

**SUPREME COURT
STATE OF LOUISIANA**

CASE NO. 2020-C-01017

BAYOU BRIDGE PIPELINE, LLC

Plaintiff/Applicant

VS.

**38.00 ACRES, MORE OR LESS, LOCATED IN ST. MARTIN PARISH; BARRY SCOTT
CARLINE, ET AL.**

Defendants/Respondents

CIVIL PROCEEDING

**WRIT OF REVIEW TO
THE LOUISIANA THIRD CIRCUIT
COURT OF APPEAL, NO. 19-00565-CA**

**FROM THE 16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARTIN, CIVIL CASE NO. 87011-E
HONORABLE KEITH COMEAUX, PRESIDING**

**REPLY BRIEF OF APPLICANT
BAYOU BRIDGE PIPELINE, LLC
IN SUPPORT OF APPLICATION
FOR WRIT OF CERTIORARI**

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LAW AND ARGUMENT

I. The court of appeal's award of attorney's fees cannot be upheld on the basis of Article I, Section 4 of the Louisiana Constitution.

Undoubtedly recognizing the weakness of the argument that the court of appeal's attorney's fee award can be upheld on the statute actually relied upon by the court (La. R.S. 13:5111), Defendants change tacks in their brief, arguing for the first time that the fee award should be upheld on the basis of the "just compensation" provision of Article I, Section 4 of the Louisiana Constitution. Brief at 5-6. This Hail Mary argument fails for two reasons.

First, even assuming that the constitution's "just compensation" clause did allow or mandate an attorney's fee award to a landowner in a successful expropriation proceeding brought against him or her (which it does not), the landowners in the present case failed to appeal the amount of the trial court's just compensation award, which did not include an attorney's fee award. Thus, they have waived any challenge to the amount of that award, including a challenge to the trial court's failure to include attorney's fees as an element of just compensation. *See Mosing v. Domas*, 2002-C-0012 (La. 10/15/02), 830 So. 2d 967, 976-77. In *Mosing*, this Court described the waiver rule and its rationale as follows:

Having appealed, Travelers was required to raise all perceived errors in connection with the exemplary damage award (especially errors of alleged constitutional magnitude) before the Court of Appeal in order to preserve those errors for review. *See Boudreaux v. State, DOTD*, 2001-1329 (La. 2/26/02), 815 So. 2d 7, 9 ("Except for the declinatory exception of lack of subject matter jurisdiction and the peremptory exceptions, two of which, prescription and res judicata, must be specially pleaded, we cannot consider contentions raised for the first time in this Court which were not pleaded in the court below and which the district court has not addressed."). Such a rule, while seemingly harsh, preserves the proper allocation of functions between the lower appellate courts and the Supreme Court by consigning the first appellate review to the court of appeal and preserving to this court discretionary review upon the litigant's petition for certiorari. *See Buckbee v. United Gas Pipe Line Co.*, 561 So. 2d 76, 86 (La. 1990). The purpose of the rule is thwarted when a litigant, such as Travelers, raises some, but not all, of its arguments on appeal and then, after a less than favorable result, urges the arguments it omitted on certiorari to this court.

Accordingly, while Travelers was not a party to the case at trial, and thus was not in a position to raise the constitutional challenge in the district court, it did appeal and in doing so, failed to assign as error the federal due process excessiveness claim it belatedly raises in this court. We cannot consider this claim, which was waived by the failure of Travelers to assert it timely in the court below. *Boudreaux v. State, DOTD, supra*; *Geiger v. State ex rel Dept. of Health*, 2001-2206 (La. 4/12/02), 815 So. 2d 80, 86.

Id.

Second, Article I, Section 4's "just compensation" clause does not mandate or allow an award of attorney's fees in expropriation and/or taking actions as Defendants claim. In *Rivet v.*

Department of Transp. & Dev., 01-CC-0961 (La. 11/28/01), 800 So. 2d 777, 782, this Court refuted the argument that this constitutional provision mandates (or allows) attorney’s fees, holding that “[a]ttorney’s fees have traditionally been regarded as being distinct from the compensation due to the landowner.” See also *State v. Miss Chub, LLC*, 47,054-CA (La. App. 2d Cir. 4/11/12), 92 So. 3d 422, 425 (same).

In *Rivet*, the plaintiffs brought an inverse condemnation action after the State appropriated their property without commencing an expropriation proceeding. The trial court found that an appropriation had occurred and awarded the plaintiffs approximately \$3 million in just compensation, plus a 25% attorney’s fee (which mirrored the 25% contingency fee owed by the plaintiffs to their attorney) and expert witness fees. *Rivet*, 800 So. 2d at 780. After a remand from this Court on the amount of attorney’s fees originally awarded,¹ the trial court awarded \$237,500 in attorney’s fees, but thereafter granted a new trial on the attorney’s fee issue on the ground that:

if Mr. Rivet would have to pay the difference between the initial amount awarded herein by the Court and the amount of attorney’s fees due per his contract, then he would not be in the same position that he was in prior to the condemnation and he would therefore not have been compensated to the full extent of his loss. Since he would not have been compensated to the full extent of his loss, he would have been denied his rights as guaranteed by the Louisiana Constitution.

Id. at 780. This Court found that the trial court’s granting of a new trial was erroneous because the court’s original attorney fee award of \$237,500 had not been “contrary to the law and evidence.”

Id. at 783. Specifically, the Court found that the trial court “fell into error” with respect to its concern that an attorney’s fee award in an amount that did not compensate the plaintiffs for the full amount they owed their attorney (in this case, 25% of the total award) would violate the “just compensation” clause. *Id.* at 782. The Court reasoned that: (1) as stated above, attorney’s fees are “distinct from the compensation due to the landowner,” which is a matter regulated by statutes²; and (2) “it is well settled that courts may inquire as to the reasonableness of attorney’s fees as part of their prevailing, inherent authority to regulate the practice of law.” *Id.* at 782. Thus, this Court rejected the argument that the “just compensation” clause of the Louisiana Constitution governs the issue of attorney’s fees in the expropriation/takings context. To the contrary, attorney’s fees are an issue of **statutory** law in Louisiana that is distinct from the “just compensation” awarded.

¹ The Court held that the trial court erred in awarding the fees as a percentage of the judgment and that it lacked record evidence of the amount of attorney’s fees actually incurred. *Id.* at 780.

² In support of this proposition, the Court cited to the Louisiana statutes regulating attorney’s fee awards in expropriation and taking actions—specifically, La. R.S. 13:5111(A), La. R.S. 19:8, and La. R.S. 48:453(A). *Id.* at 782.

Defendants do not address *Rivet* in their brief, and the cases they cite either pre-date *Rivet*, do not address the issue of attorney’s fees under the “just compensation” constitutional provision, or involve attorney’s fee awards based upon specific statutory provisions. See *Pipeline Tech. VI, LLC v. Ristroph*, 2007-1210 (La. App. 1st Cir. 5/2/08), 991 So. 2d 1 (not addressing whether “just compensation” clause would require attorney’s fee award in takings cases because no taking occurred); *Board of Supervisors of La. State Univ. v. Gerson*, 17-0229 and 17-0296 (La. App. 4th Cir. 11/14/18), 260 So. 3d 634 (court also citing La. R.S. 19:8 regarding fee award in case in which the plaintiff ultimately recovered more in “just compensation” than offered by the expropriating entity); *City of Shreveport v. Chasse Gas Corp.*, 01-34958 and 01-34959 (La. App. 2d Cir. 8/22/01), 794 So. 2d 962 (pre-*Rivet*, and the fee award was consistent with La. R.S. 19:8(A) because the landowner recovered more in “just compensation” than offered by the expropriating entity); *Consol. Sewerage Dist. Of City of Kenner v. Schulin*, 387 So. 2d 1369 (La. App. 4th Cir. 1980) (pre-*Rivet*); *Pointe Coupee Elec. Membership v. Mounger*, 447 So. 2d 1104 (La. App. 1st Cir. 1984) (pre-*Rivet*, and the fee award was rendered under La. R.S. 19:8 because the landowner recovered more in “just compensation” than offered by the expropriating entity); *State Through Dep’t of Transp. And Development v. Chambers Inv. Co.*, 595 So. 2d 598 (La. 1992) (not addressing attorney’s fees and “just compensation” clause); *Avenal v. State*, 03-3521 (La. 10/19/04), 886 So. 2d 1085 (not addressing attorney’s fees and “just compensation” clause); *Larkin Dev. N, LLC v. City of Shreveport*, 20-53374 and 20-53375 (La. App. 2d Cir. 3/4/20), 297 So. 3d 980 (not addressing attorney’s fees and “just compensation” clause); *Gravolet v. Bd. of Commissioners for Grand Prairie Levee Dist.*, 598 So. 2d 1231 (La. App. 4th Cir. 1992) (pre-*Rivet*); *Wilson v. State Dep’t of Transp. And Development*, 464 So. 2d 343 (La. App. 5th Cir. 1985) (pre-*Rivet*, and attorney’s fee award based on La. R.S. 19:201 regarding unsuccessful expropriation suits).

In sum, the court of appeal’s attorney fee award—which was expressly based upon Louisiana Revised Statutes 13:5111—cannot be upheld on the basis of the “just compensation” clause of the Louisiana Constitution. The landowners did not appeal their “just compensation” award, and, in any event, attorney’s fee awards are governed by statutory law rather than the constitutional “just compensation” provision. Consequently, the court of appeal’s fee award stands or falls on Section 13:5111.

II. The court of appeal’s award of attorney’s fees cannot be upheld on the basis of Louisiana Revised Statutes 13:5111.

A. Private entity Bayou Bridge is not an “agency” of the State.

In their brief, Defendants fail to address the holdings of the courts of appeal that the phrase “agency” of the State included in Louisiana Revised Statutes 13:5111 and 19:201 does not encompass private expropriating entities like pipelines. Instead, Defendants discuss cases on the issue of whether an expropriating entity is a “state actor” for the purpose of 28 U.S.C. § 1983, the due process clause, and other unrelated statutes that do not share the same or similar language. Stated simply, it makes no difference whether Bayou Bridge would be considered a “state actor” or a “quasi public corporation” or a “public service corporation” under those other unrelated provisions (which Bayou Bridge denies). What is at issue in the present case is solely whether Bayou Bridge acted as an “agency” of the “state of Louisiana” within the meaning of Section 13:5111 such that it is amenable to the attorney’s fee award imposed by the court of appeal. As discussed in Bayou Bridge’s original brief, the Louisiana courts of appeal that have addressed this specific issue in the context of the related and nearly identically-worded statute Louisiana Revised Statutes 19:201 have **uniformly and correctly held** that a private entity with expropriation power is **not** an “agency” of the state within the meaning of the statute. *See Ristroph*, 991 So. 2d at 4-5; *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So. 2d 4, 7 (La. App. 3d Cir. 1982). Defendants cannot simply ignore or wish these authorities away.

Further, Defendants cannot avoid these authorities and the reasoning they set forth by relying upon inapplicable rules of statutory interpretation. Resort to the supposed “purpose of the law” is improper where the plain language of the statute is unambiguous and does not lead to absurd results. *See In re: Grand Jury Subpoena*, No. 2019-KK-00962 (La. 5/28/20), 2020 La. LEXIS 986 at *5 (“The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the Legislature.”) (citation omitted).

Here, as the *Ledoux* and *Ristroph* courts held, the phrase “the State of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them” is not ambiguous in any way, and no stretching of the term “agency” of the State can bring a private pipeline entity within the statute’s purview. *Ledoux*, 347 So. 2d at 7 (“[t]he Legislature in enacting this section, for whatever reason, limited recovery of attorney fees to unsuccessful expropriation proceedings

brought by the State, its political subdivisions and agencies. We are powerless to extend its provisions by analogy to expropriators not included within its scope. Private entities with the power to expropriate are not subject to the penalty set out in LSA-R.S. 19:201.”); *Ristroph*, 991 So. 2d at 5 (stating that “no straining of the word ‘agency’ can make the statute apply” and rejecting the landowner’s argument of “agency” based upon the generic, common law meaning of the term given that the pipeline had no contract with the State and did not transact affairs on behalf of the state). And, as discussed more fully in Bayou Bridge’s original brief, the Louisiana Legislature specifically amended the language of Section 19:201 to bring private expropriating entities within the statute, but it did not similarly amend Section 13:5111 even after the *LeDoux* and *Ristroph* holdings, lending additional support to the conclusion that Section 13:5111 was clearly and unambiguously intended **not** to include private expropriating entities like pipelines. Defendants simply ignore these decisions and the legislative amendments to the virtually identical language of Section 19:201.

B. Defendants’ reconventional demand does not involve a proceeding “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.”

In their brief, Defendants disavow the clear language of their own pleadings and the court of appeal’s decision stating that their reconventional demand did not sound in “inverse condemnation” or “taking.” However, as discussed more fully in Bayou Bridge’s original brief, the language was clear and established that the reconventional demand sounded in trespass and/or “due process” violation, not a taking. Indeed, at the time the reconventional demand, Bayou Bridge had obviously already filed its expropriation petition, pursuant to which the trial court **granted** the requested expropriation and awarded “just compensation” to the Defendants. Thus, this proceeding simply did not involve a “taking of property by the defendant, other than through an expropriation proceeding.” Instead, it was a successful expropriation action in which Defendants asserted a reconventional demand based upon theories **other than** a taking—*i.e.*, trespass and “due process” claims.

Defendants rely heavily on the *Williams* decision to support their convoluted argument that the action involves a “taking.”³ See *Williams v. City of Baton Rouge*, 98-1981 (La. 4/13/99), 731 So. 2d 240. However, *Williams* does not help their case in any way. Specifically, though *Williams*

³ Further, Defendants wholly ignore the other phrase in Section 13:5111 that the proceeding must involve a taking “other than through an expropriation proceeding.”

does hold that, in appropriate circumstances, a landowner may have a **tort** claim against an expropriating entity who fails to follow the required expropriation procedure, the opinion does not say that such a tort claim amounts to a “taking” within the meaning of Section 13:5111 (or any other law), nor does it state that attorney’s fees are owed in conjunction with such a tort-based recovery. Indeed, it is well-established in Louisiana law that attorney’s fees are not recoverable absent a specific statute (or contract),⁴ and Defendants point to no such statute that allows for attorney’s fees in tort or “due process” actions. Here, Defendants received substantive awards for trespass and “due process” damages that Bayou Bridge chose not to challenge. However, there is simply no statutory basis authorizing an additional award of attorney’s fees in conjunction with those awards, including Section 13:5111, which applies solely to “a proceeding . . . for compensation for the taking of property by the defendant, other than through an expropriation proceeding.”

III. Section 13:5111 does not include expert costs.

The trial court ordered that each party should bear its own costs. 5 R. 1034. Thereafter, the court of appeal awarded Defendants their expert fees pursuant to Section 13:5111 in conjunction with its reversal of the trial court’s ruling on Defendants’ reconventional demand for “due process” damages. *Bayou Bridge Pipeline, LLC v. St. Martin Parish*, CA-19-565, p.32 (La. App. 3d Cir. 7/15/20), 304 So. 3d 529 (holding that Bayou Bridge “became liable to compensate Defendants for reasonable attorney fees and expert witness costs pursuant to the provisions of La.R.S. 13:5111.”)

However, by its express terms, Section 13:5111 does not authorize an award of expert witness fees or even costs generally, but rather only attorney’s fees. *See* La. R.S. 13:5111(A) (court “shall determine and award to the plaintiff, as part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding”). This provision must be contrasted with the following sentence of Section 13:5111(A), which provides for an award of “engineering” and “appraisal” fees **where a settlement has been reached**. La. R.S.13:5111(A) (“Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding.”) Here, there was no “settlement,” and, in any event, the trial

⁴ *See Smith v. Dep’t of Transp. and Development*, 04-1317 (La. 3/11/05), 899 So. 2d 516, 527.

court's award of expert fees is not limited to "engineering" or "appraisal" fees (and Defendants' expert testified in areas other than those).

A discretionary award for "costs" is authorized, instead, by Louisiana Revised Statutes 13:5112 (in favor of successful parties in suits against "the state or any department, board, commission, agency, or political subdivision thereof")⁵ and/or Louisiana Code of Civil Procedure article 1920. *See Board of Supervisors of La. State Univ. v. 1732 Canal St.*, 2013-CA-0976 (La. App. 4th Cir. 1/15/14), 133 So. 3d 109, 118 (holding, in expropriation action, that "[t]he award of costs—which encompasses the award of expert fees—is authorized by overlapping statutory and codal provisions: La. R.S. 13:5112, which provides for the discretionary award of costs in favor of the successful party in a suit against the state or a political subdivision; and La. C.C.P. art. 1920, which provides that costs are paid by the party cast in judgment unless the court, in equity, rules otherwise."); *Mathis v. DeRidder*, 90-1240 (La. App. 3d Cir. 4/16/92), 599 So. 2d 378, 381-82 (in inverse condemnation action, awarding expert witness fees pursuant to La. C.C.P. 1920, and attorney's fees pursuant to La. R.S. 13:5111).⁶ Critically, the court of appeal did not rely upon either of those provisions for its expert fees award in the present case.

Only one of the decisions cited by Defendants in their brief appears to hold that expert fees are recoverable under Section 13:5111. *See SDS, Inc. v. State Dep't of Transp. and Development*, 2007-0406 (La. App. 4th Cir. 2/13/08), 978 So. 2d 1013, 1018. However, in that case, the court of appeal relied, for this holding, upon this Court's decision in *Smith v. State Dep't of Transp. and Development*, 2004-1317 (La. 3/11/05), 899 So. 2d 516, 527-29, which did not state that expert fees were recoverable under Section 13:5111. Rather, in *Smith*, this Court cited Section 13:5111 only in conjunction with its discussion of the attorney's fees award, which is found in a separate section of the Court's opinion. Section 13:5111 is not mentioned at all in the section addressing expert fees. *See id.* Therefore, the *SDS* court erred in finding that *Smith* held that expert fees can be recovered under Section 13:5111. Consequently, in the present case, even if the court of

⁵ As is the case with Section 13:5111, Section 13:5112 does not apply in the present case because Bayou Bridge is not an "agency" of the State.

⁶ *See also St. Tammany Parish Hosp. Serv. Dist. No. 2 v. Schneider*, 2000-CA-0247 (La. App. 1st Cir. 5/11/01), 808 So. 2d 576, 578 (treating attorney's fees in expropriation actions separately from attorney's fees and stating that "unlike the situation involving attorney fees, there is no comparable statute mandating, or even allowing, an award of expert fees when an expropriation has been abandoned or dismissed. Clearly, had the legislature intended to make expert fees available to a property owner against whom an expropriation action has been commenced and later dismissed, it could have done so.")

appeal's attorney's fee award could be sustained under Section 13:5111 (which Bayou Bridge denies), its expert fee award cannot.

CONCLUSION

Louisiana Revised Statutes 13:5111 allows an award of attorney's fees only in proceedings: (a) "brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them," and (b) "for compensation for the taking of property by the defendant, other than through an expropriation proceeding." La. R.S. 13:5111(A). Because Bayou Bridge is not an agency of the state and Defendants' claim involved a due process violation rather than a "taking . . . other than through an expropriation proceeding," neither of these two requirements is satisfied in the present case. Thus, the present writ application should be granted, and the court of appeal's award of attorney's fees and expert witness fees pursuant to Louisiana Revised Statutes 13:5111 should be reversed. Further, expert witness fees cannot be awarded pursuant to Section 13:5111 in any event.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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