

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

CASE NO. 19-00565-CA

BAYOU BRIDGE PIPELINE, LLC

Plaintiff/Appellee

VS.

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

Defendants/Appellants

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

**BRIEF OF
PLAINTIFF-APPELLEE BAYOU BRIDGE PIPELINE, LLC**

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CONCISE STATEMENT OF THE CASE

Bayou Bridge Pipeline, LLC (“Bayou Bridge”) filed this action to expropriate a servitude for the construction, installation, and operation of an underground common carrier pipeline. The servitude consists of a 50-foot wide permanent easement comprising 1.75 acres of permanent servitude and 1.84 acres of non-permanent, temporary workspace used by Bayou Bridge during construction of the pipeline (the “Servitude”).¹ The Servitude traverses a 38-acre tract of uninhabited land in St. Martin Parish (the “Property”), owned by nearly 900 heirs, many unlocatable and most without any connection with the land whatsoever.²

Appellants are three out-of-state residents recruited by several activist groups opposed to infrastructure development and particularly the Bayou Bridge project. Furthermore, each Appellant owns an undivided interest of no more than 5/100’s (.05803) of one percent of the Property.³ Appellants filed a reconventional demand for trespass based upon Bayou Bridge’s installation of the pipeline prior to the trial court hearing the expropriation action with respect to their *de minimis* interests. After several days of hearings, the trial court granted Bayou Bridge’s petition for expropriation of the Servitude and awarded each Appellant \$75 in just compensation and \$75 in trespass damages.

In this appeal, Appellants do not challenge the trial court’s findings that Bayou Bridge is a common carrier with the statutory right to expropriate and that the pipeline is for a public and necessary purpose. Nor do they challenge the amount of

¹ Though a 50-foot permanent right of way is necessary to ensure safe distances between the Bayou Bridge pipeline and the pre-existing pipeline that Bayou Bridge paralleled across the property, Bayou Bridge cleared only 30 feet of its 50-foot right-of-way and will maintain this smaller dimension in the future.

² Prior to filing the expropriation action, Bayou Bridge acquired more than 400 easements, including the owners with the largest interest and who had consistently paid the property taxes since 1956.

³ Appellants’ ownership was stipulated as follows: (1) Theda Larson Wright – 0.0000994, (2) Peter K. Aaslestad – 0.0005803, and (3) Katherine Aaslestad – 0.0005803.

their damage awards. Instead, they first challenge the constitutionality of Louisiana's eminent domain scheme as applied to oil pipelines, a challenge the trial court rejected in a ruling denying Appellants' affirmative defense of unconstitutionality. Second, despite the fact that the trial court awarded them trespass-related damages, they claim that the court failed to resolve their trespass-related claims and award them damages for mental anguish. Third, they challenge the trial court's denial of their prematurity exceptions, which were based upon: (1) Ms. Larson Wright's failure to actually receive certain information undisputedly sent to her by Bayou Bridge; and (2) the fact that Bayou Bridge did not send Mr. Aaslestad certain information required by a statute that came into effect after his offer had already been transmitted. Finally, they challenge certain evidentiary rulings of the trial court, including rulings both admitting and excluding evidence.

STATEMENT OF FACTS

The pipeline project at issue (the "Pipeline") involves the construction and operation of a common carrier interstate crude oil transmission pipeline and associated facilities. This additional critical energy infrastructure in the State of Louisiana further highlights Louisiana's central role in meeting the vital energy and other needs of Louisiana and the Nation. 7 R. 1503-46; BBP Exh. 28 at 5. The Pipeline involved in this appeal provides additional, much-needed transportation capacity to transport greater volumes of domestically-produced crude oil to existing Louisiana crude oil refineries, utilizing existing and operational infrastructure. 5 R. 1156. In particular, the Pipeline serves as a 162-mile connection between a terminal facility in Lake Charles, Louisiana, and the refining and marketing hub of St. James, Louisiana. 5 R. 1148-49.

Bayou Bridge was required to, and did in fact, obtain numerous federal and state environmental permits and approvals for the Pipeline project, including Section 404 and 408 permits from the U.S. Corps of Engineers, a Coastal Use Permit from

the Louisiana Department of Natural Resources Office of Coastal Management, a Water Quality Certification from the Louisiana Department of Environmental Quality, and a permit from the Bayou Lafourche Fresh Water District. BBP Exhs. 9, 10, 12, 15, and 16. Environmental groups opposing energy infrastructure development (some of which are also involved in this action) and related opponents of the Pipeline sought judicial review of some of these permit decisions, all of which have been upheld by the courts when challenged. *See Atchafalaya Basinkeeper v. U.S. Corps of Engineers*, 894 F.3d 692 (5th Cir. 2018); *Joseph v. Secretary, La. Dept. of Natural Resources*, 18-CA-414 (La. App. 5th Cir. 1/30/19), 265 So. 3d 945.

With respect to acquiring the property interests necessary for the Pipeline, Bayou Bridge went to great lengths to identify, locate, and negotiate with literally hundreds of heirs with respect to the Property. It entered into over 400 servitude agreements with these heirs, paying amounts far in excess of the value of the interests involved. 5 R. 1133, 1226; BBP Exh. 22. Bayou Bridge brought the present action as to the remaining interests (involving approximately 470 total heirs, each with a *de minimis* interest) with respect to whom it was unable to obtain a voluntary servitude agreement, most unlocatable and all without any connection with the land whatsoever.

Appellants are three of these 470 individuals. All three are out-of-state residents who had never set foot on the Property until days before the trial in this case. 7 R. 1699, 1714, 1718, 1724-25, 1741; 8 R. 1753, 1757. None of them has ever paid taxes on the Property or maintained it in any way. 7 R. 1715, 1733-34; 8 R. 1758-59. None of them owns an undivided interest in the Property greater than 5/100's (.05803) of one percent. BBP Exh. 33; 5 R. 1018. They were recruited by several activist groups opposed to infrastructure development and particularly the Bayou Bridge project itself. 7 R. 1734-36. At least two of the three are also actively

fighting other pipelines in other areas of the country where they own no property interest whatsoever. 7 R. 1716, 1734.

Bayou Bridge filed the present action on July 27, 2018, the same day on which Appellant Peter Aaslestad filed a separate injunction action against Bayou Bridge seeking to halt construction of the Pipeline. 1 R. 1; 5 R. 1272; 7 R. 1726. *See Aaslestad v. Bayou Bridge Pipeline, LLC*, 087010 (16th JDC, St. Martin Parish). In the present expropriation action, Appellants filed reconventional demands for trespass and trespass-based constitutional claims based upon the fact that Bayou Bridge had commenced construction before the expropriation judgment with respect to their interests was rendered in the present action. 1 R. 86-96. Their answer also included affirmative defenses of unconstitutionality of the Louisiana eminent domain scheme as applied to crude oil pipelines. *Id.* Finally, Appellants Theda Wright Larson and Peter Aaslestad included with their answer exceptions of prematurity based upon Bayou Bridge's alleged failure to provide them with all information required by Louisiana Revised Statutes 19:2.2. *Id.*

The trial court held an evidentiary hearing on Appellants' exceptions and affirmative defenses (*i.e.*, the constitutional claims). 5 R. 1139. Following the hearing, the court denied the affirmative exceptions based on unconstitutionality. 1 R. 318; 6 R. 1308, 1325. The court also overruled Appellants' exceptions of prematurity, finding that: (1) Bayou Bridge's sending of the required information to Ms. Wright Larson satisfied the requirements of Section 19:2.2(A) even though Ms. Wright Larson never received it (because she did not pick it up at the post office)⁴; and (2) any failure by Bayou Bridge to provide the information required by Section 19:2.2(B) to Mr. Aaslestad did not render the expropriation action premature as to

⁴ The undisputed evidence showed that the U.S. Postal Service attempted delivery and left a note at the listed address stating "no secure location available." 6 R. at 1264-66; Defendants Exh. B. Thereafter, the letter remained "available for pick-up" for several weeks before it was returned to Bayou Bridge. Defendants Exh. B.

him because that section is not a statutory prerequisite to suit and, in any event, Mr. Aaslestad was not prejudiced.⁵ 1 R. at 317; 6 R. 1360; *See also* 5 R. at 1023 (“The Court in this case finds that the defendants were sent proper documentation pursuant to La. R.S. 19:2.2.”)

The court thereafter held trial on the expropriation petition and Appellants’ trespass-based reconventional demand claims. 6 R. 1368. Prior to trial, the court had ruled on motions in limine that each side brought with respect to the other side’s expert. Appellants had moved to exclude the testimony of Bayou Bridge’s economist Dr. David Dismukes, arguing that his testimony relating to the economic effects of the Pipeline would constitute evidence of “economic development, tax revenue, and incidental benefits” that is proscribed by Article I, Section 4(B)(3) of the Louisiana Constitution. 2 R. 277. The trial court granted the motion in part, holding that “I will not consider any tax revenue or economic development, but I will allow Mr. Donald to present evidence of the public benefit and the public purpose.” 6 R. 1405. Bayou Bridge had moved to exclude testimony of Appellants’ wetlands expert Scott Eustis with respect to the environmental impacts of the Pipeline, arguing that he should not be allowed to rehash the correctness of the decisions of the federal and state agencies that had permitted or approved the Pipeline. 6 R. 1411. The trial court denied the motion, holding that Mr. Eustis could testify as to environmental impact in conjunction with the “necessity” prong of the expropriation analysis. 6 R. 1424.

During the trial, consistent with its ruling on the motion in limine, the trial court allowed Dr. Dismukes to testify, generally without objection, on economic issues relevant to the public purpose and necessity inquiries, though the court sustained Appellants’ objections to certain questions. 7 R. 1508-14. Also consistent with its motion in limine rulings, the court allowed Mr. Eustis to testify at length

⁵ The evidence established that Mr. Aaslestad’s original offer was made by Bayou Bridge in December, 2016 before current Section (B) was added to La. R.S. 19:2.2. BBP Exh. 25.

concerning the environmental impact of the Pipeline to the Property itself and beyond. 7 R. 1601-1605-06, 1610, 1619-20. To avoid unnecessary repetition, Bayou Bridge addresses (and cites) the specific instances of testimony relevant to Appellants’ point of error below in Section IV of the Law and Argument portion of this brief.

Following the trial, the court issued reasons for judgment. 5 R. 1013. After incorporating its rulings on the exceptions and constitutional issues, the court described at length the evidence and testimony adduced on the public purpose and necessity issues. 6 R. 1013-18. Based upon this evidence and testimony, the court concluded that “the public purpose of the pipeline is satisfied” and “Bayou Bridge’s proof that the necessity for the expropriation has been met.” 5 R. 1016, 1018. The court then addressed the issue of damages, awarding each Appellant \$75 in just compensation for the expropriation, an amount representing Bayou Bridge’s highest previous offer that “far exceeds the amount due the landowners according to the evidence presented.”⁶ 5 R. 1021. Finally, the court addressed the trespass claims, finding the trespass claims valid and awarding each Appellant \$75 in additional damages for the trespass in light of their “very minor” ownership interests, the fact that they had “very little contact with the property,” and the fact that though they claimed mental anguish, “no party has sought medical attention and all the

⁶ A best case scenario for total just compensation was:

Theda Larson Wright
\$0.09 (land) + \$0.28 (timber) = **\$0.91**

Peter K. Aaslestad
\$0.51 (land) + \$1.66 (timber) = **\$6.64**

Katherine Aaslestad
\$0.51 (land) + \$1.66 (timber) = **\$6.64**

defendants are self-admitted advocates against pipelines.” 5 R. 1022-23. Final judgment was thereafter entered, and Appellants appealed. 5 R. 1029; 5 R. 1092.

SUMMARY OF ARGUMENT

Louisiana’s longstanding eminent domain scheme does not violate the private non-delegation doctrine of the U.S. Constitution or the right to property and due process clauses of the Louisiana Constitution because the scheme contains: (1) a standard to guide the exercise of expropriation (*i.e.*, public purpose and necessity); and (2) the opportunity for judicial review. *See* La. Const. Art. I § 4; *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701 (5th Cir. 2017).

The trial court did not “fail to render judgment” on Appellants’ reconventional demands relating to trespass. To the contrary, the court considered Appellants’ lack of ties to the property at issue, the small magnitude of their interest in the property, and their mental anguish evidence before rendering an award of \$75 in “additional damages” beyond the amount of just compensation damages to each Appellant. Thus, Appellants have already received the damages they now assert were ignored by the trial court.

The trial court correctly held that Bayou Bridge complied with all statutory prerequisites prior to filing the present expropriation action. La. R.S. 19:2.2(C) requires only that Bayou Bridge make a reasonable attempt under the circumstances to provide the described information; it does not require that the landowner actually receive the information, especially where, as here, the undisputed evidence shows that the landowner simply declined to pick up the information from the post office after the post office left a delivery notice. Further, La. R.S. 19:2.2(B) does not apply in the present case because it was enacted after the initial offer was made. Even if it did apply, it constitutes a simple notice requirement rather than a statutory prerequisite to the filing of suit, and Appellant Peter Aaslestad suffered no prejudice by not receiving a notice containing the information.

Finally, the trial court did not abuse its broad discretion with respect to the admission and/or exclusion of evidence at trial. Appellants failed to lodge a contemporaneous objection to most of the contested testimony from Bayou Bridge’s expert, and the testimony that was allowed over their sole contemporaneous objection related to public purpose, one of the main inquiries in this expropriation action. Further, Appellants’ wetlands expert was allowed to testify at length regarding alleged environmental harm of the pipeline, and Appellants have failed to identify what additional testimony should have been allowed. In any event, Appellants’ substantial rights were not affected by any of the contested evidentiary rulings.

LAW AND ARGUMENT

I. The trial court correctly held that Louisiana’s expropriation laws for oil pipelines do not violate the federal and state constitutions.

In their first point of error, Appellants argue that Louisiana’s longstanding statutory scheme governing the exercise of eminent domain by oil pipelines violates the “private non-delegation doctrine” of the Fifth Amendment of the United States Constitution and the rights to property and due process of Sections 2 and 4 of the Article I of the Louisiana Constitution. Appellants’ Brief at 14-15. The trial court rejected Appellants’ arguments and upheld the constitutionality of the eminent domain laws. 1 R. 318; 6 R. 1308, 1325. This Court reviews that ruling *de novo*. *State v. Webb*, 2013-KK-1681 (La. 5/7/14), 144 So. 3d 971, 975.

A. Louisiana’s eminent domain laws do not violate the private non-delegation doctrine.

The private non-delegation doctrine of the Fifth Amendment of the United States Constitution “is of old vintage, not having been used by the Supreme Court to strike down a statute since the early days of the last century.” *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707 (5th Cir. 2017). In those early cases, the Supreme Court struck down statutes giving private parties the “unrestrained ability

to decide whether another citizen’s property rights can be restricted.” *Id.* at 708. Thus, in *Eubank v. City of Richmond*, 226 U.S. 137, 140-41 (1912), the Court struck down a statute that allowed two-third of property owners on a block to determine whether a setback line near the street should be established beyond which no construction could occur. Similarly, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118-19 (1928), the Court struck down a statute requiring a property owner to obtain consent from two-thirds of nearby property owners in order to build a home for the poor. And, finally, in *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936), the Court struck down a statute allowing producers of more than two-thirds of annual coal production negotiating with majority of miners to set wages and hours for all operators and miners in the area. In each case, there was no standard whatsoever to guide the private party’s conduct, nor was judicial review of the party’s decision available.

Appellants claim that Louisiana’s eminent domain laws provide companies like Bayou Bridge with the same “unrestrained ability to decide whether another citizen’s property rights can be restricted” in violation of the private non-delegation doctrine. However, Appellants fail to cite a single case from anywhere in the country where a court has invalidated a similar statutory scheme on the basis of the private non-delegation doctrine. Further, *Boerschig*, the sole case cited by Appellants on the doctrine, is squarely *against* the position that Appellants are asking this Court to adopt.

In *Boerschig*, the United States Court of Appeals for the Fifth Circuit addressed whether the Texas eminent domain scheme for private gas pipelines violates the private non-delegation doctrine. 872 F.3d at 707-09. Under the Texas scheme, the eminent domain proceeding begins with a state court appointing special

commissioners who assess the property's value,⁷ after which the pipeline can take possession of the landowner's property. *Id.* at 704. A judicial case is opened in state court only if the landowner files objections to the special commissioners' award. *Id.* It is only during that judicial phase, which occurs after the pipeline already enjoys the right to possession of the property, that the landowner can contest the pipeline's finding of public necessity. *Id.*

The Fifth Circuit rejected the landowner's challenge to the Texas scheme, finding that the Texas scheme "does not appear to suffer from either of the twin ills that doomed the[] zoning and wage-setting laws" discussed in the three Supreme Court decisions cited above because:

[i]t imposes a *standard* to guide the pipeline companies—that the taking is necessary for "public use"—and provides *judicial review* of that determination that prevents the company from having the final say.

Id. (emphasis added). It made no difference that the *initial* determination of public necessity was made solely by the pipeline, nor did it matter that the judicial review provided under the scheme was highly deferential. *Id.* at 708-09. Because of the presence of a standard for the pipeline's action and an avenue for judicial review, the court held that the statutory scheme did not violate the private non-delegation doctrine. *Id.* At least one other court has reached the same conclusion. *See Cox v. State of Ohio*, No. 3:16CV1826, 2016 U.S. Dist. LEXIS 115184, at *25 (N.D. Ohio Aug. 29, 2016) (in light of opportunity for judicial review, eminent domain scheme does not violate private non-delegation doctrine).

Louisiana's eminent domain scheme provides precisely the same two protections upon which the Fifth Circuit relied in *Boerschig* to reject the landowner's claim under the private non-delegation doctrine—*i.e.*, a standard to guide the

⁷ The special commissioners are merely landowners in the county. They are not required to be lawyers and make no determination as to the propriety or necessity of the pipeline, but instead simply put a price tag on it. *See* Tex. Prop. Code § 21.014.

pipeline’s actions, and the availability of judicial review.⁸ Specifically, Article I, § 4 of the Louisiana Constitution provides that “[p]roperty shall not be taken or damaged by any private entity authorized by law to expropriate, *except for a public and necessary purpose* and with just compensation paid to the owner” and “whether the purpose is public and necessary *shall be a judicial question.*” La. Const. Art. I, § 4 (emphasis added). Thus, Appellants (and other landowners) are entitled to challenge in court the “public purpose” and the “necessary purpose” required by Louisiana law for the right of expropriation to exist. A long line of jurisprudence elucidates just what these standards mean. *See, e.g., ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 2009-C-1628 (La. 3/16/10), 35 So. 3d 192, 197-200. Indeed, the present action is precisely such an action challenging an expropriation, though here, for whatever reason, Appellants chose not to appeal the correctness of the trial court’s finding that the Pipeline satisfies the public purpose and necessity standards.

In their brief, Appellants argue that challenging an expropriation is difficult and rare, and that other entities, both in Louisiana and in other states, are subject to more rigorous front-end procedures in conjunction with the exercise of their expropriation powers. However, as *Boerschig* makes clear, such additional procedures are not constitutionally mandated by the private non-delegation doctrine so long as the eminent domain scheme provides for the required standard and opportunity for judicial review. Thus, Appellants’ federal constitutional argument fails, as the trial court properly held.

⁸ The Louisiana scheme is even more protective than the Texas scheme insofar as it provides that the expropriator cannot take possession until the judicial determination allowing expropriation has been made, whereas in Texas the expropriator may take possession before the judicial challenge to the expropriation. La. R.S. 19:8(A)(3).

B. Louisiana’s eminent domain laws do not violate the state constitution.

Appellants’ argument under the state constitution is based on the same alleged faults with the Louisiana eminent domain laws as applied to oil pipelines. Appellants’ Brief at 15 (“For the same reasons . . . Louisiana’s eminent domain scheme also violates the right to property and due process in the Louisiana Constitution.”) Though Appellants correctly make the unremarkable point that state statutes can be declared unconstitutional as a general matter, they cite no Louisiana jurisprudence invalidating any aspect of the longstanding eminent domain statutes, nor do they even brief the issue of precisely what is required by the due process and private property clauses of the Louisiana Constitution that is lacking in Louisiana’s eminent domain laws. *Id.* By failing to adequately brief this point of error, Appellants have waived it. *See, e.g., Burgess v. Shi Gang Zheng*, 2017-CA-0665 (La. App. 4th Cir. 10/10/18), 257 So. 3d 764, 769 n.4 (“It is . . . well settled that if an appellant identifies an assignment of error . . . but fails to brief that point with citations to the record and support in the law, that issue or assignment is deemed waived.”) (citation omitted). In any event, for the same reasons discussed above with respect to Appellants’ argument based upon the federal non-delegation doctrine, Appellants’ arguments of unconstitutionality based upon the state constitution fail in light of the standards and opportunity for judicial review provided for in the Louisiana eminent domain scheme.

II. The trial court did not err in “failing to render judgment” on Appellants’ reconventional demands.

In their second point of error, Appellants argue that the trial court “failed to render judgment” on their reconventional demands based upon their constitutional rights to property and due process “arising from BBP’s trespass on the property.” Appellants’ Brief at 22. Appellants argue that, based upon these claims, they “are entitled to additional damages beyond the value of the land taken for the bad-faith,

illegal taking because it was not an inverse condemnation where the illegal taking was through oversight or technical error,” citing *Williams v. City of Baton Rouge*, 98-1981 (La. 4/13/99), 731 So. 2d 240, 246. *Id.* at 24. In particular, Appellants argue that they are entitled to damages that go “beyond the value of the land taken” and compensate Appellants for their mental distress. *Id.*

This argument is perplexing, to say the least, because the trial court *did* award Appellants precisely the “additional damages” they now assert were ignored relating to the trespass. Specifically, in its reasons for judgment, the court found that “claim for trespass is valid” and that “a person damaged by trespass is entitled to full indemnification.” 5 R. 1022. Assessing those damages, the court noted the “minor” nature of Appellants’ ownership interests, the fact that “they had very little contact with the property,” and the fact that “although all the defendants claim some mental anguish for this property, no party has sought medical attention” for such mental distress. 5 R. at 1022-23. Based upon these factors, the court awarded each Appellant \$75 “for the trespass of the approximately 5 months of activity on the property prior to the expropriation.” 5 R. 1023. That amount was in addition to an award of \$75 each for just compensation for the expropriation.⁹ *Id.* See also 5 R. 1033-34 (final judgment awarding “just compensation” of \$75 and “additional damages” of \$75 for each Appellant based upon their “interest and lack of connectivity to the Property.”) Critically, Appellants did not challenge the amount of these awards on appeal.

In sum, the trial court already awarded Appellants the “additional damages” they assert were ignored, and they did not challenge the amount of those awards in this appeal. Therefore, their second point of error is without merit.

⁹ The court found the total fair market value of the 3.59 acres lost in the temporary and permanent servitudes to be \$871. 5 R. 1019. It also calculated a treble damage award for the trees lost. 5 R. 1020-21. Adding the fair market value of the land and this treble damage amount would have resulted in awards of \$0.91 for Ms. Larson Wright based on her .000094 interest, and \$6.64 each for the remaining two Appellants given their .0005803 interest each. 5 R. 1021. Given that Bayou Bridge had already offered each Appellant \$75 in compensation, the court awarded that amount. *Id.* Appellants have not appealed the “just compensation” award.

III. The trial court did not err in overruling Appellants' prematurity exceptions.

In their third point of error, Appellants Theda Larson Wright and Peter Aaslestad claim that the trial court erred in overruling their respective prematurity exceptions because Bayou Bridge failed to comply with the statutory prerequisites prior to filing suit.¹⁰ Appellants' Brief at 25. In particular, Ms. Larson Wright claims that Bayou Bridge failed to "provide" her with the information required by La. R.S. 19:2.2(A) because the evidence showed that though Bayou Bridge mailed the information to her, she never received it. *Id.* at 26-27. Mr. Aaslestad claims that Bayou Bridge failed to provide him the information required by La. R.S. 19:2.2(B)(4)-(7). *Id.* at 26-27. Appellate courts review rulings on an exception of prematurity for manifest error. *Smith v. Barial*, 2018-CA-0573, 2018 La. App. LEXIS 2647, at *9 (La. App. 4th Cir. Dec. 19, 2018). Review is *de novo* only to the extent these arguments raise purely legal issues. *See Landis Constr. Co. v. Reg'l Transit Auth.*, 2015-CA-0854 (La. App. 4th Cir. 5/25/16), 195 So. 3d 598, 602.

Louisiana Revised Statutes 19:2.2 provides for several categories of information to be provided by the expropriating entity to the landowner whose property is being expropriated. Subsection A provides that "[b]efore exercising the rights of expropriation provided by R.S.19:2, any expropriating authority . . . shall" provide the landowner certain information from the appraisal/evaluation performed by the expropriating authority and offer to compensate the landowner an amount not less than the lowest appraisal. La. R.S. 19:2.2(A).

Subsection C provides that "at least thirty days prior to the filing of a petition for expropriation," the expropriating authority shall send several additional items, including: the basis on which the expropriating authority exercises its power; the compensation to be paid; a copy of all appraisals obtained; a survey plat showing the

¹⁰ This point of error relates only to Appellants Theda Larson Wright and Peter Aaslestad.

location of the proposed expropriation; a description of any planned surface facilities; and a statement of the considerations for the proposed route or area. La. R.S. 19:2.2(C).

Finally, Subsection B provides that “[n]ot more than thirty days after making an offer to acquire an interest in the property,” the expropriating authority “shall provide” the property owner a notice that includes certain information, including, among others, statements: (1) identifying the website of the expropriating authority where the property owner can read the expropriation statutes upon which the expropriating authority relies or a copy of the expropriation statutes upon which the expropriating authority relies; (2) offering to provide upon request of the property owner a copy of the expropriation statutes upon which the expropriating authority relies; (3) identifying an agency responsible for regulating the expropriating authority, including the name, website, and telephone number of the agency; and (4) informing that the property owner may hire an agent or attorney to negotiate with the expropriating authority and an attorney to represent the property owner in any legal proceedings involving the expropriation. La. R.S. 19:2.2(B)(4)-(7). This version of Subsection B was added to the statute by Act No. 108 of 2016, effective January 1, 2017.

A. Theda Larson Wright

Appellants concede that the evidence concerning Theda Larson Wright established that Bayou Bridge sent the property appraisal information required by La. R.S. 19:2.2(A) to Ms. Larson Wright, but the post office could not deliver the packet and left a note at the listed address stating “no secure location available.” 6 R. at 1264-66. In response to Appellants’ questioning, Bayou Bridge’s witness testified that he understood this to mean that the Postal Service attempted to deliver the packet, including appraisal, and left a notice after no one accepted service of the document. 6 R. at 1267. The tracking information establishes that this same packet

remained “available for pick-up” for several weeks before it was returned to Bayou Bridge. Defendants Exh. B. Based upon this evidence, the trial court found that “Bayou Bridge sent the appraisal information and therefore satisfied the requirement” of Section 19:2.2(A). 2 R. at 317. *See also* 5 R. at 1023 (“The Court in this case finds that the defendants were sent proper documentation pursuant to La. R.S. 19:2.2.”)

The trial court’s ruling is correct. In *Thomas v. New Orleans Redevelopment Authority*, 2004-CA-1964 (La. App. 4th Cir. 10/6/06), 942 So. 2d 1163, 1168-70, the court rejected the plaintiff’s claim that the defendant improperly expropriated the plaintiffs’ property because though it sent the required notices (including notices under Section 19:2.2) to the plaintiffs at their address of record and addresses discovered by the defendant’s private investigator, the notices were not actually received by the plaintiffs. The court held that due process requires only a reasonable attempt to provide actual notice; actual receipt is not required. *Id.* at 1169-70. This principle has been applied in other contexts in many cases, as well. *See, e.g., 3525 N. Causeway Blvd. Corp. v. Penney*, 07-CA-883 (La. App. 5th Cir. 3/11/08), 982 So. 2d 195 (notice of tax sale of property). Were it otherwise, Appellants and other project opponents could scuttle an entire expropriation project merely by staying inside and refusing to accept legally required notices.

Consistent with these cases and the federal and state jurisprudence on which they are based, Section 19:2.2(A)’s use of the term “provide” does not require that Ms. Larson Wright actually *received* the appraisal notice, but rather only that Bayou Bridge made a reasonable attempt to give her actual notice under the facts. Appellants do not claim that the trial court manifestly erred in finding that Bayou Bridge’s sending of the notice constituted such a reasonable attempt under the specific facts developed at trial. Therefore, Appellants’ argument with respect to Ms. Larson Wright fails.

B. Peter Aaslestad

Mr. Aaslestad claims that the trial court should have granted his exception of prematurity because he was not provided information required by La. R.S. 19:2.2(B)(4)-(7), which, as discussed above, requires the expropriating authority to provide a notice containing certain information to the landowner within thirty (30) days of an offer. 1 R. 168; 6 R. 1355. The trial court ruled that “Section 19:2.2([B])¹¹ is not a statutory prerequisite and any failure to provide such notice did not result in any prejudice.” 1 R. 317; 6 R. 1360. *See also* 5 R. at 1023 (“The Court in this case finds that the defendants were sent proper documentation pursuant to La. R.S. 19:2.2.”)

Mr. Aaslestad’s argument fails for multiple reasons.

First, Subsection B is not applicable with respect to Mr. Aaslestad because Bayou Bridge made its initial offer to him in December, 2016, before the effective date of the amendment adding Subsection B to the statute.¹² BBP Exh. 25. Louisiana Civil Code article 6 provides that “[i]n the absence of contrary legislative expression, substantive laws apply prospectively only.” La. Civ. Code art. 6. Substantive laws are those that establish new rules, rights, and duties or changes existing ones. *Grambling State Univ. v. Walker*, 44,995-WCA (La. App. 2d Cir. 3/3/10), 31 So. 3d 1189, 1194. In other words, an act is substantive if it creates a new obligation where none existed before. *Id.* For example, in *Grambling State Univ.*, the court held that a law requiring that the injured employee sign a “choice of physician” form was substantive and could not be applied retroactively with respect to an incident that preceded the effective date of the law. *Id.* Similarly, Subsection B is a substantive

¹¹ In its order, the court mistakenly referenced Subsection C instead of Subsection B, which was the actual subject of Appellants’ exception. *See* 1 R. 168; 6 R. 1355.

¹² Though the trial court did not base its ruling on this ground, Bayou Bridge can assert, in support of the judgment, any ground supported by the record. La. Code Civ. P. art. 2133. *See also* La. Code Civ. P. art. 2164 (“The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.”)

law because it imposes a new duty on Bayou Bridge. Thus, it cannot be applied retroactively to the offer made to Mr. Aaslestad prior to the effective date of the amendment.

Second, even if Subsection B were applicable, the trial court was correct in holding that unlike Subsections A and C, the notice provided for in Subsection B is not a statutory prerequisite to the filing of an expropriation action. Unlike Subsections A and C, Subsection B does not include the language “before exercising the right of expropriation” or “at least thirty days prior to the filing of a petition for expropriation.” Instead, it merely provides that the described notice shall be provided to the landowner “not more than thirty days after an offer to acquire an interest in the property.” Thus, the language of Subsection B is conspicuously missing language included in other parts of the very same statute that makes the described notice a *necessary prerequisite* to the filing of the expropriation action as opposed to a simple notice requirement. Louisiana law is clear that “[l]aws on the same subject matter must be interpreted in reference to each other.” La. Civ. Code art. 13. Clearly, the legislature could have included the same language in Subsection B tying the described notice to the expropriating authority’s ability to bring an expropriation action, but it did not. That fact is fatal to Mr. Aaslestad’s argument.

Finally, the trial court did not commit manifest error in finding that, in any event, Mr. Aaslestad suffered no prejudice by failing to receive the information listed in Subsection B(4)-(7). As discussed above, information required by these subsections relates to identifying the governing expropriation statutes and agency, along with informing the landowner of his right to obtain counsel. Mr. Aaslestad was obviously aware of his right to obtain counsel, as he is represented by counsel in the present expropriation proceeding, and his counsel filed an injunction action against Bayou Bridge on his behalf on the same day that Bayou Bridge filed the present action. 5 R. 1235. For this reason, it is not surprising that when questioned

by the trial court, Mr. Aaslestad's counsel could not identify any prejudice that Mr. Aaslestad suffered as the result of not receiving the information listed in Subsection B(4)-(7).¹³ 6 R. 1358-60. Thus, Appellant Peter Aaslestad's claim fails for this reason as well.

IV. The trial court did not commit reversible error with respect to its evidentiary rulings.

In their final point of error, Appellants seek reversal based upon certain evidentiary rulings of the trial court. It is well-established under Louisiana law that the district court enjoys "exceptionally broad discretion" concerning the admissibility of evidence at trial. *See Ferrara v. Questar Expl. & Prod. Co.*, 46,357-CA (La. App. 2d Cir. 6/29/11), 70 So. 3d 974, 982. Further, error may not be predicated upon a ruling admitting or excluding evidence "unless a substantial right of the party is affected." La. Code Evid. Art. 103(A). If the ruling is one admitting evidence, a "timely objection" must appear of record "stating the specific ground of the objection." *Id.* If the ruling is one excluding evidence, "the substance of the evidence" must have been made known to the court by counsel. *Id.*

In the present case, Appellants claim that the trial court erred by: (1) admitting certain testimony allegedly related to "economic development, enhancement of tax revenue, [and] incidental benefits to the public," and (2) excluding certain testimony allegedly relating to environmental harm, economic harm, and the users of the pipeline. Appellants' Brief at 28. However, the trial court committed no errors (and certainly did not abuse its broad discretion) with respect to the admissibility of evidence, nor did any of the court's rulings affect Appellants' substantial rights. Further, as discussed further below, in most cases Appellants failed to make any contemporaneous objection or made the *choice* not to question witnesses on the

¹³ Moreover, much of the information mentioned in Subsection B(4)-(7) was provided to Mr. Aaslestad in other correspondence or through communications with others. BBP Exhs. 25 and 26.

information they now claim was improperly excluded. Thus, there is no basis for reversal as the result of erroneously admitted or excluded evidence.

A. Evidence admitted by the trial court

With respect to testimony allegedly improperly admitted, Appellants claim that the court abused its discretion by admitting, “over Appellants’ objection,” testimony from Bayou Bridge’s expert Dr. David Dismukes on the “purported economic and incidental benefits of oil and petroleum products.” Appellants’ Brief at 28-29. They cite three instances of such testimony—specifically, testimony concerning: (1) the effect of increased diversity of crude oil prices on consumer prices (7 R. 1508); (2) the effect of crude oil transport alternatives on Louisiana refinery competitiveness (7 R. 1509); and (3) the effect of pipelines in creating new commerce opportunities (7 R. 1514). Appellants’ Brief at 29. However, Appellants did not make a contemporaneous objection in the second and third of these instances.¹⁴ Thus, they waived any objection to the admission of that testimony. *See, e.g., M&R Drywall, Inc. v. MAPP Constr., LLC*, No 2017 CA 0186, 2019 La. App. LEXIS 762, at *47 (La. App. 1st Cir. Apr. 29, 2019).

With respect to the first instance, the trial court did overrule Appellants’ objection to Mr. Dismukes’s testimony concerning the effect of the pipeline on consumer prices, finding that this testimony related to the public purpose of the proposed pipeline rather than the pipeline’s economic impact to the state. 7 R. 1508 (“That’s not the economic impact to the state. It’s a public benefit, so I’m going to allow it.”) Far from an abuse of discretion, this ruling was entirely correct because,

¹⁴ On page 28 of their brief, Appellants purport to list several occasions in which they did make contemporaneous objections. However, in only one of these instances did the trial court overrule the objection and allow the testimony to come in. 7 R. 1508. That instance is discussed *infra*. In all other instances, the court sustained the objections, and the testimony was not allowed. 7 R. 1512, 1543. The sustained objections had nothing to do with the specific testimony (to which no objection was lodged) of which Appellants now complain.

contrary to Appellants' argument, the Louisiana Constitution does not prohibit evidence of "economic benefits" of the proposed pipeline expropriation project.

Article I, Section 4 of the Louisiana Constitution provides that "[p]roperty shall not be taken or damaged by any private entity authorized by law to expropriate, *except for a public and necessary purpose* and with just compensation being paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question." La. Const. Art. I, § 4 (emphasis added). Louisiana courts have recognized for decades that oil and gas pipelines serve a public purpose under this constitutional provision. *See, e.g., Crooks v. Placid Ref. Co.*, 05-119 (La. App. 3d Cir. 06/01/05), 903 So. 2d 1154, 1166; *Louisiana Res. Co. v. Greene*, 406 So. 2d 1360, 1364 (La. App. 3d Cir. 1981); *Texas Pipe Line Co. v. Stein*, 190 So. 2d 244, 251 (La. App. 4th Cir. 1966), *rev'd on other grounds*, 202 So. 2d 266 (La. 1967).

That longstanding principle was reaffirmed by the Louisiana Supreme Court in *ExxonMobil Pipeline*, 35 So. 3d at 197-99. There, the court rejected a narrow interpretation of what constitutes a "public purpose," holding that "any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose." *Id.* at 199 (citation omitted). Applying this broader definition, the court held that an access road to a petroleum pipeline served a public purpose because it allowed the pipeline company to service its "pipeline, which delivers petroleum products to end users, and which redounds in benefits to the public at large." *Id.*

As demonstrated by *ExxonMobil Pipeline*, the well-established principle that petroleum pipelines serve a public purpose was not changed or affected by the 2006 constitutional amendment adding Article I, Section 4(B)(3), which provides that "[n]either economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose." La. Const. Art. I, § 4(B)(3). That amendment was adopted to remedy the holding of *Kelo v. City of New London*, 545

U.S. 469 (2005), in which the U.S. Supreme Court upheld an expropriation of non-blighted property to implement an economic development plan intended to revitalize the ailing economy of a city. *See St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2017-C-0434 (La. 1/30/18), 239 So. 3d 243, 250. Thus, the sole purpose of the expropriation in *Kelo* was economic development, and the case did not involve an entity like a common carrier pipeline or port or utility provider whose proposed project benefits the public in ways other than mere “economic development” of an undeveloped area. In *ExxonMobil*, the Louisiana Supreme Court affirmed the public purpose of a petroleum pipeline without so much as a mention of Article I, § 4(B)(3), which simply does not affect the “public purpose” analysis with respect to a petroleum pipeline.

In the present case, the trial court was correct that the testimony at issue concerning the effect of the proposed pipeline on consumer prices went to the issue of public purpose and did not constitute the kind of “economic development” evidence proscribed by Article I, § 4(B)(3). Further, even if it did, the admission of this single piece of testimony did not affect a “substantial right” of Appellants, particularly given: (1) the nature of this proceeding as a bench trial¹⁵; and (2) the admission, without objection, of other testimony concerning the public benefits of the Pipeline that, according to Appellants, relate somehow to “economics.” *See* 7 R. 1509 (effect of oil transportation options on Louisiana refinery competitiveness); 1514 (effect of pipeline on new opportunities for commerce). Thus, the trial court’s admission of this piece of testimony provides no basis for reversing the court’s decision.

¹⁵ *See, e.g., State v. Walker*, 394 So. 2d 1181, 1185 (La. 1981) (noting that in a bench trial, the possibility for prejudicial effect on the trial judge is far less than upon a jury).

B. Evidence excluded by the trial court

Although Appellants' argument on the allegedly improperly excluded evidence is not altogether clear, it appears that they are contesting the exclusion of testimony relating to: (1) the identities of the shippers and customers of the crude oil; (2) the negative economic and environmental impacts of the Pipeline (from Dr. Dismukes); and (3) the negative environmental impacts of pipelines in Louisiana (from Appellants' wetlands expert, Scott Eustis). Appellants' Brief at 29.

1. Identity of shippers and customers

With respect to the identity of the shippers and customers of the crude oil to be transported by the Pipeline, the trial court sustained Bayou Bridge's objection to testimony on that subject, finding that it was not relevant to the public purpose and necessity issues before the Court.¹⁶ 7 R. 1688-89. That ruling was not an abuse of discretion or even erroneous. In *ExxonMobil*, the Louisiana Supreme Court noted that the public purpose of a pipeline related to "deliver[ing] petroleum products to end users" without specifying any particular class that such "end users" must fall within. 35 So. 3d at 199. Likewise, other Louisiana courts have held that it makes no difference to whom the oil or gas is being shipped and/or where the oil or gas will ultimately go, as "[s]upplying natural gas to either private individuals through public utilities or directly to private industries is a sufficient public purpose for expropriation, regardless of how far removed the consumers are from the area of expropriation" and "[t]he pipeline serves a public purpose merely by placing more natural gas in the stream of commerce." *Louisiana Resources Co.*, 406 So. 2d at 1364. Thus, the trial court did not abuse its discretion by excluding evidence of the identity of the shippers and customers.

¹⁶ Bayou Bridge presented testimony that it had entered multiple contracts with different entities, but it could not reveal the details of those contracts because of confidentiality provisions. 5 R. 1150.

2. Dismukes testimony concerning environmental impact

With respect to the testimony sought from Dr. Dismukes concerning the economic and environmental effects of the pipeline, the trial court allowed Dr. Dismukes to address a general question about the environmental impacts of pipelines (7 R. 1552) but sustained Bayou Bridge’s objection to further testimony because Dr. Dismukes is an economist, not an environmental expert. 7 R. 1554, 1556. Appellants attempted to get around that expertise limitation by relating the environmental testimony to the issue of “economic benefits,” to which the court responded that it would permit the questions, but this would open the door to the kind of “economic benefits” testimony that it had previously held was inadmissible (on Appellants’ motion in limine), with the result that Bayou Bridge would thereafter be able to elicit such testimony from Dr. Dismukes. 7 R. 1554-60. Ultimately, Appellants *chose* not to pursue such questioning. 7 R. 1560. The court did not abuse its discretion by stopping Appellants’ attempt to question Dr. Dismukes on matter beyond his expertise. *See, e.g., State v. Thomas*, 16-578 (La. App. 3d Cir. 4/19/17), 217 So. 3d 651 (“an expert witness may not give expert testimony beyond the scope of the field of expertise in which he is qualified.”) And Appellants have no basis to assert error, in any event, because they *chose* not to question Dr. Dismukes on the environmental impacts to the extent they relate to issues of economics within Dr. Dismukes’s area of expertise—*i.e.*, the court itself did not “exclude” this testimony at all.

3. Eustis testimony concerning environmental impact

Finally, with respect to testimony concerning environmental impact of pipelines in Louisiana that Appellants sought to elicit from Mr. Eustis, the court did not abuse its broad discretion in any way with respect to “environmental impact” testimony. First, on Bayou Bridge’s motion in limine to exclude Mr. Eustis’s testimony, the court denied the motion, stating that it would *allow* Mr. Eustis to

testify with respect to environmental impact in the context of the “necessity” prong of the governing expropriation analysis. 6 R. 1424.

Second, the court did not state that Mr. Eustis could testify only as to the “specific parcel of land at issue” in this expropriation as Appellants represent; rather, the context of the ruling and the testimony admitted thereafter show that the court merely limited testimony to the environmental impacts of *this* Pipeline along the entire route, as opposed to testimony relating to all pipelines generally in Louisiana. 7 R. 1562-63. However, despite this ruling, Mr. Eustis was allowed (sometimes over objection) to testify extensively as to the environmental impacts of the proposed Pipeline well beyond the route location, including throughout the entire Corps of Engineers’ management area (7 R. 1601-05), with respect to state restoration projects off the route location (7 R. 1606, 1610), and even as to the entire Louisiana coast (7 R. 1619-20). *See also* 5 R. 1017 (court’s reasons for judgment describing Mr. Eustis’s testimony).

In their appeal brief, Appellants wholly ignore the breadth of the testimony that Mr. Eustis was allowed to give at trial. Even more importantly, they fail to identify a single concrete piece or area of testimony with respect to which he was not, but should have been, allowed to testify. Merely stating vaguely that testimony concerning “adverse impacts in terms of environmental harms and costs” was “refused” by the trial court is not enough—Appellants must identify the specific record cite at issue where the substance of the evidence was made known to the court by counsel. La. Code Evid. art. 103. They have not done so here.

Nor have Appellants shown that their substantial rights were affected by the exclusion of any “environmental harm” testimony. As discussed above, Mr. Eustis was, in fact, allowed to testify broadly on “environmental impact” issues.¹⁷ Further,

¹⁷ The trial court heard and rejected Mr. Eustis’s testimony concerning the harm caused by the placement of the pipeline within existing spoil banks, concluding that Mr. Eustis had failed to prove that the pipeline was, in fact, placed within spoil banks and Bayou Bridge had established,

the standard with respect to the court’s ability to consider “environmental harm” in the context of the “necessity” inquiry is exceedingly deferential and does not allow the court to rebalance, *de novo*, environmental harm issues that have been considered and rejected by the numerous state and federal authorities that have permitted the pipeline for construction and use. *See ExxonMobil*, 35 So. 3d at 200 (“Once public necessity is established, the extent and location of the property to be expropriated are within the sound discretion of the expropriation authority and determination of same will not be disturbed by the court if made in good faith The criteria to be considered by the expropriator in determining the location and extent of the property to be expropriated includes factors such as . . . environmental impact.”) Indeed, Mr. Eustis himself testified on cross-examination that he personally raised the same environmental issues before the U.S. Corps of Engineers, the Louisiana Department of Environmental Quality, and the Louisiana Department of Natural Resources Office of Coastal Management, each of which granted permits to Bayou Bridge despite the objections.¹⁸ 7 R. 1625-26. Thus, there is no basis for reversing the decision below based upon alleged error in excluding “environmental harm” testimony by Mr. Eustis.

CONCLUSION

The trial court did not commit reversible error in this case. First, Louisiana’s longstanding eminent domain scheme easily passes constitutional muster. Second, the trial court already awarded Appellants the additional trespass-related damages

to the contrary, that the pipeline was not laid within spoil banks. 5 R. at 1018. Appellants did not challenge these factual findings on appeal.

¹⁸ The trial court specifically held as much, stating “the defendant would want the Court to supplant the findings of the various agencies that permitted this project. All the permits have been introduced into evidence, and the findings of those permitting agencies and the expertise of those permitting agencies should be considered by the Court, but the Court should not supplant the well thought and well researched opinions of the various agencies that permitted this project. Therefore, the Court finds that the proper permitting has been done, and that the public purpose and necessity has been proven by Bayou Bridge Pipeline, LLC.” 5 R. 1018. Appellants did not challenge this finding on appeal.

they now assert were ignored. Third, Bayou Bridge complied with all statutory prerequisites to the filing of this expropriation action. And, finally, the trial court did not abuse its broad discretion with respect to any of its evidentiary rulings. Consequently, the trial court's decision should be affirmed in all respects.

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