

LOUISIANA SUPREME COURT

STATE OF LOUISIANA

**BRIEF
DUPLICATE**

DOCKET NO. 20 C 1017

BAYOU BRIDGE PIPELINE, L.L.C.

PLAINTIFF-APPLICANT

VERSUS

38.00 ACRES, MORE OR LESS, LOCATED IN ST. MARTIN PARISH, ET AL.

DEFENDANTS-RESPONDENTS

CIVIL APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT
PARISH OF ST. MARTIN, STATE OF LOUISIANA
CIVIL ACTION NO. 87011
THE HONORABLE KEITH COMEAUX, PRESIDING

BEFORE THE THIRD CIRCUIT COURT OF APPEAL
CIVIL ACTION NO. 19-0565
THE HONORABLE SYLVIA R. COOKS, BILLY H. EZELL, SHANNON J. GREMILLION,
D. KENT SAVOIE, AND JONATHAN W. PERRY, PRESIDING

CIVIL PROCEEDING

***AMICUS CURIAE BRIEF OF THE STATE OF LOUISIANA,
EX REL. JEFF LANDRY, ATTORNEY GENERAL
IN SUPPORT OF
THE PLAINTIFF'S-APPLICANT'S APPLICATION FOR WRIT OF CERTIORARI***

RESPECTFULLY SUBMITTED:

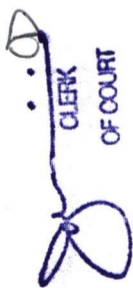
**JEFF LANDRY
ATTORNEY GENERAL**

BY: 

ELIZABETH B. MURRILL (#20685)
Solicitor General
JOSEPH S. ST. JOHN (#36682)
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6766
emurrill@ag.louisiana.gov
stjohnj@ag.louisiana.gov
*Attorneys for Amicus Curiae, State of Louisiana
ex rel. Jeff Landry, Attorney General*

SUPREME COURT
OF LOUISIANA

2020 AUG 17 PM 3:33


CLERK
OF COURT

INPUT BY: _____

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT.....1

I. INTRODUCTION.....1

II. THE THIRD CIRCUIT ERRONEOUSLY HELD THAT A PRIVATE ENTITY IS A “STATE ACTOR” WHEN IT APPLIED LA. R.S. 13:5111 TO BBP’S ACTIONS IN THIS MATTER......2

III. TREATING A PRIVATE ENTITY AS A “STATE ACTOR” COULD HAVE FAR-REACHING AND BIZARRE CONSEQUENCES......3

A. The Third Circuit’s decision risks a bizarre extension of the Louisiana Public Records Act......3

B. The Third Circuit ruling risks extending sovereign immunity protections to wholly private parties......4

IV. CONCLUSION5

VERIFICATION OF SERVICE6

TABLE OF AUTHORITIES

Cases

Atchafalaya Basinkeeper v. Bayou Bridge Pipeline,
Docket No. C-665373, 19th JDC, EBR (filed Jan. 16, 2018).....3

Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, More or Less, Located in St. Martin Parish,
CA 19-565, p.18 (La.App. 3 Cir. 7/15/20), —So.3d—.1, 2, 3, 4

Crooks v. State of Louisiana,
2019-C-0160 (La. 1/29/20) — So.3d —.1

Crooks v. State of Louisiana,
17-750 (La.App. 3 Cir. 12/28/18), 263 So.3d 5401

Gallagher v. “Neil Young Freedom Concert,”
49 F. 3d 1442 (10th Cir. 1995).....3

Jojola v. Chavez,
55 F.3d 488, 4933

Lugar v. Edmonson Oil Company,
457 U.S. 922, 936 (1982).....3

Mark v. Borough of Hatboro,
51 F.3d 1137, 1150 (3rd Cir. 1995).3

New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals,
2015-1351 (La.App. 4 Cir. 9/7/16), 200 So.3d 996, 10023

Williams v. State, Dept. of Health and Hosp.,
97-0055 (La. 12/2/97), 703 So.2d 579, 582-583.....5

Statutes

La. Const. art. 1, sec. 4(B)(4)1, 2

La. R.S. 13:51111, 2, 3

La. R.S. 19:21, 4

La. R.S. 45:2511

MAY IT PLEASE THE COURT:

ARGUMENT

I. INTRODUCTION

The State of Louisiana (“the State”) began its involvement in this matter as a litigant occasioned by the Defendants’-Respondents’ constitutional challenge to La. Const. art. 1, sec. 4(B)(4), La. R.S. 19:2, and La. R.S. 45:251. Following successful defenses of those laws at the district and appellate courts in this matter, the State’s involvement as a party to this litigation came to an end.

The State now appears in this matter in the capacity of *amicus curiae* for a narrow purpose raised for the first time by the Third Circuit Court of Appeal on a matter not related to the State’s original involvement in this case. In the context of analyzing whether the Defendants-Respondents were entitled to attorney and expert witness fees for their damages claims, the Third Circuit departed from long-standing jurisprudence when it stated that “[a]t the time [Bayou Bridge Pipeline (“BBP”)] violated the Defendants’ due process rights it acted as a private entity qualified as an agent of the government for the purposes of La. R.S. 13:5111.”¹

This is not the first time that the Third Circuit has recently misinterpreted La. R.S. 13:5111. In the matter of *Crooks v. State of Louisiana, Department of Natural Resources*,² the Third Circuit defied logic as it twisted that statute to reach an unprecedented decision regarding the taking of land underlying Catahoula Lake. Until the partial course correction in *Crooks* provided by this Court,³ the Third Circuit’s decision resulted in a windfall (and inappropriate, as this Court found) judgment against the State.

In this matter, the Third Circuit has, once again, improperly interpreted La. R.S. 13:5111. The consequences of this misinterpretation are not a windfall monetary judgment against the State, but rather represent a gross departure from nationwide jurisprudence regarding the matter of what constitutes a “state actor,” as well as a confounding ruling that could reconfigure the reach of such bedrock laws and concepts as the Public Records Act and sovereign immunity.

Such a classification of a private entity as a “state actor” casts a pall over the willingness and ability of these necessary entities to exercise their lawful rights under Louisiana law to

¹ *Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, More or Less, Located in St. Martin Parish, CA* 19-565, p.32 (La.App. 3 Cir. 7/15/20), —So.3d—.

² 17-750 (La.App. 3 Cir. 12/28/18), 263 So.3d 540, *writs granted*, 2019-C-160 (La. 5/6/19), 269 So.3d 691.

³ *Crooks v. State of Louisiana*, 2019-C-0160 (La. 1/29/20) — So.3d —.

expropriate property for public necessities and potentially grants them immunities not envisioned by the Legislature. With this misinterpretation of La. R.S. 13:5111, the Third Circuit has judicially created a new class of damages and immunities not envisioned by the Legislature when it passed La. R.S. 13:5111 or Revised Statutes Title 19 or by the people when they ratified the expropriation authority found in La. Const. art. I, sec. 4(B)(4). For these significant policy reasons, the State appears as *amicus curiae* in this matter.

II. THE THIRD CIRCUIT ERRONEOUSLY HELD THAT A PRIVATE ENTITY IS A “STATE ACTOR” WHEN IT APPLIED LA. R.S. 13:5111 TO BBP’S ACTIONS IN THIS MATTER.

The Third Circuit improperly applied La. R.S. 13:5111 to the analysis of damages in this matter because no “state actor” was involved in the complained-of action. Louisiana Revised Statute 13:5111(A) provides (in pertinent part; emphasis added):

A court of Louisiana rendering a judgment for the plaintiff, *in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them*, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a 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....

The key to applying La. R.S. 13:5111 to any situation is that the actor in an expropriation proceeding must be a “state actor.”⁴ The only actor in this matter was BBP—decidedly not a “state actor.”⁵ Indeed, when BBP undertook the trespass actions that are at the heart of this dispute, it was not trespassing pursuant to any expropriation action. Because the courts below found that this private party undertook a private tort (i.e., it trespassed before instituting an expropriation action), this tort cannot have constituted a tort in any constitutional sense. These were private actions by a private party. Thus, on its face, La. R.S. 13:5111 does not apply to this case and the Third Circuit erred in its decision to use that law.

The issue of whether a private actor can be held responsible for private damages under a theory that such an actor was effectively functioning as a government agent is *res nova* in Louisiana. However, the federal jurisprudence is replete with rejections the Third Circuit’s creation of a confluence between private torts occasioned by private actors amounting to actions arising “under color of state law.”

⁴ Although the term “state actor” is used here for brevity, that term is used here as shorthand for the following text from La. R.S. 13:5111: “...the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them....”

⁵ *Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, More or Less, Located in St. Martin Parish, CA 19-565*, p.18 (La.App. 3 Cir. 7/15/20), —So.3d—.

Federal courts do not sanction the application of such “state actor” theories of liability to private party actions and neither should Louisiana courts. In the matter of *Jojoba v. Chavez*, the United States Court of Appeal for the Tenth Circuit characterized the allegation that a private party acting in his private capacity was a “state actor” as “improperly imposing liability on the state of conduct for which it cannot be fairly blamed.”⁶ At no time in this case, was BBP a “state actor” or a “public employee.” In the context of actions under 42 U.S.C. § 1983, the *Jojoba* court stated that “private conduct that is not ‘fairly attributable’ to the State is simply not actionable... ‘however discriminatory or wrongful’ the conduct is.”⁷ The same result should obtain here. There is no doubt, as the Third Circuit stated, that BBP was acting as a private citizen.⁸ Very simply, without a “state actor,” La. R.S. 13:5111 is inapplicable and the Third Circuit improperly applied it in this case.

III. TREATING A PRIVATE ENTITY AS A “STATE ACTOR” COULD HAVE FAR-REACHING AND BIZARRE CONSEQUENCES.

The classification of BBP as a “state actor” is a significant decision with far-reaching and, as-yet, uncharted results.

A. The Third Circuit’s decision risks a bizarre extension of the Louisiana Public Records Act.

Whether BBP constitutes a “state actor” for the purposes of the Louisiana Public Records Act has already been the subject of litigation in a different matter.⁹ Notwithstanding the outcome in that district court decision finding in the negative, the Third Circuit’s classification of BBP as a “state actor” in order to shoehorn it into La. R.S. 13:5111’s purview would again raise questions of whether that wholly private entity is required to adhere to the public records laws of this State. This same concern was addressed in dictum in *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*,¹⁰ when the Louisiana Fourth Circuit observed that,

The Louisiana Municipal Association, appearing as *amicus curiae*, is concerned that a ruling in this case could be detrimental to municipalities if it is construed to

⁶ 55 F.3d 488, 493 (citing *Gallagher v. “Neil Young Freedom Concert,”* 49 F. 3d 1442 (10th Cir. 1995).

⁷ *Id.* (internal citations omitted). See also *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 936 (1982); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1150 (3rd Cir. 1995).

⁸ *Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, More or Less, Located in St. Martin Parish, CA* 19-565, p.18 (La.App. 3 Cir. 7/15/20), —So.3d—.

⁹ *Atchafalaya Basinkeeper, Louisiana Bucket Brigade, and 350 New Orleans v. Bayou Bridge Pipeline, L.L.L., and Chris Martin*, Docket No. C-665373, Nineteenth Judicial District Court, East Baton Rouge Parish (filed Jan. 16, 2018) (dismissing on exceptions of no cause of action claims that BBP is subject to the Public Records Act).

¹⁰ 2015-1351 (La.App. 4 Cir. 9/7/16), 200 So.3d 996, 1002.

mean that a private entity becomes subject to the Public Records Act solely by entering into a contract with a municipality.

The Fourth Circuit avoided this problem by stating that such a classification would not apply unless:

the entity (the LSPCA) acts as an instrumentality of the municipality (the City of New Orleans) in rendering mandated (by the Municipal Code ordinances) municipal services such as investigating municipal code violations, seizing animals and serving citations in the course of its investigations, euthanizing animals, using vehicles maintained and fueled (as well as initially purchased) by the municipality, and whose uniformed officers appear in court to testify regarding municipal violations.¹¹

BBP was acting on its own behalf pursuant to La. R.S. 19:2 when it undertook the expropriation that is the subject of this dispute and not “as an instrumentality of the” State.¹² Nonetheless, with the Third Circuit explicitly stating that BBP was acting “a private entity qualified as an agent of the government,”¹³ the careful avoidance of triggering such requirements as private parties’ adherence to the Public Records Act by the Fourth Circuit in *New Orleans Bulldog Society* is eviscerated and such entities are again at risk of being subject to such laws. This result must be rejected by this Court.

B. The Third Circuit ruling risks extending sovereign immunity protections to wholly private parties.

The Louisiana Constitution of 1974 provides for the waiver of sovereign immunity from suits in contract or tort against the state, a state agency, or a political subdivision.¹⁴ Because the Third Circuit has classified BBP as a “state actor” within the meaning of La. R.S. 13:5111, private entities similarly situated in future litigation are arguably entitled to invoke the sovereign immunity defense provided for in the Louisiana Constitution as a means to avoid liability or litigation in certain cases.

Indeed, when the State availed itself of this defense in the matter of *Two O’Clock Bayou Land Co., Inc. v. State*,¹⁵ the Third Circuit found that La. Const. art. XII, sec. 10 was pertinent to the inquiry of “whether the State can be sued in this action without its consent.”¹⁶ After quoting Sections 10(A), (B), and (C) of Article XII of the 1974 Constitution, the court agreed with the

¹¹ *Id.*

¹² *Id.*

¹³ *Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, More or Less, Located in St. Martin Parish, CA* 19-565, p.32 (La.App. 3 Cir. 7/15/20), —So.3d—.

¹⁴ *Canal/Claiborne, Ltd. v. Stonehedge Dev., LLC*, 2014-0664 (La. 12/9/14); 156 So.3d 627, 630 (citing La. Const. art. XII, sec. 10(A)).

¹⁵ 415 So.2d 990 (La. App. 3 Cir. 1982).

¹⁶ *Id.* at 991.

State's contention that the suit was not based in contract or for injury to property within the meaning of those provisions, but rather was a suit for the determination of the ownership of land. Consequently, the State contended, the suit fell in the category of "other suits" under Section 10(B) and the land company needed the authorization of the Legislature to proceed. Again, the court agreed.¹⁷ The obvious risk of classifying BBP as a "state actor" for the purposes of La. R.S. 13:5111 is that such an action opens the door to private parties being able to avail themselves of the sovereign immunity shield to avoid liability for anything other than tortious action or contractual violations. Such private parties are not sovereigns should not be authorized to be sued only upon their own consent.¹⁸ Surely, the Third Circuit did not intend this consequence of its ruling in the case below, but it is a logical outcome of such a classification of BBP and this Court should grant writs to review and reverse that classification.

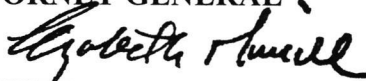
IV. CONCLUSION

For the reasons stated herein, the State of Louisiana, respectfully requests that this Court grant the Plaintiff's-Applicant's Writ Application and overrule the incorrect portions of the Third Circuit's decision.

Respectfully submitted:

JEFF LANDRY
ATTORNEY GENERAL

By:



ELIZABETH B. MURRILL (#20685)
Solicitor General

JOSEPH S. ST. JOHN (#36682)
Deputy Solicitor General

LOUISIANA DEPARTMENT OF JUSTICE

1885 N. Third Street

Baton Rouge, LA 70804

Tel: (225) 326-6766

emurrill@ag.louisiana.gov

stjohnj@ag.louisiana.gov

*Attorneys for Amicus Curiae, State of Louisiana ex
rel. Jeff Landry, Attorney General*

¹⁷ *Id.* at 991-92.

¹⁸ *Accord Williams v. State, Dept. of Health and Hosp.*, 97-0055 (La. 12/2/97), 703 So.2d 579, 582-583 (noting that sovereign immunity is a defense not "available to private parties similarly situated" to the government).

VERIFICATION OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary public, personally appeared

LAUREN BARBALICH

who, after being duly sworn, did state that he is a paralegal for the *Amicus Curiae*, the State of Louisiana, *ex rel.* Attorney General Jeff Landry, are true to the best of his knowledge, information, and belief, and that a copy of the brief was served upon the following via electronic transmission or U.S. Mail (as indicated below), on this 14th day of August 2020.

William P. Quigley, Esq.
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118

Misha L. Mitchell, Esq.
411 Walnut Street #15255
Green Cove Springs, FL 32043

Pamela C. Spees, Esq.
Astha S. Pokharel, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Michael B. Donald, Esq.
Jones Walker, LLP
811 Main Street, Suite 2900
Houston, TX 88002

Ian A. McDonald, Esq.
Jones Walker, LLP
600 Jefferson Street, Suite 1600
Lafayette, LA 70501

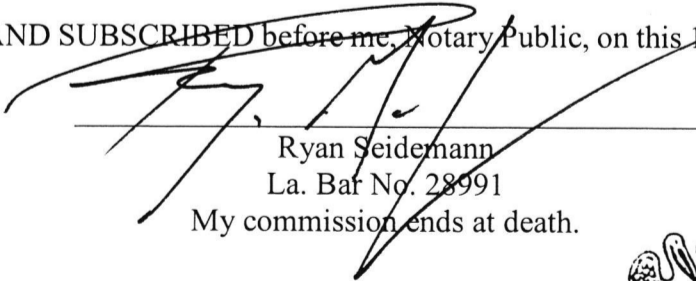
Archie P. Joseph, Esq.
P.O. Box 1283
Breux Bridge, LA 70517

Hon. Keith Comeaux
Judge, Sixteenth Judicial District Court
300 Iberia Street
New Iberia, LA 70560

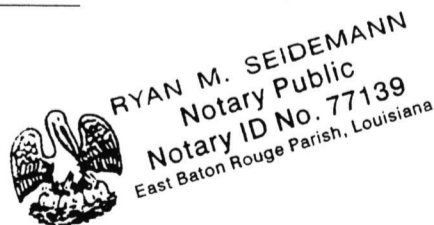
Hon. Becky Patin
St. Martin Clerk of Court
415 St. Martin Street
P.O. 308
St. Martinville, LA 70582

Hon. Renee R. Simien
Clerk of Court
Louisiana Third Circuit Court of Appeal
1000 Main Street
Lake Charles, LA 70615

SWORN AND SUBSCRIBED before me, Notary Public, on this 14th day of August, 2020.



Ryan Seidemmann
La. Bar No. 28991
My commission ends at death.





Jeff Landry
Attorney General

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

August 14, 2020

400 Royal Street, Suite 4200
New Orleans, LA 70130

20 0C 572


Re: *Bayou Bridge Pipeline, LLC v. 38.00 Acres, More or Less, Located in St. Martin Parish, et al.*

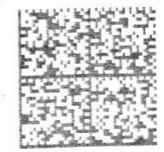
Dear Clerk,

Please find the Original and fifteen (15) copies of *State of Louisiana's Motion for Leave of Court to File Amicus Curiae Brief* and *Amicus Curiae Brief of the State of Louisiana, Ex. Rel. Jeff Landry, Attorney General in support of the Plaintiff's- Applicant's Application for Writ of Certiorari* to be filed in the above referenced matter.

Please contact me at barbalichl@ag.louisiana.gov or Mrs. Murrill at murrille@ag.louisiana.gov if you have any concerns.

Sincerely,


Lauren Barbalich
Paralegal to Elizabeth Murrill



U.S. POSTAGE >>> PITNEY BOWES



ZIP 70802 \$ 008.70⁰
02 4W
0000361943 AUG 14 2020

State of Louisiana
DEPARTMENT OF JUSTICE
JEFF LANDRY
ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE, LA 70804-9005

20 00 572

Hon. John Tarlton Olivier
Clerk of Court
400 Royal Street, Suite 4200
New Orleans, LA 70130