

**320 So.3d 1054**

**BAYOU BRIDGE PIPELINE, LLC**

**v.**

**38.00 ACRES, MORE OR LESS, LOCATED IN  
ST. MARTIN PARISH, et al.**

**No. 2020-C-01017**

**Supreme Court of Louisiana.**

**May 13, 2021**

**Rehearing Denied June 29, 2021**

GENOVESE, J.

This case involves whether an award of attorney fees and other litigation costs to defendant landowners in an expropriation proceeding may be upheld under current law. For the following reasons, we concur and affirm the court of appeal's award to defendants; however, we find that the basis of the award is vested in the Louisiana Constitution of 1974 rather than statutory law.

The facts in this case arise out of the construction of the Bayou Bridge Pipeline, which carries crude oil from Lake Charles to St. James, Louisiana. As part of the project, Bayou Bridge Pipeline, LLC ("BBP"), sought to acquire servitudes on the property of various landowners. The specific piece of property at the center of this litigation is approximately 38 acres of land ("the property") in St. Martin Parish. Prior to reaching servitude agreements with all individuals with an ownership interest in this particular parcel of land, BBP began pipeline construction. Specifically, in July 2018, BBP entered the property, cleared trees, dug trenches, and undertook other action in furtherance of the project.

Peter Aaslestad, one of the property owners, filed suit against BBP in order to enjoin BBP from further construction. BBP later stipulated that it would remain off the property as of September 10, 2018. However, the pipeline construction was more than 90% complete at that time.

Meanwhile, in late July 2018, after it had begun construction on the property,

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BBP filed expropriation litigation against hundreds of property owners with whom servitude agreements could not be reached, including Mr. Aaslestad, Katherine Aaslestad, and Theda Larson Wright (hereinafter collectively referred to as "defendants"). In response, defendants filed a reconventional demand against BBP, alleging BPP trespassed on their property and violated due process by proceeding with construction of the pipeline prior to a judgment of expropriation.<sup>1</sup>

The matter proceeded to a trial wherein the trial court granted BBP's petition for expropriation, finding the expropriation served a public and necessary purpose. The trial court also granted defendants' reconventional demand, finding that BBP trespassed on defendants' property prior to obtaining permission or legal authority. The trial court ultimately awarded each defendant \$75.00 for the expropriation and another \$75.00 in trespass damages. Finally, the trial court ordered that each party bear its costs and attorney fees. Relying on La. R.S. 19:12, the trial court reasoned as follows:

The Court also notes and finds the provisions of La. R.S. 19:12 are applicable in this case. It states "if the highest amount offered prior to the filing of the expropriation suit is equal to or more than the final award[,] the Court may[,] in its discretion[,] order the defendant to pay all or a portion of the cost of the expropriation proceeding." *Id.* The Court in this case finds that the defendants were sent proper documentation pursuant to La. R.S. 19:2.1, and the final tender made to the defendants was that of \$75. Bayou Bridge has prevailed on its expropriation case pursuant to La. R.S. 19:12. However, the landowners have prevailed on their trespass claim. Therefore, this Court orders

that each party will bear its own costs.

Defendants appealed. Pertinent to the issues before this Court, defendants specifically argued that the trial court failed to render judgment on parts of their reconventional demand alleging violations of their property and due process rights. A five-judge panel of the Third Circuit Court of Appeal affirmed in part and reversed in part in a 4-1 decision. In its ruling, the majority declined to address the trespass damage award, finding that it had not been properly raised as an assignment of error.<sup>2</sup> On the merits, the court of appeal upheld the constitutionality of the expropriation process set forth in La. R.S. 19:2(8), La. R.S. 45:251, and La. Const. art. I, § IV(B)(4).<sup>3</sup> In addition, the court of appeal found the Louisiana expropriation statutes do not violate property and due process rights guaranteed in the Louisiana Constitution. The court of appeal also affirmed numerous evidentiary rulings made by the trial court. Finally, the court of appeal determined that BBP violated defendants' due process rights and awarded \$10,000.00 to each defendant for this violation:

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As co-owners, Defendants' due process rights were individually viable and as against BBP, a third-party, each were entitled to be recognized regardless of their co-ownership interest or residence. *In accord*, Kenneth M. Murchison, Local Government Law, 53 La.L.Rev. 823, 850 (1993) (footnotes omitted) (stating "the right to exclude others has been recognized as an essential attribute of the ownership of immovable property. When the government physically invades (or authorizes third parties to invade) real estate, a taking occurs even if the financial impact is minimal."). Thus, regardless of BBP's assertions of limitation, each Defendant was entitled to assert their constitutionally guaranteed due

process rights against BBP's expropriation action and contest BBP's right to such an expropriation. As such, the due process rights established and specifically recognized in La. Const. art. 1, § 4 existed to protect Defendants' property ownership rights, and BBP willfully, wantonly, and recklessly violated those rights.

In the present case, the trial court's failure to award damages for BBP's violation of Defendants' due process rights, a claim separate and apart from their award for trespass damages, constituted legal error. When the trial court errs as a matter of law in its assessment of damages rather than abuses its "much discretion," an appellate court, if it can, must assess *res nova* the amount of damages appropriate under the circumstances. *Mart v. Hill*, 505 So.2d 1120, 1128 (La.1987).

*Bayou Bridge Pipeline, LLC v. 38.00 Acres*, 19-565, pp. 35-36 (La. App. 3 Cir. 7/15/20), 304 So.3d 529, 550-51 (footnote omitted). Ultimately, the court of appeal found that although defendants could not challenge the amount of the trespass award, they were entitled to damages for due process violations:

After reviewing the record, we find the Defendants proved they are entitled to damages for BBP's violation of the due process rights particularized in this state's constitution. To decide otherwise would give entities such as BBP the unrestrained ability to decide whether another citizen's property rights can be restricted and makes a mockery of this state's carefully crafted laws of expropriation. Therefore, we award these Defendants each \$10,000.00 for BBP's violation of their due process

rights.

*Id.*, at p. 39, 304 So.3d at 552. Finally, the court of appeal found defendants are entitled to attorney fees and other litigation costs pursuant to La. R.S. 13:5111, but remanded the matter for a hearing to determine the reasonable amounts of each:

In addition, the Defendants have prayed for an award of reasonable attorney fees and expert witness fees. At the time BBP violated the Defendants' due process rights[,] it acted as a private entity qualified as an agent of the government for purposes of La.R.S. 13:5111. *See Mongrue v. Monsanto Co.*, 249 F.3d 422 (5th Cir. 2001). As such, when it commenced pipeline construction on Defendants' property prior to the initiation of expropriation proceedings, it became liable to compensate Defendants for reasonable attorney fees and expert witness costs pursuant to the provisions of La.R.S. 13:5111. Because the record is incomplete with regard to these elements of costs, we remand this matter to the trial court for a hearing to determine those elements of cost.<sup>4</sup>

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*Id.*, at p. 40, 304 So.3d at 552-53. BBP thereafter sought writs in this Court, arguing that the court of appeal erred in awarding defendants attorney fees and expert witness costs pursuant to La. R.S. 13:5111, because BBP is not "the State of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them." Alternatively, BBP averred that the present action does not involve a proceeding "for compensation for the taking of property by the defendant [in reconvention], other than through an expropriation proceeding[.]"

Louisiana Revised Statutes 13:5111(A) provides, in relevant part, as follows:

[a] court of Louisiana rendering 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 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.

By its plain language, La. R.S. 13:5111 does not allow for an award of attorney fees in this case, as it involves expropriation by a private entity. Specifically, we find that BBP is not an "agency" of the state.<sup>5</sup> Therefore, each party's arguments regarding whether or not this statute applies will not be addressed. Instead, we find that the Louisiana Constitution of 1974 does provide the legal authority and basis to uphold the award of attorney fees and litigation costs.

The Louisiana Constitution of 1974 requires 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." La. Const. Art. I, § IV(B)(5). This article applies to both public and private entities and was amended in the Constitution of 1974 in order to encompass costs of litigation and attorney fees. *See Bd. of Supervisors of La. State Univ. v. Gerson*, 17-0229, 17-0296, p. 28 (La. App. 4 Cir. 11/14/18), 260 So.3d 634, 654, *writ denied*, 18-2054 (La. 2/25/19), 266 So.3d 292 (reviewing cases and legislative history from the 1973 Constitutional Convention, in holding "the payment of attorney 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 Sup'rs of Louisiana State Univ. & Agric. & Mech. Coll. v. Villavaso*, 14-1277, p. 11 (La. App. 4 Cir. 12/23/15), 183 So. 3d 757, 764, writ denied sub nom. *Bd. of Sup'rs of Louisiana State Univ. & Agric. & Mech. Coll. v. Villavaso*, 16-0161 (La. 3/24/16), 190 So.3d 1193 ;

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*Bd. of Comm'rs of New Orleans Exhibition Hall Auth. v. Missouri Pac. RR Co.*, 93-0755, 625 So.2d 1070, 1082 (La. App. 4 Cir. 9/22/93), as clarified on reh'g, 11/18/93, writ granted, 93-2499 (La. 9/27/93), 627 So.3d 638, writ denied, 93-2518 (La. 10/15/93), 627 So.2d 638, 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)). Additionally, this Court has previously held that La. Const. Art. I, § IV allows landowners to seek compensation for land already taken or damaged by a "governmental or private entity" exercising the power of eminent domain. *State through Dep't of Transp. & Dev. v. Chambers Inv. Co, Inc.*, 595 So.2d 598, 602 (La.1992) (emphasis added). This constitutional provision has served as the basis for fee awards for "wrongful taking[s] in violation of both the Louisiana and United States Constitutions." See *Gravolet v. Bd. of Comm'rs for Grand Prairie Levee Dist.*, 598 So.2d 1231, 1233 (La. App. 4 Cir. 1992). Furthermore, regardless of the specific procedural posture of the case, i.e., whether the proceeding is an expropriation matter (where the damage to property is anticipated) or an inverse taking (where the damage to the property occurred before suit was filed), "one thing that both actions [ ] have in common ... is our state constitution. *Larkin Dev. N., L.L.C. v. City of Shreveport*, 53,374, p. 13 (La. App. 2 Cir. 3/4/20), 297 So.3d 980, 990, reh'g denied 7/16/20, writ denied, 20-01026 (La. 12/22/20), 307 So.3d 1039. Moreover, "we note that the courts of this state have held that both expropriation and inverse condemnation actions arise from the same constitutional mandate of just compensation." *Id.* p. 16, 297 So.3d at 991.

BBP argues alternatively that landowners in the present case failed to appeal the amount of the

trial court's compensation award, which did not include an attorney fee award. Thus, BBP argues that defendants have waived any challenge to the amount of that award, including a challenge to the trial court's failure to include attorney fees as an element of just compensation, citing *Mosing v. Domas*, 02-0012, pp. 12-14 (La. 10/15/02), 830 So.2d 967, 976-77.<sup>6</sup>

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We disagree with BBP's contention that defendants waived their right to challenge the award of costs and attorney fees. Indeed, defendants appealed the trial court's failure to rule on their reconventional demand, which directly relates to a determination of the full extent of their loss caused by the taking. Thus, we find the waiver rule in *Mosing* inapplicable because defendants raised the issue of whether they had received compensation to the full extent of their loss in the lower court.

BBP also argues that La. Const. art. I, § IV's "just compensation" clause does not provide for an award of attorney fees in expropriation and/or taking actions. In support, it cites *Rivet v. State Dep't of Transp. and Dev.*, 01-0961, p. 6 (La. 11/28/01), 800 So.2d 777, 782 (per curiam), wherein this Court stated in dicta that "[a]ttorney's fees have traditionally been regarded as being distinct from the compensation due to the landowner. See, e.g., La. R.S. 13:5111(A), La. R.S. 19:8, and La. R.S. 48:453(A)."<sup>7</sup> BPP notes that, in *Rivet*, the landowners brought an inverse condemnation action after the state appropriated their property without bringing an expropriation action. The trial court awarded the landowners approximately \$3 million in just compensation, plus a 25% attorney fee and expert witness fees. *Id.* at p. 1, 800 So.2d at 779. After a remand from this Court on the amount of attorney fees originally awarded, the trial court awarded \$237,500.00 in attorney fees, but thereafter granted a new trial on the attorney fee issue on the ground that Mr. Rivet would have to pay the difference between the initial amount awarded herein by the Court and the amount of attorney fees due per his contract. Thus, 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 pp. 3-4, 800 So.2d 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 \$237,500.00 was not "contrary to the law and evidence." *Id.* at p. 7, 800 So.2d at 783. Specifically, the Court found that the trial court "fell into error" with respect to its concern that an attorney 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 p. 6, 800 So.2d at 782. This Court reasoned that: (1) as stated above, attorney fees "have traditionally been regarded as being distinct from the compensation due to the landowner"; and, (2) "it is well settled that courts may inquire as to the reasonableness of attorney fees as part of their prevailing, inherent authority to regulate the practice of law." *Id.* (citations omitted). BBP argues that *Rivet* demonstrates that this Court rejected the argument that the "just compensation" clause of the Louisiana Constitution governs the issue of attorney fees in the expropriation/takings context.

In addressing *Rivet*, defendants note that the ruling does not explicitly state whether or to what extent La. Const. art. I, § IV(B)(5) is intended to include attorney fees and legal costs in the compensation awarded for a taking. They argue instead that this Court simply held that the amount of attorney fees to be awarded to compensate a landowner for the full extent of their loss is within the discretion

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of the trial court. Defendants aver *Rivet*'s reliance on statutory provisions as the sole authority for its reasoning that "[a]ttorney's fees have traditionally been regarded as being distinct from the compensation due to the landowner" reinforces the premise that the statutes regulating attorney fees in takings cases give effect to, and should be applied to be

consistent with, the constitutional compensation requirement. *Id.*

While this Court has generally acknowledged that attorney fee awards are governed by statute or contract, we have also noted that there are exceptions to this rule. *See e.g.*, *Hernandez v. Harson*, 237 La. 389, 409, 111 So.2d 320, 327 (1958) (discussing exceptions to the jurisprudential rule that attorney fees are not allowed except where authorized by statute or contract). Additionally, we note that "the constitution is the supreme law of this state, to which all legislative acts must yield." *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371, p. 22 (La. 7/1/08), 998 So.2d 16, 32 (citations omitted). We agree with defendants that *Rivet* is inapplicable because it does not address the fundamental question presented herein: whether the Louisiana Constitution permits *any* award of attorney fees and litigation costs separate from any statutory authority explicitly authorizing an award of attorney fees and costs. We find that it does. Thus, under the specific facts of this case, we find sufficient support in the Louisiana Constitution to uphold the awards of attorney fees and costs.

#### **DECREE**

We affirm the ruling of the court of appeal and remand this matter to the trial court for further proceedings consistent with this opinion.

#### **AFFIRMED.**

Weimer, C.J., additionally concurs and assigns reasons.

Crain, J., concurs in part, dissents in part and assigns reasons.

McCallum, J., additionally concurs for the reasons assigned by Weimer, C.J.

WEIMER, C.J., additionally concurring.

I agree that the Louisiana Constitution of 1974 provides a basis for upholding the award of attorney fees and litigation costs. I write separately only to highlight the history surrounding La. Const. art. I, § 4, which fully

supports the majority's decision.

Relative to the "Right to Property," Article I, § 4(B)(5) provides:

In every expropriation or action to take property pursuant to the provisions of this Section, a party has the right to trial by jury to determine whether the compensation is just, and **the owner shall be compensated to the full extent of his loss** . Except as otherwise provided in this Constitution, the full extent of loss 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.]

The language "the owner shall be compensated to the full extent of his loss" was included as part of the 1974 revision to the Louisiana Constitution. Previously, the 1921 constitution gave the landowner the right to "just and adequate compensation." La. Const. art. I, § 2 (1921).

It has long been recognized, including by this court, that the 1974 constitution significantly expanded the concept of compensation by adding to the expropriation provision the requirement that the owner be compensated to the "full extent of his loss." See, e.g.,

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**State Through Dep't of Highways v. Constant** , 369 So.2d 699, 701-02 (La. 1979) ; **State, Dep't of Transp. & Dev. v. Dietrich** , 555 So.2d 1355, 1358-59 (La. 1990) ; **State, Dep't of Transp. & Dev. v. Chambers Inv. Co.** , 595 So.2d 598, 602 (La. 1992).

While this court has not previously addressed whether "full extent of his loss" encompasses attorney fees, scholarly commentary from Professor Lee Hargrave and commentary from

Louis "'Woody' " Jenkins, a member of the House of Representatives and a delegate at the constitutional convention, undoubtedly support the holding in this case that attorney fees can be awarded under La. Const. art. I, § 4. Professor Hargrave explained:

The history of Section 4 reveals a desire to increase the level of compensation beyond that provided by existing state law. The change from the 1921 Constitution's language ("just and adequate compensation") to the new phrase ("compensated to the full extent of his loss") was deliberate, prompted by a belief on the part of the sponsors that inadequate awards have been provided under existing law. The new formula comes from the 1972 Montana Constitution, and was stated by the committee in comments as "intended to permit the owner whose property has been taken to remain in equivalent financial circumstances after the taking." This level of compensation applies "in every expropriation," whether by public agencies or private persons.

**The change is far reaching. Explaining his proposal, Delegate Louis Jenkins indicated it would even extend to costs of litigation and attorney fees: "[A]nd even if you win, you are going to lose, because of the cost of going to court, hiring an attorney, which you'll have to pay. So this would attempt to take into account that fact."** [Emphasis added.]

Lee Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 15. Mr. Jenkins also related the purpose and intent of changing the constitutional language:

The amount of compensation to be paid when property is taken is not merely "just compensation" as that

term has been understood under the fifth and fourteenth amendments of the Federal Constitution and the 1921 State Constitution. Instead, the owner must be compensated "to the *full extent* of his loss." This is intended to include things "which, perhaps, in the past may have been considered *damnum absque injuria*, such as cost of removal", **attorney fees**, inconvenience, loss of aesthetic value or business profits and so forth. [Emphasis added.]

Louis "Woody" Jenkins, The Declaration of Rights, 21 Loy. L. Rev. 9, 23 (1975). In referencing attorney fees, Mr. Jenkins quoted comments from the constitutional convention:

In other words, when someone's property is taken, he has a certain loss, and this section says that loss shall be the measure of just compensation. Sometimes, unfortunately, it has been much less. For example, suppose a highway comes across the corner of your property. You are offered five hundred dollars for it. It's worth a thousand. At present, there is no way you can get what it's worth because if you go to court and challenge that offer and try to get your thousand dollars, ... even if you win, you are going to lose, because of the cost of going to court, hiring an attorney, which you'll have to pay. So this would attempt to take into account that fact.

*Id.* at n.68 (citing Proceedings, Aug. 30, 1973, at 8).

Importantly, this court has historically relied on the above-cited articles by Professor

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Hargrave and Mr. Jenkins when considering and opining on other issues relative to the meaning of "full compensation" under this constitutional

provision. See **Constant**, **Dietrich**, and **Chambers Inv. Co.**, *supra*. Following the same guidance in this case supports a holding that La. Const. art. I, § 4 was intended to encompass an award of attorney fees.<sup>1</sup>

CRAIN, J., concurring in part, dissenting in part.

I agree with the majority's conclusion that Louisiana Revised Statute 13:5111 does not apply to a private party exercising expropriation authority granted by Louisiana Revised Statute 19:2. I also agree that just compensation "to the full extent of his loss," as used in Article I, § 4B(5) of the Louisiana Constitution, can include attorney fees incurred by the property owner in defending an expropriation suit. I do not, however, believe such an award is appropriate in this case.

The property owner's attorney fees, like all other recoverable expropriation damages, must be "incurred by the owner because of the expropriation." See La. Const. art. I, § 4B(5). Before filing an expropriation suit, an expropriating authority must make an offer of compensation to the property owner. See La. R.S. 19:2.2A(2). If the owner declines the offer, proceeds to trial, and recovers more than was offered, the constitution's causation requirement for recovery of attorney fees is satisfied. The property owner necessarily incurred attorney fees "because of the expropriation," specifically due to the expropriating authority's failure to compensate the owner to the full extent of his loss. However, the same cannot be said when the property owner recovers a sum equal to or less than the pre-suit offer. In that instance, the owner voluntarily incurred attorney fees because of his refusal to accept an offer equal to or greater than the constitutionally required compensation. His attorney fees were not incurred because of the expropriation; they were incurred because he demanded more than he was due. An award of attorney fees to the property

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owner under those circumstances is contrary to the constitution, not supported by the

convention history, and inconsistent with the ancillary statutory scheme enacted for expropriation proceedings. *See* La. R.S. 19:8A(3) and 19:12.

Here, at the outset of the expropriation proceeding, plaintiff offered each defendant \$75 as compensation for the full extent of the loss caused by the expropriation. Defendants refused the offer, proceeded to trial, and were awarded \$75 for expropriation damages. Because they failed to recover more than plaintiff's offer, defendants' attorney fees were not caused by the expropriation. An award of attorney fees is thus not permitted by Article I, § 4B(5). *See also* La. R.S. 19:8A(3). I respectfully dissent from the majority decision to the extent it remands to the trial court for an award of attorney fees in this case.<sup>1</sup>

Application for rehearing denied.

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Notes:

<sup>1</sup> Defendants answered the suit, alleging the Louisiana expropriation statutes were unconstitutional as applied to oil pipelines. Defendants also included an exception of prematurity, alleging BBP failed to offer information to defendants as required by La. R.S. 19:2.1.

<sup>2</sup> The court of appeal ultimately determined that the adequacy of the trespass damage award was not properly raised by defendants. It noted that while defendants raised as error the trial court's failure to compensate them for BBP's violation of their due process rights, defendants did not specifically address the adequacy of the \$75.00 trespass damage award, and they failed to argue that the \$75.00 award should be increased.

<sup>3</sup> These statutory and constitutional provisions permit common carriers—such as BBP—to expropriate private property for public and necessary purposes. Specifically, the court of appeal reasoned the expropriation statutes do not violate the nondelegation doctrine, as it affords expropriation defendants a clear process

for judicial review.

<sup>4</sup> Judge Ezell dissented in part and assigned reasons, stating that he would not have awarded defendants damages for violation of due process. Judge Ezell further stated: "I believe that the damages suffered by Defendants for Bayou Bridge's improper entry onto their property were for trespass alone."

<sup>5</sup> We note that the legislature has previously amended certain expropriation statutes in order to allow for attorney fee awards. For example, La. R.S. 19:201 was amended to allow attorney fees to be awarded against private expropriating entities in unsuccessful expropriation actions by substituting the phrase "any expropriating authority referred to in R.S. 19:2" in place of the prior listing of state governmental expropriating authorities. La. R.S. 19:201 (current version as amended in 2012). However, the legislature did not similarly amend La. R.S. 13:5111, which retains the listing of state governmental expropriating authorities that was contained in the original version of La. R.S. 19:201.

<sup>6</sup> 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*, 01-1329 (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 , 01-2206* (La. 4/12/02), 815 So. 2d 80, 86.

*Id .* at pp. 13-14, 830 So.2d at 977 (footnote omitted).

<sup>2</sup> The cited statutes provide for attorney fees in expropriation and appropriation proceedings.

<sup>1</sup> I recognize there are some situations where the award of attorney fees may be limited in expropriation suits. For example, La. R.S. 19:8(A)(3) provides in relevant part:

Immediately **after compensation has been determined** , the plaintiff shall, upon motion of the defendant, present evidence as to the highest amount it offered the defendant for the property and severance damages, if any, prior to the trial on the merits. After hearing evidence

on the issue, the court shall determine the highest amount offered. **If the highest amount offered is less than the compensation awarded for the property and severance damages, if any, the court may award reasonable attorney fees to the defendant .** [Emphasis added.]

According to Louisiana's expropriation laws, the expropriating authority shall engage in negotiations of a compensation agreement with property owners **prior** to taking possession of the land. In fact, expropriation laws require an expropriating authority to comply with very specific requirements in its dealings with the owners of the property to be expropriated and attempt to reach a compensation agreement with the owners—all before an expropriation suit is filed. La. R.S. 19:2 ; La. R.S. 19:2.2. In this case, Bayou Bridge Pipeline ("BBP") entered the property, cleared the property, and began construction of the pipeline, all prior to initiating expropriation litigation. In such a situation, La. R.S. 19:8(A)(3) should not be applied to limit an award of attorney fees. Additionally, although the district court found the highest tender from BBP was \$75, equal to the amount awarded for compensation for the property, the landowners were subsequently awarded an additional \$10,000 for their due process claims. These damages are not "compensation awarded for the property" as referenced in the statute. Because the attorney fees were awarded relative to these claims and not as compensation for the appropriated property, and because the total damages awarded to the landowners exceed the \$75 tender from BBP, this statutory provision should not be applied to limit or eliminate the attorney fee award.

<sup>1</sup> I recognize the trial court also awarded damages for plaintiff's pre-expropriation trespass; however, attorney fees are not authorized for an action in trespass. *See Booth v. Madison River Communications , 02-0288* (La. App. 1 Cir. 6/27/03), 851 So. 2d 1185, 1190, *writ denied* , 03-2661 (La. 12/12/03), 860 So. 2d 1161. Defendants' recovery of attorney fees is

only authorized in defense of the expropriation proceeding. *See* La. Const. art. I, § 4 (B)(5). For this same reason, the court of appeal's award of damages for the violation of defendants' due

process rights, which is not before this court, does not support an award of attorney fees.

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