

At no time did counsel for the DOTD object to the lack of any instructions concerning the intentional interference with contractual relations or any of the underlying intentional acts of the conspiracy. This is the fundamental flaw upon which the Panel erred. The Panel stated that "Defendants point out that the predicate tort of intentional interference with business relations was not in fact submitted to the jury for deliberations, nor were the essential elements for a valid cause of action alleging intentional interference with business relations explained to the jury." What the Second Circuit Panel did not point out is that defendant/appellants never objected to this. Defendants only objected to the term "intentional interference with contractual relations" being included in verdict form question No. 2.

Judge Rambo instructed the jurors as follows:

> "Jeff Mercer, LLC brings this action claiming that the Louisiana Department of Transportation and Development, Willis Jenkins, John Eason, Pam Higginbotham, Michael Murphy, John Gassaway, Bernard Sincavage, and Barry Lacy destroyed his construction business through conspiracy and intentional interference with his business relations with his prime contractors. Conspiracy is an agreement or combination of two or more persons for the specific purpose of committing an intentional or willful act when, in addition, one or more of the parties to the agreement or combination doesn't act or action furtherance of the agreement or combination. He who conspires--excuse me. He who conspires with another person to commit an intentional or willful is answerable, in solido, with that person for the damage caused by such act. In this case, the plaintiff alleges that the defendants intentionally harmed Jeff Mercer, LLC. A person intends something when he subjectively wants it to happen or when he must have realized to a virtual certainty that it would have happened." R. 3973 – 3974.

After the jury instructions had been read and the jury had gone to deliberate, counsel for defendants made one final objection. Mr. Saye stated, "I have one thing just for the record. I want to make sure that I preserve my rights that the closing instructions conform to the jury verdict form. ***I believe they do***, but I did have one question." R. 3980 (emphasis added). Counsel pointed out "page four, the second to last paragraph", concerning the instructions, which was the above cited paragraph

and its mentioning that Jeff Mercer, LLC claimed that the defendants "destroyed his construction business through conspiracy and intentional interference with his business relations with his prime contractors." R. 3973. "I'm just not sure it confirms -- conforms with the –[ruling]." R. 3981.

Judge Rambo explained, "I edited that as well when I went back upstairs after our discussion and after the ruling that I placed on the record I took out tortious, which is how the paragraph had read previously. Tortious as we indicated, was a separate tort with a separate cause of action. And simply put intentional interference because even in this case, since a conspiracy is what is alleged, any activity in the furtherance of conspiracy would have to be intentional rather than negligence. That's why I put that qualifying in there." R. 3981. Mr. Saye replied, "That's fine. I just wanted to note my objection for the record....". *Id.* Judge Rambo said "I understand. Well, assuming that it was not waived by not bringing it to my attention before I read it." R. 3981.

This wasn't a situation where counsel of defendant was "caught off guard". In fact, one hour had passed from the judge making his ruling on the directed verdict (1:57 p.m.) until immediately after the jury left when the final objection was made and the court recessed. (2:56 p.m.). R. 3969, 3982. Counsel for defendant was not a first year lawyer, but an experienced litigator employed by the State Attorney General. One hour was more than ample time to formulate a specific objection.

Therefore, the DOTD simply did not preserve an objection to the lack of any specific jury instructions regarding intentional interference with business relations nor did it object to that either contemporaneously or immediately thereafter. This issue was only raised upon the new trial motion when it was made later. Judge Rambo addressed this "new" argument in his own ruling regarding the motion for new trial and/or judgment notwithstanding the verdict.

Judge Rambo stated as follows:

> "A primary focus of the post-trial motion and the argument of same before the Court is the verdict form used by the jury during its deliberations. To begin, the Court notes it is questionable as to whether Counsel for the Defendants has preserved the objections now made in the post-trial motion with respect to the jury verdict form due to the lack of a contemporaneous objection specifically identifying the basis now urged after the fact. Our law requires a contemporaneous objection to potential errors as soon as they arise with a statement of the basis for the objection in order to preserve same for appellate review. As the Court appreciates it, the policy behind this rule is to allow the trial Court to make any rulings necessary in a timely fashion so as to prevent the prospect of any potential error or prejudice... While the Record will establish defense Counsel was given ample opportunity to voice objections and state the basis therefor with respect to the jury verdict form used during deliberations, the Record will also reflect it to be questionable that defense Counsel raised an objection and stated any specific basis or claimed any specific prejudice at the time the verdict form was presented and thereafter used by the jury. The arguments advanced by the post-trial motions were not specifically made at the time despite the Court's request for a statement regarding what, if anything, was improper about the jury verdict form. Given all the circumstances, any objection to the verdict form used could reasonable be said to have been waived due to the lack of a contemporaneous objection as required by our law." R. 1522.

The Panel also made a fundamental error in its analysis in failing to apply the law as established by the Louisiana Supreme Court in Wooley v. Lucksinger, 09-0571 (La. 04/01/11); 61 So.3d 507.

The Panel simply did not follow the Supreme Court requirements.

In Wooley, the Louisiana Supreme Court dealt with almost exactly the same issue.[1] In that case, the appeal was brought with an assertion that the jury charge did not adequately instruct the jury as to the various underlying intentional torts. *Id.* at 600. The trial court instruction read as follows:

> You are instructed that a conspiracy is a meeting of minds or agreement by two or more persons or corporations to accomplish an unlawful act or a lawful act by illegal means. To be part of a conspiracy, at least two parties must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damage to plaintiff.

[1] It should be noted that in *Wooley*, the Court was dealing with an instruction regarding Texas Civil Conspiracy law, the elements of which are identical to those of Louisiana Civil Conspiracy.

> One or more persons involved in a conspiracy must have performed some act or acts to further the conspiracy. One or more persons involved in a conspiracy must have performed some act or acts to further the conspiracy. One or more persons must commit an unlawful act in connection with the conspiracy. ...
>
> Conspiracy is a derivative claim meaning it require an underlying intentional wrong. To hold Health Net liable for conspiracy, you must find an underlying intentional wrong occurred.

Id. at 601-602.

The Supreme Court ruled "[t]he instruction does not improperly allow the jury to eliminate the intentional or knowing aspects of civil conspiracy. Instead, the instruction gave proper guidance to the jurors that the underlying wrong which they had to find proved in order to support a finding of conspiracy had to be an unlawful act, such as statutory violation, or an intentional wrong other than negligence." *Id.* at 602. The Supreme Court held that the jury charges on conspiracy adequately provided the correct principles of law and adequately guided the jury in its deliberations on the issue. *Id.* The instructions given by Judge Rambo in this case are almost identical to those given by the trial court in Wooley. Thus, the Panel's opinion is simply wrong.

Great restraint is required to be excised before an appellate court reverses a jury verdict due to an erroneous jury charge. *Id.* at p. 574. The ultimate issue is whether the jury instructions misled the jury to such an extent that the jurors were prevented from dispensing justice. *Id.* Even if an error is found, that does not justify a de novo review without taking into consideration the instructions as a whole and the circumstances of the case. *Id.* at p. 578. For example, the trial court's failure to give any instructions to the attorneys prior to closing argument did not lead to an automatic de novo review, but the court must take the additional step of determining whether any prejudice resulted to the complaining party without the circumstances of the case. *Id.* at p. 577. Further, the Louisiana Supreme Court held that giving

general instructions regarding conspiracy and the intentional acts in furtherance of it, without defining the elements of the underlying intentional acts, was proper. *Id.* at p. 602. The Supreme Court reversed the appellate court, which had found that the jury instructions did not give the jury any guidance to determine whether the underlying intentional torts of a conspiracy had occurred. *Id.* at p. 600.

In Sommer v. DOTD, a similar question arose. On appeal, the defendants asserted that "the trial court judgement was tainted by legal error because there is no Louisiana cause of action for intentional interference with employment." Sommer v. Dep't of Transp. & Dev., 97-1929 (La. App. 4 Cir. 03/29/00); 758 So. 2d 923, 935-936. In that case, the appellate court ruled "the evidence supporting the defamation and conspiracy claims is the same evidence supporting the trial court's finding of intentional interference with the employment contract between Ms. Sommers and Customs. The general and special damages arising from loss of the Customs job are likewise identical. This assignment of error is therefore moot." *Id.* at 936.

In light of that, even if the court were to find that it was error for the language relating to intentional interference with contractual relationships to be left in, it would not constitute reversible error as the same facts used to prove it go to show conspiracy. This is the same conclusion Judge Rambo stated in his reasons for leaving the language in Question No. 2. Also, there was absolutely no prejudice to defendant due to the lack of specific instructions on intentional interference with business relations or another intentional tort of the conspiracy. When Mr. Saye made his closing argument to the jury (filling 17 pages of transcript R. 3940 – 3957) and which exceeded the court's time limit (R. 3956) he made his argument knowing that the DOTD's "intentional interference with business relations" was an issue. Despite that knowledge, Mr. Saye never once argued the facts or law concerning the DOTD's intentional interference of Mercer's relationship with Diamond B or Austin Bridge.

Thus, under the Wooley analysis, there was no prejudice to defendants by the later exclusion of the specific instructions on interference with business relations since defendants never made any argument about it anyway, when he thought that it would be included.

When taken as a whole, it is clear that these instructions fairly and reasonably pointed out the issues and provide correct principles of law for the jury to apply to those issues. The jury was given its instructions, then given the Verdict Form. The jury had no questions about the Verdict Form. The instructions, Verdict Form, and evidence were clear enough that a unanimous verdict was returned from the 12 person jury. Further, even if there was error in the Jury Instructions or Verdict Form, the degree of error, when taken with the adequacy of the Jury Instructions and Verdict Form as a whole, cannot be seen to rise to the level to have so misled the jury as to preclude it from reaching a verdict based on the law and facts.

C. THE SECOND CIRCUIT PANEL ERRED IN COMPLETELY IGNORING THE EVIDENCE OF MALICIOUS AND INTENTIONAL ACTS OF THE DOTD AGAINST MERCER.

The Panel's opinion failed to mention or even discuss some of the most critical facts of the entire case. The record was very carefully "cherry- picked" to reveal only the most favorable evidence of the DOTD. This is completely out of line with appropriate judicial appellate review standards.

1. MONROE

a. Solicitation of Bribery

Public bribery under La. R.S. 14:118 includes the offer to accept anything of value by a public employee. Further, the Louisiana Department of Transportation and Development's own policies prohibit employees from seeking or soliciting anything of value as a gift, loan or gratuity or favor from any person, firm, whose

interest that may be substantially affected by such employee's performance or non-performance of his official duties.

The Panel ignored the overwhelming evidence of the DOTD's inspector, Willis Jenkins, soliciting bribes from Jeff Mercer. On April 30, 2007, Willis Jenkins, a Senior DOTD Inspector, demanded money or "green" from Mercer and his men, telling them that the job would not go well if he did not get what he wanted. R. 2262 – 2263, 2369, 2843, 2847. Jenkins stated, "you going to give me money or green or this job's not going to go well…and any jobs in the future." R. 2262 – 2263, 2807.

Mercer ignored the first bribery attempt, hoping the problem would go away. R. 2329. On May 25, 2007, it happened a second time when Jenkins demanded a generator or else the job would get more difficult. R. 2331, 2808, 2872. Jenkins later admitted to this, but claimed he was only joking. However, the testimony of Jeff Mercer and his employees was clear that Jenkins was mad and demanding when he made the statement, and it was no joke at all. R. 2332, 2808 -2809, 2843 – 2844. Mercer realized he had to report Jenkins and contacted Marshall Hill, the DOTD District Engineer. Marshall Hill's first response was that "he was not surprised by the report of Jenkins asking for bribes." R. 2337, 2888. Hill thought Jenkins had done something wrong in the past. R. 2888. Jenkins' personnel records show that he was not a joker, but was someone with a bad attitude. R. 2706 – 2708. Plaintiff Exhibit A-22. Jenkin was written up as being "disrespectful and insolent to supervisors and other personnel", that his "open and vehement contempt and insolence to authority is a detriment to both himself and the workforce", that he "exhibited resentfulness when asked to help others, very disassociated from gang and activities and wants to go his own way whenever he wants," and that he "openly expresses resentment and contempt when supervisors attempt to give direction or counsel." R. 2706 – 2708, Plaintiff Exhibit A-22. Further, Jenkins admitted on

cross-examination that in over thirty (30) years of working for the DOTD he had never ever joked about asking for something of value for a contractor working under his supervision. *Id.*

The unanimous jury composed of twelve (12) men and women, whose families were not connected to the DOTD, found that DOTD inspector Willis Jenkins had cooperated in, advised, or assisted in the harm to Mercer by intentional acts. R. 3987.

b. Conspiracy to cover up bribery.

The DOTD simply swept these bribery attempts under the rug and conspired to cover it up. After Mercer had reported Jenkins to Marshall Hill, the Project Manager, John Eason, called all inspectors on the job together for a group meeting (not separately). R. 2774, 2715. Although they had different stories regarding bribery attempts going into the meeting, they all walked out of the meeting with the same "understanding of what happened." R. 2774 – 2775. The actions of Jenkins and fellow inspectors to cover up his bribery were vividly exposed at trial by the inconsistencies in their stories. Inspector Brad Trichel first told his boss, Marshall Hill, that he knew nothing about Jenkins asking for cash or a generator, but later claimed he was present. R. 2792 – 2793, 2789. Greg Ratcliff claimed to have been present, but the lead inspector's site manager plan shows that he wasn't even on the Louisville Job that day. R. 2909. Pam Higginbotham, the lead inspector, testified that neither Brad Trichel nor Greg Ratcliff were present. R. 2909. She actually didn't hear any of the conversation Jenkins had with Mr. Mercer and his men. R. 2909 – 2910. All of these witnesses lied to cover-up their friend's bribery and then met together and conspired to cover it up. Those intentional acts also clearly harmed Jeff Mercer, LLC. Under Civil Code Article 2324, these people conspired with each

other to commit an intentional willful act in covering-up for their fellow inspector, Willis Jenkins.

The unanimous jury composed of twelve (12) men and women, whose families were not connected to the DOTD, found that a DOTD conspiracy existed and that Project Engineer John Eason and DOTD inspector Willis Jenkins cooperated in, advised, or assisted in the harm to Mercer by intentional acts. R. 3987.

c. Whistleblower retaliation.

Further, intentional and willful acts occurred in what is analogous to a whistleblower retaliation under Louisiana Revised Statute 23:967. That statute prohibits an employer from taking reprisals against an employee who discloses a workplace act or practice that is in violation of state law. See Hale v. Touro Infirmary, 886 So.2d 1210 (La. App. 4 Cir. 2004); Accardo v. Lower Health Services, 943 So.2d 381 (La. App. 1st Cir. 2006).

In this situation, Marshall Hill reassured Mercer that there would be no retaliation by the DOTD. R. 2338, 2370. Despite Mercer reporting "the most serious complaint" in Hill's experience, the DOTD basically did nothing. R. 2087, 2090 – 2891. Jenkins wasn't punished. R. 2891. There wasn't even a citation written in his personnel record. R. 2891, Plaintiff Exhibit A-20. The DOTD never conducted a true investigation of facts, never even questioned Mercer and his men about what had happened. R. 2890 – 2891. Jenkins was supposed to be transferred from the job, but that never happened either. R. 2895. Jenkins continued to work on the Louisville Job. R. 2916 – 2918.

The personnel of the Monroe DOTD showed great animosity towards Mercer after he reported Willis Jenkins for the attempted bribery. Project Engineer John Eason was aggravated and angry about it. He did not think Mercer's actions were

appropriate. R. 3491 – 3492. The inspectors under him felt the same way. R. 3492. The first day Mercer was on the job after Jenkins had been removed, Eason came to the work site and told Mercer that he and his company would have to remove a large section of concrete, a section that had just been approved by a DOTD inspector. Mercer said "you must be joking." Eason said "there'll be no more joking on this job." R. 2342, 2895 – 2896. One inspector told Bennett Tripp, one of Mr. Mercer's crew, that, because his buddy had been removed, the project would now be a "living hell" for Mercer. R. 2812. None of these actions have anything to do with "legitimate business purposes," as cited in the Second Circuit's ruling.

At this point, the inspectors started marking off short sections of concrete work that would not allow for Mercer to do a full day's job, costing the company money by mobilizing its workforce without getting the full benefit of a day's work. Unknown to Mercer, Project Engineer Eason had been sneaking Jenkins back onto the job to do survey work without telling his boss Marshall Hill. R. 3497 – 3499. One inspector would tell them to do something; and another would come later with different instructions. R. 2365 – 2366, 2369. Mercer eventually asked to be removed from the job because after reporting the bribery, the company had received the "pure hell" they had been promised from the inspectors. R. 2370.

The unanimous jury composed of twelve (12) men and women, whose families were not connected to the DOTD, found that Project Engineer John Eason and DOTD inspector Willis Jenkins cooperated in, advised, or assisted in the harm to Mercer by intentional acts. R. 3987.

d. Intentional interference with business relations.

A plaintiff bringing a claim for intentional interference with business relations must prove by preponderance of evidence that the defendant improperly influenced others not to deal with the plaintiff through actual malice. Bogues v. La. Entergy

Consultants, Inc., 46343 (La. App. 2d Cir. 08/10/11); 71 So. 3d 1128.. This type of claim is based on the principle that the right to influence others not to enter into a business relations with others is not an absolute.

The record demonstrates that the DOTD simply did not stop with retaliation on the Monroe Job, but set out to ruin or destroy Mercer's relationship with its main prime contractor Diamond B Construction. Diamond B had hired Mercer for seven (7) of its first eleven (11) jobs. R. 2251. After the Louisville job, Diamond B hired Mercer on another job near Mangham. At a preconstruction conference, the DOTD project engineer told James "Jeff" Wood, the General Manager for Diamond B, that the DOTD would not talk to Mr. Mercer. R. 2747. There would be no communication between them. R. 2747. The DOTD required Diamond B to have a superintendent on the job at all times with Mercer. In thirty (30) years of dealing with the DOTD on road construction jobs, Jeff Wood testified he had never been required by the DOTD to have a superintendent on the job 24/7 with any of his subcontractors, never before or since. R. 2748. At that point, Diamond B stopped using Jeff Mercer LLC because it would have cost the company too much to do business with it. R. 2748 – 2749. These activities all arose after the Monroe Job and after Mercer had filed the present lawsuit in September of 2007, against the DOTD and Eason. The DOTD's actions ruined the contractor/subcontractor relationship between Diamond B and Mercer, causing Diamond B to pull another $5 million job from Mercer that Diamond B had previously verbally hired Mercer for. R. 3506 – 3506. Mercer never worked for Diamond B again. R. 2383, 2750, 3006-3007.

There was no legitimate business interest for the DOTD in taking this action. The DOTD Blue Book Section 105.66 simply requires a contractor to have a representative on the job at all times. That does not mean the representative has to be in one place with Mercer. What the DOTD told Diamond B was that they would

not communicate with Mercer, and that Diamond B would essentially have to have an employee "babysitting" Mercer at all times. R. 2747-2748. That's completely different from what Section 105.66 requires of simply having a representative on the job itself. Further, the DOTD did not present one iota of evidence contrary to this. The DOTD had listed as a will call witness former Diamond B employee Mark Dinnat, but failed to call him as a witness. R. 1368. As a result, Mercer is entitled to all negative inferences from the DOTD's failure to call Mark Dinnat, i.e., that Diamond B stopped using Mercer due to the DOTD interference. Thus, the only evidence presented to the jury is totally in favor of Mercer, showing an intentional interference of Mercer's relationship with Diamond B.

The unanimous jury composed of twelve (12) men and women, whose families were not connected to the DOTD, found that Project Engineer John Eason and DOTD inspector Willis Jenkins cooperated in, advised, or assisted in the harm to Mercer by intentional acts. R. 3987.

2. I-49 / SHREVEPORT AND BASTROP

a. Intentional interference with business relations.

The retaliation by the DOTD against Mercer did not end in the Monroe area. The cloud that resulted from Mercer reporting Willis Jenkins' bribery and filing a lawsuit against the DOTD followed it to Shreveport where the company was working on two jobs on I-49. The DOTD engineers in Shreveport searched for any dirt they could find on Mercer, getting information from Monroe area engineers from the Louisville Project. R. 2896, 3103 – 3105. The Shreveport DOTD and Monroe DOTD communicated back and forth about Mercer early on the I-49 jobs, even though Mercer's work on I-49 had nothing to do with Louisville Avenue. R. 3103-3104.

The Project Engineer on I-49, Michael Murphy, harbored personal animosity toward Mercer. Mercer irritated and frustrated him. R. 3172. Murphy's animosity towards Mercer resulted in him trying to get Austin Bridge, the prime contractor on I-49, to get Mercer removed from the job. R. 3173-3174. When Austin Bridge would not comply, Murphy used the same tactic the DOTD had previously used to threaten Diamond B; they made Austin Bridge have a supervisor "babysitting" with Mercer 24/7. R. 3174. This also damaged Mercer's relationship with Austin Bridge, as the company expected compensation for having to keep the project supervisor in one place rather than supervising the project as a whole. Plaintiff Exhibit D-27. Murphy took these actions, knowing it would damage Mercer's relationship with Austin Bridge by costing the company money to have someone supervise Mercer. R. 3175. This is clear interference with the business relations between Mercer and its prime contractor, Austin Bridge. Murphy's actions weren't legitimate business interests, but malicious and intentional acts to harm Mercer.

The intentional interference with Mercer's relationship with Austin Bridge was further ruined by the DOTD's actions on the Bastrop job. The DOTD denied Mercer payment for over $7 million worth of work. R. 2489, 2495. Dan Holycross, with Austin Bridge, testified that the nature of the job due to rotten underlying soils had significantly changed and Mercer should have been paid. R. 3739 – 3740. An additional $1.5 million in utility delays were rejected by Barry Lacy, the Claims Engineer for the DOTD. He sat on the utility claim for six (6) months before denying it. R. 3155 – 3156. This huge sum owed forced Mercer to file suit against Austin Bridge, which Mercer was required to do under State law to make a claim for contractual fees and thus, ruined that relationship, and his chances to be hired as a subcontractor by any other prime contractor. R. 2691, 2696. That turned the company into a pariah with other contractors. R. 2505 – 2506.

Oddly enough, these tactics were not mentioned or discussed by the Panel in its decision. The unanimous jury composed of men and women from Ouachita Parish, whose families were not connected to the DOTD, found that Project Engineer Michael Murphy and Claims Engineer Barry Lacy cooperated in, advised or assisted in the harm to Mercer by intentional acts. R. 3987.

b. Malicious prosecution.

Malicious prosecution requires the malicious commencement of a criminal proceeding by the defendant against the plaintiff with the criminal proceedings terminated in favor of the plaintiff. See Lemoine v. Wolfe, 168 So.3d 362, 367 (La. 2015).

Someone from the DOTD (no one ever admitted to being the culprit even after a trial with more than twenty (20) witnesses) went to the FBI office and made false charges against Mercer, claiming that Jeff Mercer, LLC had committed federal crimes on the I-49 Job. R. 2484. It was a stipulated fact at trial that the DOTD reported Mercer to the FBI and the OIG (Office of Inspector General). R. 2484. The claimed crime was that Mercer had falsely reported dirt work that had been performed by another subcontractor as his own. R. 2480. Only a short time later, both an FBI agent and an OIG agent (Office of Inspector General) showed up at Mr. Mercer's house. R. 2479 – 2480. After a thorough examination of all the facts, the federal investigators found that Mercer had not violated any federal laws, and the criminal case was dismissed. This was caused by a clerical error on the part of Austin Bridge, Mercer's prime contractor on the job. R. 2480. Austin Bridge should not have reported the work of the dirt subcontractor as going toward the DBE goal on the I-49 job. Had the DOTD bothered to check on the matter before reporting it to the FBI, they would have known that as well. R. 2480. Cathy Rando with the DBE Section of the DOTD had investigated this issue related to the DBE rules the

year before. R. 3055. Rando and the DBE Section knew no crime had occurred and were shocked that someone within the DOTD had reported this to the FBI as a crime. R. 3054 – 3055. Thus, there was no good faith reporting the crime by the DOTD, but a malicious intent to put Mercer out of business, with reckless disregard for the truth. These facts weren't discussed by the Panel or Saye in his closing argument, for good reason. There can be no stronger evidence of intentional acts by the DOTD to harm Mercer than the DOTD's filing false FBI criminal charges to try to have him arrested.

Although Project Engineer Michael Murphy denied being the person who reported Mercer or that he even knew who that person was, the cookie crumbs of circumstantial evidence lead to him as being the culprit. That is precisely what Mercer argued to the jury:

> "Who did it, who reported Mercer to the FBI? I think you know the answer to that mystery. Who held personal animosity against Mercer? Who lied about all of the events in question regards to I-49? Who was trying to cover his rear-end from messing up the boxes? Who had Lane Fouts, with Austin Bridge, fired from his job? Who made his own inspector, J. D. Gassaway, the scape goat for his own failure to perform his work as an engineer? Who wrote the July 13, 2010 letter requiring all of the boxes to be redone by Mercer without paying him? Whose file was subpoenaed by the federal authorities investigating Mr. Mercer? Where do all of the cookie crumbs lead to? They lead directly to Project Engineer on I-49, Michael Murphy." R. 3934 – 3935.

The unanimous jury composed of men and women, whose families were not connected to the DOTD, found that Project Engineer Michael Murphy cooperated in, advised or assisted in the harm to Mercer by intentional acts. R. 3987.

c. <u>Continuing Conspiracy to harm Mercer.</u>

With Murphy coming down hard on Mercer, Mercer had sent an email to Baton Rouge DOTD Headquarters in the DBE Division of the DOTD pleading for their help. In the email, Mr. Mercer asked them a critical question, "Who protects a DBE from the DOTD itself?" R. 2431-2434, Plaintiff Exhibit C-2. What Mr.

Mercer didn't know was that the DBE section of the DOTD had been instructed not to communicate with him. This instruction came from very top of the DOTD. Sherri LeBas, the Secretary of the DOTD, and Cheryl Duvieilh, the head legal counsel for the DOTD, had instructed the DBE Section not to communicate with Mr. Mercer because Mercer had filed a lawsuit against the DOTD. R. 3024, 3014, 3017-3018, 3050, 3070; Plaintiff Exhibit C-3. The lawsuit, at that time, had nothing to do with the current project on I-49, only the bribery on Louisville. However, neither the DBE Section or anyone from the DOTD ever bothered to tell Mr. Mercer that it wouldn't help him or inform him of his right to file a Title VI Claim. R. 3030. In response to Mr. Mercer's email asking for help, the DBE Section did not come to the aid of Mercer. Instead, top personnel in the DBE Section and the Construction Section of the DOTD began to investigate Mercer to see if the company had violated any DBE regulations. R. 3029 – 3030, 3047 – 3048, 3097 - 3098.

Mercer's problems on I-49 culminated with the installation of a set of 10 foot by 10 foot concrete culvert boxes. J.D. Gasaway, the DOTD inspector, told Mr. Mercer that his supervisor, Michael Murphy, told him that he wasn't being "hard enough on Mercer." R. 2456. The concrete slab, designed by the DOTD's Project Engineer Michael Murphy, on which these huge culverts rested was too short for all of the boxes to fit. R. 2440. J.D. Gasaway, the DOTD inspector on the job, approved the slab, and told Mercer to install the boxes with them hanging over the concrete slab as that was the way it was designed. R. 2440, 2405, 2437. Murphy, as the Project Engineer, was required under both the contract specifications of the job and the DOTD Blue Book of its general job specifications to inspect all pipe joints, including these, before the backfill process of covering the pipe was ever done. R. 3840, 3843. That's something Murphy simply did not do. R. 3841. The field book of J. D. Gasaway, which in spite of discovery requests was never disclosed prior to

trial, revealed that Gasaway had indeed inspected the construction of the boxes as they were built, but Murphy had not. R. 3193, 3838, 3840. The DOTD did not produce this evidence until the last day of trial, which is more evidence of covering up. R. 3193, 3821 3838. Murphy claimed it had been sitting in some boxes in Shreveport. R. 3838. Instead of accepting responsibility for its own failure, the DOTD through its employees Michael Murphy, Benard Sincavage and Greg Wall conspired to cover up their own fault, blame Mr. Mercer and make him fully responsible for the cost of replacement (over $600,000.00). R. 2448. Murphy lied in the initial emails to Wall and Sincavage, claiming that "we" weren't aware of the overlap before the boxes were set. Exhibit D – 30; R. 3106. This is in complete conflict with the testimony and field book of J.D. Gasaway, the inspector who was well aware of the overlap and thought he had "most likely" spoken to Murphy about it. R. 2962, 3105 – 3106.

The evidence clearly showed the continuing conspiracy to harm Jeff Mercer, LLC by the entire DOTD, even going up to the very head secretary of the DOTD. When faced with the requirement that he was going to have to replace all of the 10 x 10 boxes, Mercer sent an email to Sherri LeBas, the Secretary of the DOTD, pleading for help. See Exhibit C – 8. LeBas sent the email to Stephanie Ducote the head of the DBE Section "for further handling." Exhibit C – 8, C – 9, R. 3069, 3072. However, Ducote was told by the DOTD's Legal Department not to communicate with Mr. Mercer. R. 3070. None of Mr. Mercer's complaints were ever looked into by the DBE Section. Instead, LeBas' instructions for "further handling" involved LeBas's own in-house investigator John Rollins investigating Mercer regarding the box culverts. R. 3071, 3072 – 3073, 3193. Rollins took his orders from Secretary LaBas' office. R. 3073. Ducote admitted to participating in the later federal

investigation of Mercer. R. 3079. It was in this setting that the DOTD reported to the FBI on the false criminal charges.

Of great importance, but not mentioned by the Panel, was that while Mercer was required to redo these boxes, on another job just north of where Mercer's boxes were installed, the DOTD didn't make another subcontractor redo its work on a similar set of 10 x 10 boxes that had much larger gaps than Mercer's. R. 2453, 3789 – 3790; Plaintiff Exhibit D – 16. The DOTD then conspired to hide the condition of the boxes at that site (James Boxes). Brian Buckel, Chief Engineer for DOTD, took twenty (20) or more videos of Mercer's boxes, but only a few of the James Boxes, claiming to have run out of capacity to record. R. 3684. Lane Fouts of Austin Bridge said that "the box that I looked at on the project just north of us, it did have the size of gaps that Mercer had." R. 3789. The truth was only revealed when Mr. Mercer himself videoed the James Boxes in 2015. The video shows the gaps in the James Boxes are far worse than those in Mercer's boxes, but the DOTD had not required that subcontractor (James) to reinstall his boxes. Plaintiff Exhibit D – 17 (1 – 4), R. 3902. These actions were not "legitimate business relations", but simply a conspiracy to punish Mercer.

The unanimous jury composed of men and women, whose families were not connected to the DOTD, found that a DOTD conspiracy existed and that Project Engineer Michael Murphy cooperated in, advised or assisted in the harm to Mercer by intentional acts. R. 3987.

d. <u>Continued threats of malicious prosecution and wrongful withholding of payments to Mercer.</u>

After this, Mercer asked the DOTD to pay him the amounts he had earned, but the State threatened Mercer with federal prosecution, continuing to bully Mr. Mercer as it did when it had falsely reported Mercer to the FBI. Barry Lacy, the

Claims Engineer for the DOTD, sat on Mercer's claim for reimbursement of the 10 x 10 boxes for about two (2) years. R. 3145 – 3146. "I'm kind of busy. This one slipped through the cracks," he testified. R. 3146. He threatened Mercer by telling Dan Holycross with Austin Bridge to "ask him if he wants to reconsider this request before I turn the matter over to the U.S. Department of Transportation, Office of Inspector General, Investigations." R. 3146. Lacy admitted that he had not ever used that language with any other contractor. R. 3151. Dan Holycross testified he had never before received a letter like that from the DOTD in the over thirty years he had been in the road construction business. R. 3742. Lacy threatened to report Mercer to the feds for making false payment claims, not once, not twice, but three times on three separate jobs. "Tell Mercer that the feds are cracking down on bogus claims". R. 3152 – 3153. See Exhibits C – 17, C – 18, C – 19. Lacy had never used that "verbiage" with any other contractor. R. 3154 – 3155. This harassment didn't stop until Jeff Mercer LLC was out of business. Jeff Mercer, LLC had run out of work by the end of 2011. R. 2505. No one would hire the company. R. 2522. The State had ruined Mr. Mercer's relationship with his instate contractors like Diamond B, and his out of state contractors like Austin Bridge. Mr. Mercer tried to bid as a prime contractor, but the DOTD, on its Falcon website (which provides information on DOTD jobs to prospective bidders) required Mercer to bid on the jobs at a high price, but later allowed the successful bidder to change his price by change order. R. 2505. R. 2515 – 2518. These actions by the DOTD were intentional and malicious acts to harm his business, actions which eventually succeeded.

The unanimous jury composed of men and women, whose families were not connected to the DOTD, found that Claims Engineer Barry Lacy cooperated in, advised or assisted in the harm to Mercer by intentional acts. R. 3987.

In late 2011, Jeff Mercer, LLC had to shut its doors and let its employees go because it could no longer get jobs, and Mr. Mercer was frightened by the constant threats of federal prosecution. R. 2505. For the Panel to find that "most if not all of the alleged wrongful or malicious actions taken by the DOTD and its employees were done not with an intention of putting Mercer out of business, but were instead done in furtherance of legitimate protective business interest" is ludicrous and such a conclusion flies in the face of the true evidence.

D. EVEN IN ASSUMING ARGUENDO THAT REVERSIBLE ERROR OCCURRED, THE SECOND CIRCUIT PANEL ERRED IN DOING A DE NOVO REVIEW FROM A COLD RECORD TO DETERMINE SUBSTANTIAL CONFLICTS OF TESTIMONY.

It is a simple rule in appellate review that where substantial issues involving credibility and conflicts of testimony exist, the case should be remanded rather than a de novo review of a cold record. The Panel ignored this law and did exactly what it was not supposed to do, a de novo of a cold record.

In Abney v. Smith, 35 So.3d 279 (La. App. 1st Cir. 2010), the appellate court found a reversible error in the jury instructions, but held that remand was proper because a preponderance of the evidence could not be determined fairly from the cold record due to the substantial conflict in testimony. See also Franklin v. Franklin, 928 So.2d 90, 94 (La. App. 1st Cir. 2005), writ denied, 924 So.2d 1021 (La. 2006). Masters v. Courtesy Ford Company, Inc., 765 So.2d 1055, 1056 (La. 2000); Diez v. Schwegmann Giant Super Markets, Inc., 657 So.2d 1066, 1071 (La. App. 1st Cir. 1995), writ denied, 663 So.2d 720 (La. 1995).

The Panel did not even follow the jurisprudence that it cited in its opinion. In Georgia-Pacific, L.L.C. v. Dresser-Rand Co., 2015-2002 (La. App. 1st Cir. 10/31/16); 207 So.3d 1131, 1140, the court recognized that on "occasions where the weight of the evidence is so nearly equal that a first-hand view of the witness is

essential to a fair resolution of the issues," the case should be remanded for a new trial. That's exactly what Georgia-Pacific court did; remanded it for a new trial.

That's the essence of the case that was before the jury. There were substantial conflicts in the testimony regarding whether a DOTD inspector had made bribery attempts to Mercer and whether the DOTD had maliciously retaliated against Mercer for reporting the bribery. Critical to the case was the issue of credibility. Do you believe Mercer and his crew or the DOTD employees? The jury saw the people on the stand and believed Mercer and his crew, not the DOTD. Instead of reviewing the entire record, the Panel simply selected facts that were all in the DOTD's favor, citing none of the overwhelming evidence and impeachment of the DOTD's witnesses that the jury saw live. The twelve jurors' determination was that most of the DOTD employees were not credible and that Jeff Mercer and his witnesses were. The jury found that three named defendants were not guilty, J. D. Gassaway, Pam Higginbotham and Bernard Sincavage. That shows the careful manner in which the jury weighed the evidence. The unanimous jury worked almost a month, sacrificing their time and doing their duty as citizens of the United States of America and the State of Louisiana. The Second Circuit Panel threw all of their hard work and effort into the garbage heap. That's yet another injustice because on appeal, the Panel looked at a cold record without being able to weigh the credibility of the witnesses at all.

For the foregoing reasons, the Panel's June 7, 2017 opinion should be vacated and rehearing before a new Panel be granted or, in the alternative, before an independent Circuit Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DAVID P. DOUGHTY, hereby certify that the above and foregoing Memorandum in Support of Application for Rehearing, Motion to Recuse and to Vacate the Panel's Opinion, has this date been forwarded via United States mail, postage prepaid and properly addressed to counsel of record;

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RAYVILLE, LOUISIANA, this 16th day of June, 2017.

OF COUNSEL