

SUPREME COURT OF LOUISIANA

NO. 2020-C-01017

BAYOU BRIDGE PIPELINE, LLC
Plaintiff/Petitioner

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 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

DEFENDANT-LANDOWNERS' BRIEF IN OPPOSITION
TO APPLICATION OF BAYOU BRIDGE PIPELINE, LLC
FOR WRIT OF CERTIORARI

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35 La. L. Rev. (1974).5

SUMMARY OF ARGUMENT IN OPPOSITION

Petitioner Bayou Bridge Pipeline, LLC, (“Petitioner” or “Bayou Bridge”) “trampled Defendants’ due process rights as landowners” and “eviscerated the constitutional protections laid out to specifically protect those property rights” when it chose to misuse the power granted to it by the State of Louisiana in deliberate disregard of Louisiana’s expropriation laws. *Bayou Bridge Pipeline, LLC v. St. Martin Parish*, CA-19-565 (La. App. 3d Cir. 7/15/20), 304 So. 3d 529, 549. Bayou Bridge now appeals the attorneys’ fees and expert costs the Third Circuit awarded after it found that Bayou Bridge acted “willfully, wantonly, and recklessly” when it did so. *Id.* at 550.

The award of fees and costs is mandated by the Louisiana Constitution of 1974, which provides at Art. I, Sec. 4(5) that in “every expropriation or action to take property,” the owner “shall be compensated to the full extent of his loss.” (emphasis added). This provision, which applies to both public and private expropriators, was amended in the Constitution of 1974 “to increase the level of compensation beyond that provided by existing state law” and was specifically intended to encompass costs of litigation and attorneys’ fees. *See Pipeline Tech. VI, LLC v. Ristroph*, 2007-1210, p. 8 (La. App. 1 Cir. 5/2/08); 991 So.2d 1, *writ denied*, 2008-1676 (La. 10/24/08); 992 So.2d 1037 (reviewing legislative history of constitutional amendment and issue of attorneys’ fees). It has served as the basis for fee awards for “wrongful taking[s] in violation of both the Louisiana and United States Constitutions” and “unconstitutional expropriation[s].” *See Gravolet v. Bd. of Comm'rs for Grand Prairie Levee Dist.*, 598 So.2d 1231, 1236 (La. App. 4 Cir. 1992) and *Wilson v. State, Dep't of Transp. & Dev.*, 464 So.2d 343, 345 (La. App. 5 Cir. 1985), *writ denied*, 468 So.2d 1207 (La. 1985), respectively. As the fee award is a question of law, this Court reviews the matter *de novo* and can choose to base the award of attorneys’ fees and expert costs on this constitutional provision, if it is concerned about interpreting La. R.S. 13:5111 to encompass private expropriators acting as agents of the state.

However, this Court may validly hold that the Third Circuit’s award of attorneys’ fees was also warranted by and is consistent with the purpose of La. R.S. 13:5111 and related constitutional and statutory provisions. The statute applies to takings by agencies of the state and Bayou Bridge was acting as such when it misused the power of expropriation delegated to it by the State. This interpretation best conforms to the purpose of the law, required by La. Civ. Code art. 10, to deter unlawful expropriations and fully compensate landowners, as gleaned from the

plain language of this statute and the constellation of constitutional and statutory provisions governing the rights to property, due process, and takings.

The award of fees under La. R.S. 13:5111 is also appropriate because the due process violations found by the Third Circuit clearly arose from Bayou Bridge’s unlawful “taking of property” “other than through an expropriation proceeding” which is the concern at the center of this provision. Bayou Bridge’s revisionist word play cannot erase the fact that it *took* Respondents’ property without first commencing an expropriation proceeding and obtaining the legal right to do so and that Respondents’ claims have arisen out of this unlawful taking.

Bayou Bridge’s interpretation of Louisiana’s various fee provisions for takings-related claims would lead to “absurd consequences” in violation of La. Civ. Code art. 9 because it would place landowners whose rights were willfully violated in the course of a taking without the same access to accountability and compensation as landowners whose rights were respected by good-faith expropriators who followed the law, whether or not they were successful.

STATEMENT OF THE CASE

Respondents Katherine Aaslestad, Peter Aaslestad, and Theda Larson-Wright, (hereinafter “Respondents” or “landowners”) co-own, along with hundreds of others, a 38-acre parcel of land in the Atchafalaya Basin. *Bayou Bridge Pipeline, LLC*, 304 So.3d at 535. Before obtaining their consent and before commencing an expropriation proceeding, Bayou Bridge entered Respondents’ property in the summer of 2018, cleared trees, dug trenches, and began construction of the pipeline even though it lacked legal authority to do so. *Id.* A Bayou Bridge representative testified that the company made the decision in early 2018 to commence construction without a legal right to do so, acknowledging that it did so because “time is money.” *Id.* at 552. On July 27, 2018, Respondent Peter Aaslestad brought suit to enjoin Bayou Bridge from continuing to illegally construct on the property. In the course of that injunction proceeding, Bayou Bridge entered a stipulated agreement in September 2018 to remain off the property. However, at that point the construction was more than 90 percent complete.¹

¹ The Third Circuit took note of this fact as well and the impact on Mr. Aaslestad, who testified:

I had all sorts of scenarios going through my mind, but what I hoped for was that they would follow the law and exit the property and stop construction. I did not expect to learn that in the time between when I filed the injunction and there was an injunction hearing that they would complete the construction. That was probably the most upsetting. For me it's been a ramp up of stress. And the big jump up was on, I think it was the 10th or 11th of September when they signed papers saying, oh, we agree not to enter the property, and it felt like a victory, only to learn that the reason that they're saying we won't enter the property is because they don't need to enter the property anymore except to do clean up under their idea. At that point I felt outsmarted. I felt defeated and terrified if I'm making the right decision to stick my neck out.

Immediately after Mr. Aaslestad filed the injunction suit, Bayou Bridge filed to commence the expropriation proceeding on July 27, 2018. *Id.* at 535. The Respondents answered with affirmative defenses and reconventional demands for the violations of their rights to property and due process under the United States and Louisiana constitutions, as well as for trespass. The trial court denied the affirmative defenses and allowed the expropriation, finding Bayou Bridge to be a common carrier but that it had in fact committed trespass and awarded the landowners \$75.00 in damages. However, the trial court failed to rule on the landowners' reconventional demands for violations of due process resulting from the intentional taking of their property by Petitioner prior to commencing expropriation proceedings, obtaining a judgment and compensating the landowners as required under Louisiana expropriation laws.

The Third Circuit remedied that legal error by ruling on the claim and awarding damages, attorneys' fees and expert costs for the flagrant due process violation. The Third Circuit ruled that Petitioner, an out-of-state pipeline company, "trampled" the due process rights of the landowners and "eviscerated the constitutional protections laid out to specifically protect those property rights" when it took their property willfully, wantonly, and recklessly. *Id.* at 549-550.

The taking in this case occurred well before any expropriation proceeding, and continued despite the legal filings by Mr. Aaslestad to stop the illegal construction. The Third Circuit based the fee award on La. R.S. 13:5111, which applies to claims "for compensation for the taking of property by the defendant, other than through an expropriation proceeding" and which requires that an award to the landowner include reasonable attorneys' fees. *Id.* at 552. The Court of Appeal ruled that Petitioner acted "as a private entity qualified as an agent of the government for purposes of La. R.S. 13:5111." *Id.*

In its brief, Bayou Bridge attempts to deflect from the egregiousness of its conduct by repeatedly pointing to what it describes as Respondents' "*de minimis* interest" in the property -- even taking aim at their political beliefs and mischaracterizing their testimony to suggest they were "recruited" by "activist groups."² But these landowners had rights and those rights, the Third Circuit found, were intentionally and willfully violated. The Third Circuit specifically

Id. at 551-52.

² See Petitioner Br., p. 1 stating "They were recruited by several activist groups opposed to infrastructure development and particularly the Bayou Bridge project itself. 7 R. 1734-36." In fact, the reference to the record is to the testimony of Peter Aaslestad and shows the opposite -- that he had long been bothered by eminent domain abuse, 7 R. 1734:9-18, and that he was the one who reached out to an advocacy group for help: "It was to say I can't believe that this eminent domain abuse is happening to me, how can I get help, and that was the first place I went." 7 R. 1735:25-27.).

declined Bayou Bridge’s invitation to join it in disregarding Louisiana’s property laws and the rights of landowners, pointing instead to the right set out in Art. I, Sec. 4 of the Louisiana Constitution to “acquire, own, control, use, enjoy, protect, and dispose of private property” and the dictates of art. 802 of the Louisiana Civil Code that a “co-owner has the right to use and enjoy the thing as if he were the sole owner.” *Bayou Bridge Pipeline, LLC*, 304 So.3d at 550. And, as the Third Circuit noted, it was not just these three landowners who were affected by Bayou Bridge’s illegal conduct. There were hundreds of other co-owners whose rights were violated in the same way as Respondents when Bayou Bridge made the decision to begin construction on their property without their consent or a judgment of expropriation. *Id.* at 552.

In awarding damages, attorneys’ fees and expert costs, the Third Circuit also noted the record evidence of how the Respondents felt harmed and violated by Bayou Bridge’s conduct. The court found significant the testimony of Theda Larson Wright that the “land means a lot to our family... we feel our roots are there” and her family felt “upset” and “violated.” *Id.* at 551. The court also noted Katherine Aaslestad’s testimony that she felt “really depressed that this could happen the way it’s taken place without any kind of permission or any kind of resolution at the very least” and that she was “also outraged” because she believes in property rights. *Id.* at 552. The court also referenced Peter Aaslestad’s testimony that the matter was “distressing” to him because he felt he was “being pulled into a conflict” and he is “a single individual and BBP is a billion-dollar company” and he “felt defeated and terrified if I’m making the right decision to stick my neck out” and “felt [he] would not have the resources to fight for [his] rights.” *Id.* at 551-552.

LAW AND ARGUMENT

As this case shows, “[t]he power of expropriation is fraught with the possibility of abuse and injustice and, accordingly must be strictly construed.” *Kimble v. Bd. of Comm'rs for Grand Prairie Levee Dist.*, 94-1134 (La. App. 4 Cir. 1/19/95); 649 So.2d 1112, 1113, *writ denied*, 95-0405 (La. 4/7/95); 652 So.2d 1347, and *writ denied*, 95-0416 (La. 4/7/95); 652 So.2d 1347. Expropriation statutes “are to be construed strictly *against* the expropriator and *liberally for the property owner*” because they are in “derogation of the common right to own property.” *Louisiana Intrastate Gas Corp. v. Gulf Outlet Lands, Inc.*, 542 So.2d 705, 706 (La. App. 4 Cir. 1989) (emphasis added); *see also So. Natural Gas Co. v. Poland*, 406 So.2d 657, 669 (La. App. 2

Cir. 1981), *writ denied* 412 So.2d 86, *certiorari denied* 103 S.Ct. 75, 459 U.S. 833, 74 L.Ed.2d 73.

I. Attorneys' Fees and Expert Costs Are Mandated by Art. I, Sec. 4 of the Louisiana Constitution.

The Louisiana Constitution of 1974 provides the most expansive and forceful pronouncement on the matter of takings-related attorneys' fees, requiring that landowners be compensated "to the full extent" of their loss, which "shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and *any other damages actually incurred by the owner because of the expropriation.*" (emphasis added). This constitutional provision, which applies to both public and private expropriators, was amended in the Constitution of 1974 "to increase the level of compensation beyond that provided by existing state law" and was specifically intended to encompass costs of litigation and attorneys' fees. *See Ristroph*, 991 So.2d at 5-6 (reviewing legislative intent and history of constitutional amendment and issue of attorneys' fees), citing Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. (1974), pp. 15-16, available at <https://digitalcommons.law.lsu.edu/lalrev/vol35/iss1/5> (discussing legislative intent for the provision to consider the property owner's "subjective intangible losses" and to include costs of litigation and attorney fees). *See also Bd. of Supervisors of La. State Univ. v. Gerson*, 17-0229, 17-0296 (La. App. 4 Cir. 11/14/18); 260 So.3d 634, 653, *writ denied*, 18-2054 (La. 2/25/19), 266 So.3d 292 (reviewing cases and legislative history from the 1973 Constitutional Convention, in finding "the payment of attorney's fees in expropriation actions that makes a landowner truly whole" and that "a landowner 'is entitled to' attorney's fees as part of the compensation 'to the full extent of his loss,' which is mandated by the constitution."), quoting *Bd. of Comm'rs of New Orleans Exhibition Hall Auth. v. Missouri Pac. RR Co.*, 93-0755 (La. App. 4 Cir. 9/22/93); 625 So.2d 1070, 1082, *writs denied* 93-3100, 93-3088 (La. 1/28/94), 630 So.2d 802, *cert. denied*, 512 U.S. 1220, 114 S.Ct. 2707, 129 L.Ed.2d 835 (1994); *City of Shreveport v. Chanse Gas Corp.*, 01-34958, 01-34959 (La. App. 2 Cir. 8/22/01); 794 So.2d 962, 977-978 (affirming trial court's award of attorneys' fees "as an element of compensation for 'the fundamental right of landowners to test an expropriation on all points or issues which may arise.'"), quoting *Louisiana Resources Co. v. Greene*, 406 So.2d 1360, 1371 (La. App. 3 Cir. 1981); *Consol. Sewerage Dist. of City of Kenner v. Schulin*, 387 So.2d 1369, 1373 (La. App. 4 Cir. 1980) ("the legislative intent relative to the phrase 'to the full extent of his loss' was meant to include an award of attorney's

fees to the landowner in expropriation cases under Article I, § 4 of the Constitution of 1974.”); *Pointe Coupee Elec. Membership Corp. v. Mounger*, 447 So.2d 1104, 1111 (La. App. 1 Cir. 1984) (“There can be no doubt that legal costs of an expropriation proceeding come within the constitutional guarantee of just and adequate compensation to the landowner.”).

In the absence of legislatively prescribed procedures, courts have generally found that the compensation requirement in La. Const. Art. I, Sec. 4 is self-executing and affords landowners the opportunity to seek compensation for land already taken or damaged by a “governmental *or private entity*” with the power of eminent domain. *State through Dep’t of Transp. and Development v. Chambers Inv. Co, Inc.*, 595 So.2d 598, 602 (La. 1992) (emphasis added); *Avenal v. State*, 03–3521 (La.10/19/04), 886 So.2d 1085, 1103–04, *cert. denied*, 544 U.S. 1049, 125 S.Ct. 2305, 161 L.Ed.2d 1090 (2005); *Larkin Dev. N, LLC v. City of Shreveport*, 20-53374, 20-53375 (La. App. 2 Cir. 3/4/20); 297 So.3d 980, 990-991, *writ denied*, 2020-01026 (La. 12/22/20) (identifying that “an inverse condemnation action is a judicial creation” but reasoning that “both expropriation and inverse condemnation actions arise from the same constitutional mandate of just compensation. Thus, both actions should enjoy and inherit the same constitutional protections and rights associated with such.”).

This constitutional provision has served as the basis for fee awards for “wrongful takings in violation of both the Louisiana and United States Constitutions,” *see Gravolet*, 598 So.2d at 1236, and “unconstitutional expropriation[s].” *See Wilson*, 464 So.2d at 345 (“The plaintiff contends, and we agree, since the Louisiana Constitution, Article I, Section 4 allows the landowner to recover attorney fees in litigating a legal expropriation, it is only logical that attorney fees can be awarded in litigating an unconstitutional taking. A landowner should not be penalized for exercising his fundamental right to test an expropriation on all points or issues which may arise.”).

This Court can base the Third Circuit’s award on the constitutional requirement for an award of fees, if it accepts Bayou Bridge’s restrictive interpretation of La. R.S. 13:5111. Nevertheless, La. R.S. 13:5111 is likewise applicable and including common carriers is consistent with constitutional and statutory intent and strictures of judicial interpretation.

II. Petitioner Was Acting as an Agent of the State and Attorneys’ Fees Are Warranted Under La. R.S. 13:5111.

This Court may also affirm the Third Circuit’s award under La. R.S. 13:5111. It is well established in both state and federal law that private entities exercising powers traditionally and

exclusively reserved to the state, particularly eminent domain, are considered agents of the government or acting under color of law:

Under the “public function” doctrine, a private entity becomes a state actor within the meaning of § 1983 when it exercises “powers traditionally exclusively reserved to the State.” *Andrews v. Fed. Home Loan Bank*, 998 F.2d 214, 218 (4th Cir.1993) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). Eminent domain is just such a power. *Jackson*, 419 U.S. at 353, 95 S.Ct. 449. And so when a private entity exercises eminent domain authority, it becomes a state actor within the meaning of § 1983. *Baldwin v. Appalachian Power Co.*, 556 F.2d 241, 242 (4th Cir.1977).

Klemic v. Dominion Transmission, Inc., 138 F.Supp.3d 673, 686 (W.D. Va. 2015). Under this “‘public functions’ test, the law deems a private actor that ‘exercise[s] powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain,’ to be a state actor.” *Cox v. State of Ohio*, 3:16CV1826, 2016 WL 4507779, at *7 (N.D. Ohio Aug. 29, 2016) citing *Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007). Courts have emphasized the state action element in the exercise of eminent domain because it is “traditionally associated with sovereignty.” See *Jackson v. Metro. Edison Company*, 419 U.S. 345, 352-353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (finding a private utility was not a government actor but contrasting that with entities delegated the power of eminent domain). See also *Kohl v. U.S.*, 91 U.S. 367 (1875) (eminent domain described as an inherent power of the sovereign); *Mongrue v. Monsanto*, 249 F.3d 422 (5th Cir. 2001) (private entities expressly delegated the power of eminent domain under Louisiana law qualify as an agent of the government for purposes of establishing constitutional liability for a taking).

Moreover, “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of state law.’” *Wagoner v. Dyson*, 97-606 (La. App. 3 Cir. 12/10/97), 704 So.2d 346, 348, citing *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031 1043, 85 L.Ed. 1368 (1941).

Likewise, Louisiana courts have long found that private entities delegated the power of eminent domain to be governmental or quasi-governmental actors. As early as 1917, this Court observed:

A quasi public corporation may be said to be a private corporation which has given to it certain powers of a public nature, such, for instance, as the power of eminent domain, in order to enable it to discharge its duties for the public benefit, in which respect it differs from an ordinary private corporation, the powers of which are given and exercised for the exclusive advantage of its stockholders...

State ex rel. Coco v. Riverside Irr. Co., 76 So. 216, 218 (La. 1917). See also, *Chambers*, 595 So.2d at 601 (finding that use of eminent domain “always involves the taking or damaging of property interests by the state or some alter ego of the state, such as a public utility, that has been delegated the power to condemn.”), *Crooks v. Placid Ref. Co.*, 2005-119, p. 10 (La. App. 3 Cir. 6/1/05); 903 So.2d 1154, 1161, *writ denied*, 2005-1756 (La. 1/13/06); 920 So.2d (describing private entities upon which Art. 1, Sec. 4 of the Louisiana Constitution of 1974 confers the power of expropriation as “public or quasi public [*sic*] corporations”), *Illinois Cent. R. Co. v. Mayeux*, 301 F.3d 359, 363-64 at n. 18 (5th Cir. 2002) (“all corporations endowed with the power of expropriation are public service corporations” obliged by law to “serve the public without discrimination”). This principle is further evidenced by constitutional and statutory language describing the public nature of the exercise of eminent domain power. See, e.g., La. R.S. 45:241 defining common carrier to include persons engaged in the transport of petroleum as “public utilities and common carriers for hire”; and La. Const. Art. I, Sec. 4 (B)(2)(b)(v) (defining “public purpose” to include “public utilities for the benefit of the public generally.”); *Bayou Bridge Pipeline, LLC*, 304 So.3d at 551, fn 10.

Bayou Bridge does not quarrel with the award of damages for the due process violation which requires state action. See *Fontenot v. Southwest Louisiana Hosp. Ass’n*, 2000-00129 (La. App. 3 Cir. 12/6/00); 775 So. 2d 1111, 1117 (“In order to invoke the due process clause of either constitution, a plaintiff must first show that ‘some property or liberty interest has been adversely affected by state action.’ . . . ‘a private entity can be held to constitutional standards when its actions so approximate state action that they may be fairly attributed to the state’”).

Its only issue in this appeal is with the award of attorneys’ fees and expert costs, where it desires to wield the state power of eminent domain over landowners in Louisiana without all of the accountability that comes with it. However, as noted above, eminent domain “always involve[s] the taking or damaging of property interests by the state *or some alter ego of the state, such as a public utility*, that has been delegated the power to condemn.” *Chambers*, 595 So.2d at 601. (emphasis added).

A. The Third Circuit’s Ruling Avoids Absurd Consequences and Best Conforms to the Purpose of the Law.

The Third Circuit’s ruling that Petitioner was acting as an agent of the government for purposes of La. R.S. 13:5111 is warranted by the rules of judicial interpretation. When the language of the law “is susceptible of different meanings, it must be interpreted as having the

meaning that best conforms to the purpose of the law.” La. Civ. Code. Art. 10. *Vogt v. Bd. of Levee Comm’rs of Orleans Levee Dist.*, 95-1187 (La. App. 4 Cir. 9/4/96); 680 So.2d 149, 155-156 (reasoning that “[w]hen the literal construction of a statute produces unreasonable results, the letter must give way to the spirit of the law and the act must be construed to produce a reasonable result”, that “[t]o ascertain the true meaning of a word, phrase or section, the act as a whole must be considered” and “[u]njust results should be avoided if possible statutes should be construed to apply equally to all persons similarly situated.”). *See also, New Orleans Bulldog Soc’y v. Louisiana Soc’y for the Prevention of Cruelty to Animals*, 2016-1809, p. 7 (La. 5/3/17); 222 So.3d 679, 684 (holding that where a statute is not clear or unambiguous, or its application leads to absurd consequences, “the statute must be interpreted as having the meaning that best conforms to the purpose of the law” in holding that non-profit corporation was an “instrumentality” of government subject to the Public Records Law).³

The Third Circuit’s application best conforms to the purpose of this law and related constitutional and statutory provisions – to redress and fully compensate landowners for takings, whether or not properly undertaken, including the costs of litigating the taking. *See Ristroph*, 991 So.2d at 5-6 (reviewing legislative history of La. Cont. Art. I, Sec. 4 and Legislature’s “desire to increase the level of compensation beyond that provided by existing state law,” to include “costs of litigation and attorney fees” in “every expropriation,” whether by public agencies or private persons.”). *See also, Wilson*, 464 So.2d at 345 (“plaintiff contends, and we agree, since the Louisiana Constitution, Article 1, Section 4 allows the landowner to recover attorney fees in litigating a legal expropriation, it is only logical that attorney fees can be awarded in litigating an unconstitutional expropriation.”).

The Third Circuit’s decision makes even more sense when considering the operation of separate but related laws. La. Civ. Code Art. 13 requires that “laws on the same subject matter must be interpreted in reference to each other.” As discussed above, the legislative history of Art. I, Sec. 4 of the Louisiana Constitution of 1974 confirms that compensation for takings by any kind of expropriator was intended to include attorneys’ fees. *See Ristroph*, 991 So.2d at 5-6. On the other hand, La. R.S. 19:201, as Petitioner points out, governs compensation to a landowner

³ La. R.S. 13:5111 was passed in 1975 (1975 La. Acts. No. 434, § 1), just after the 1974 Constitution expanded compensation for takings to include the full extent of the landowner’s loss for all expropriations whether by public or private entities. Thus, 13:5111 should be interpreted in light of this constitutional mandate.

where the expropriation proceeding was either unsuccessful or abandoned and provides that the landowner is entitled to attorneys' fees in that situation too.

Legislative intent to compensate landowners to the full extent of their loss for takings by any expropriating authority supports the Third Circuit's application of La. R.S. 13:5111 to hold common carriers to the same standard under the law as any other authority yielding the extraordinary power of eminent domain. If Petitioners' argument were to prevail, it would mean that landowners who suffered a willful, unlawful taking in violation of their rights to due process would not be entitled to attorneys' fees but those who did not suffer such a violation in the ordinary expropriation process would be. The restrictive application of the law urged by Bayou Bridge would lead to absurd consequences.

B. Landowners' Claims Were for an Unlawful *Taking* in Violation of Their Rights to Due Process.

Bayou Bridge suggests that La. R.S. 13:5111 does not apply because the Third Circuit "not[ed] that Defendants' claims were admittedly **not** takings/inverse condemnation claims." Petitioner Br. at 8 (emphasis in original). Bayou Bridge takes liberties with the Third Circuit's ruling in tacking on the word "taking" here when neither the Third Circuit nor Respondents stated their claims were not rooted in a taking. A due process claim for violation of the right to property could only arise out of an unlawful taking – because the very nature of the violation arises out of the fact that the expropriator did not follow the law governing takings.

Rather, the Third Circuit was noting that Respondents have clearly distinguished their due process claims for the bad faith taking from good faith inverse condemnation claims because the compensation and damages are treated differently. Respondents emphasized that distinction because this very Court has done so. *Williams v. City of Baton Rouge*, 98-1981, p. 6 (La. 4/13/99); 731 So.2d 240, 246 (distinguishing between good-faith and bad-faith trespassers in takings cases and the difference in compensation for inverse condemnation in the case of good-faith trespass and general damages for bad faith trespass and other torts). *See also Archbold-Garrett v. N.O. City*, 893 F.3d 318, 324 (5th Cir. 2018) ("Given the uncertainty of state law, this court is not convinced that an inverse condemnation action would provide the same scope of damages available to the Appellants under *Carey v. Piphus* to remedy their standalone procedural due process injury"); *Sid-Mar's Restaurant & Lounge, Inc. v. State*, 2015-326 (La. App. 5 Cir. 12/9/15); 182 So.3d 390, 398 (holding, "as a matter of law, plaintiffs are not entitled

to an award of damages for mental anguish for an inverse condemnation that not was the result of an unlawful or tortious act of the State.”⁴

As the Third Circuit noted, Respondents were concerned that allowing Bayou Bridge to characterize its flagrant, willful violation as an inverse condemnation claim would have allowed Bayou Bridge “to treat this violation as an inadvertent mix-up or administrative error, and essentially back-date an expropriation judgment it has not yet obtained.” *Bayou Bridge Pipeline, LLC*, 304 So.3d at fn 13. As this Court has pointed out, when an expropriator acts in good faith for public purposes but failed to properly expropriate “through oversight or lack of foresight,” landowners “are limited to recover the same damages as they could have had the land been properly expropriated.” *Williams*, 731 So.2d at 247; *see also* La. R.S. 19:14. However, when the expropriator acts in bad faith and knowingly takes matters into their own hands, they are liable for damages beyond the compensation for the inverse condemnation (*e.g.*, damages for in tort). *Id.*

Inverse condemnation proceedings are one vehicle for seeking compensation for takings done without following the relevant law but they are not the only vehicle. *See Williams v. City of Baton Rouge*, 731 So.2d at 248 (affirming finding that landowners are “not limited to an inverse condemnation action” and are “*entitled to assert reconventional demands* against the State in tort for damage” to their property, including general damages for mental anguish) (emphasis added). Landowners reasonably raised claims for trespass and constitutional due process violations arising out of the same operative facts – Bayou Bridge’s unlawful entry and construction on their property prior to an expropriation proceeding. Petitioner cites a number of cases which do not support its theory that La. R.S. 13:5111 does not apply to the present facts because they do not involve a taking of any kind – they simply stand for the proposition that section 13:5111 requires that a taking have occurred without an expropriation proceeding. *See Ristroph*, 991 So.2d 1 (court did not allow an expropriation); *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So.2d 4, 6 (La. App. 3 Cir. 1977) (court refused to allow expropriations on ground that there was no public or necessary purpose for the pipeline); *Estate of Patout v. City of New Iberia*, 738 So.2d 544, 555 (La. 1999) (finding damages were not incurred “for public purposes” so a compensable taking did not occur); *Whipp v. Bayou Plaquemine Brule Drainage Bd.*, 476 So. 2d 1042 (La. App. 3

⁴ The dissent, which would have only found a trespass, misses the due process violation at the heart of this claim, which is actionable and compensable on its own.

Cir. 1985) (the damage to the property did not amount to a taking); *Unlimited Horizons v. Parish E. Baton Rouge*, 99-0889 (La. App. 1 Cir. 5/12/00); 761 So.2d 753 (holding that although taking occurred, La. R.S. 13:5111 was inapplicable because of the three year prescription).

Respondents chose to raise their due process claims through a reconventional demand in the expropriation proceeding that was only commenced after Respondent Aaslestad sought an injunction to stop Bayou Bridge's illegal conduct. While the expropriation was allowed after-the-fact, they prevailed in the trial court on their reconventional demand for trespass and in the Third Circuit on their takings-related due process claim. Bayou Bridge's proposed interpretation of the statute would penalize the landowners for not bringing a separate action. *See Wilson*, 464 So.2d at 345, citing *Greene*, 406 So.2d 1360 (noting courts have held that landowners "should not be penalized for exercising their fundamental right to test an expropriation on all points or issues which may arise").

Respondents' reconventional demands were for violations of due process in the taking of their property without Respondents' consent and without properly expropriating, and the statute thus applies.

C. La. R.S. 13:5111 Includes Expert Costs as Evidenced by its Title and Cases Interpreting the Provision.

Courts have great discretion in assessing court costs and expert witness fees can be taxed as costs. *Chumley v. Today's Realty, Inc.*, 43,676, p. 15 (La. App. 2 Cir. 11/5/08); 995 So.2d 676, 685, *on reh'g* (Nov. 25, 2008), *writ denied*, 2008-2999 (La. 2/20/09); 1 So.3d 498. *See also*, La. C.C.P. 1920 ("the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable."). The Third Circuit had authority to award of expert costs and it was not contingent on La. R.S. 13:5111, though Bayou Bridge suggests that La. R.S. 13:5111 does not provide "for expert witness fees at all, but merely attorneys' fees." Petitioner Br. at n. 5. However, La. R.S. 13:5111 is entitled "Appropriation of property by state, parish, municipality or agencies thereof; *attorney, engineering and appraisal fees*; prescription." (emphasis added). Its references to "engineering and appraisal fees" suggest otherwise and cases interpreting this provision have held that it does require expert costs be paid as well. *See SDS, Inc. v. State, Dep't of Transp. & Dev.*, 2007-0406, p. 8 (La. App. 4 Cir. 2/13/08); 978 So.2d 1013, 1018, *writ denied*, 2008-0592 (La. 5/2/08); 979 So.2d 1289 ("A landowner is entitled to recover costs for expert witnesses under La. R.S. 13:5111(A).); *Smith v. State, Dep't of Transp. & Dev.*, 2004-

1317 (La. 3/11/05); 899 So.2d 516 (commercial building subtenant was entitled to expert witness fees, in inverse condemnation action).

CONCLUSION

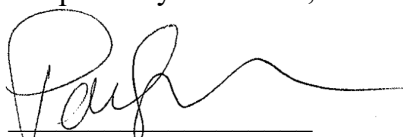
The Louisiana Constitution mandates that landowners be “compensated to the full extent” of [their] loss, which includes “any damages actually incurred by the owner because of the expropriation” whether by public or private expropriators. The legislature intended that this provision include attorneys’ fees and litigation costs, and it provides an independent basis for the fees and costs awarded by the Third Circuit. The provision applies equally to damages arising from wrongful expropriations. The Third Circuit’s award of fees is also warranted under La. R.S. 13:5111 as it “avoids absurd consequences” and “best conforms to the purpose of the law” and related constitutional and statutory provisions aimed at protecting the rights to property and due process in takings by public and private entities.

The Third Circuit’s award of attorneys’ fees and costs should be affirmed.

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CERTIFICATE OF SERVICE

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