

**SUPREME COURT  
STATE OF LOUISIANA**

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**CASE NO. 2020-C-01017**

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**BAYOU BRIDGE PIPELINE, LLC**

**Plaintiff/Applicant**

**VS.**

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

**Defendants/Respondents**

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**CIVIL PROCEEDING**

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

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

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

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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 interstate crude oil pipeline and associated facilities (“the Pipeline”).<sup>1</sup> The servitude—which 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—traverses a 38-acre tract of uninhabited land in St. Martin Parish owned by nearly 900 heirs, many unlocatable and most without any connection with the land whatsoever.

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 tract at issue. 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.

Defendants are three of these 470 individuals. All three are out-of-state residents who had never set foot on the tract at issue 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 tract or maintained it in any way. 7 R. 1715, 1733-34; 8 R. 1758-59. None of them owns an undivided interest in the tract greater than 5/100’s of one percent (.0005803). 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 Defendant 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, Defendants filed reconventional

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<sup>1</sup> 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. 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.

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 Defendants' 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, Defendants 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 rendered judgment authorizing the expropriation (5 R. 1029-34), rejecting Defendants' constitutionality challenge (1 R. 3018; 6 R. 1308, 1325) and prematurity exceptions (1 R. 317; 6 R. 1360), and awarding both just compensation for the expropriation and damages for trespass (5 R. 1021-23). The trial court did not award Defendants any attorney's fees or expert witness costs. 5 R. 1021-23; 5 R. 1029-34. Final judgment was thereafter entered, and Defendants appealed. 5 R. 1029; 5 R. 1092.

Defendants assigned four alleged errors in the underlying appeal. Specifically, they claimed that the trial court erred in: (1) denying their claim of unconstitutionality of the Louisiana eminent domain scheme; (2) failing to render judgment on the due process violation component of their reconventional demand; (3) denying their prematurity exceptions; and (4) rendering certain evidentiary rulings relating to the exclusion and admission of expert testimony. Defendants did not appeal the propriety of the trial court's public purpose determination for the expropriation, the amount of compensation awarded for the expropriation, the amount of damages awarded for the trespass, or the trial court's denial of attorney's fees and expert witness costs.

A five-judge panel of the Third Circuit upheld all of the trial court's rulings except its failure to award damages on the due process violation alleged in Defendants' reconventional demand. *Bayou Bridge Pipeline, LLC v. St. Martin Parish*, CA-19-565 (La. App. 3d Cir. 7/15/20), 304 So. 3d 529. As to that ruling, the majority<sup>2</sup> held that despite the trial court's (unappealed) award of trespass damages,<sup>3</sup> Defendants were also entitled to due process damages arising out of

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<sup>2</sup> Judge Ezell dissented from the majority's award of damages on the Defendants' due process claims because: (1) "the damages suffered by Defendants for Bayou Bridge's improper entry onto their property were for trespass alone," and (2) "[b]ecause Defendants have not appealed the amount of those trespass damages, those amounts are final." CA-19-565 at p.54 (Ezell, J., dissenting).

<sup>3</sup> Though no party raised the issue, the majority spent considerable time at the beginning of its decision explaining why it could not simply increase the amount of the trespass damages despite Defendants' failure to appeal that issue. In the end, the majority concluded that Defendants waived the issue by failing to appeal it. CA-19-565 at p.9 ("we do not find that the adequacy of the quantum award, one that was purely discretionary with the trial court, falls within the parameters of the 'interest of justice' exceptions

the same actions by Bayou Bridge—*i.e.*, the commencement of construction prior to an expropriation judgment covering Defendants’ *de minimis* interests in the property. CA-19-565 at p.25; 29. Though the trial court had awarded each Defendant only \$75 for trespass damages based upon the miniscule amount of their property interests and their lack of any connection to the property, the majority assessed Defendants’ damages for this due process violation *res nova*, awarding each Defendant \$10,000 by focusing on the “deprivational conduct of the party who violated those due process rights.” *Id.* at 29. The court of appeal did not render this award on the basis of a “taking”; in fact, it went out of its way to note that Defendants had specifically and strenuously disavowed to the trial court that their reconventional demand constituted an “inverse condemnation” claim. *Id.* at 23 n.13.

In conjunction with this “due process violation” award, the court of appeal *sua sponte* awarded attorney’s fees and expert witness fees to Defendants pursuant to Louisiana Revised Statutes 13:5111,<sup>4</sup> ruling as follows:

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.

*Id.* at 32 (emphasis added). The court did not mention the word “taking” in connection with this award either, though it did make indisputably clear that its award of attorney’s fees and expert witness costs was made solely: (a) pursuant to Louisiana Revised Statutes 13:5111, and (b) on the basis of the “due process” violation.

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[to Uniform Court of Appeal Rule 1-3 requiring a specification of errors]. Accordingly, we do not find the adequacy of the trespass damage award is before us.”).

<sup>4</sup> Prior to the court of appeal’s ruling, no party had ever mentioned or briefed the possibility of an award of fees under Louisiana Revised Statutes 13:5111. Defendants’ reconventional demand simply contained a general request for “judgment . . . against BBP for all general and special damages reasonable in the premises, together with judicial interest, costs, attorneys fees, expert fees, and for all other general and equitable relief to which . . . entitled.” 1 R. 96. Defendants also requested attorney’s fees against Bayou Bridge in conjunction with their answer, seeking judgment “dismissing the expropriation petition filed by BBP, at its costs and for reasonable attorney’s fees and litigation fees included.” *Id.* As discussed above, the trial court did not award attorney’s fees and expert witness costs to Defendants, and Defendants did not appeal the trial court’s failure to make such an award.

Bayou Bridge timely filed a writ application from the court of appeal's July 15, 2020 decision, which application was granted by this Court for briefing purposes on December 8, 2020. Defendants did not seek writs from the court of appeal's decision.

### **SPECIFICATION OF ERRORS**

The court of appeal erred in awarding Defendants attorney's fees and expert witness costs pursuant to Louisiana Revised Statutes 13:5111 because:

- Bayou Bridge is not “the State of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and
- Alternatively, the present action does not involve a proceeding “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.”

### **LAW AND ARGUMENT**

Under Louisiana law, attorney's fees are not allowed except where authorized by statute or contract. *DOTD v. Williamson*, 597 So. 2d. 439, 441 (La. 1992). Louisiana Revised Statutes 13:5111, the statute relied upon by the court of appeal for its award in the present case, provides, in pertinent part, that:

[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.

La. R.S. 13:5111(A). By its plain terms, Section 13:5111 allows an award of attorney's fees<sup>5</sup> only in proceedings: (a) “brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them,” and (b) “for compensation for the taking of property by the defendant, other than through an expropriation proceeding.” La. R.S. 13:5111(A). Because neither of these two requirements is satisfied here, the court of appeal's application of Section 13:5111 to the circumstances of this case is manifestly incorrect and should be reversed.

#### **I. Bayou Bridge, a private entity with the power of expropriation, is not an agent of the State of Louisiana within the purview of La. R.S. 13:5111.**

Apparently conceding that Bayou Bridge is not “the State of Louisiana, a parish, or municipality or other political subdivision,” the Third Circuit relied upon the “agent” language of Section 13:5111 to render the statute applicable, holding that “[a]t the time BBP violated the

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<sup>5</sup> It should be noted that Section 13:5111 does not provide for expert witness fees at all, but rather merely attorney's fees.

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.” CA-19-565 at p.32. The court cited a single federal Fifth Circuit Court of Appeals decision (*Mongrue v. Monsanto Co.*, 249 F.3d 422 (5th Cir. 2001)) in support of this remarkable and wholly unprecedented holding.

Critically, the court ignored prior decisions of its own and other circuits construing nearly identical language in a similar statute. Specifically, a prior version of Louisiana Revised Statutes 19:201 authorized an award of attorney’s fees in the related context of unsuccessful expropriation actions, stating as follows:

A court of Louisiana having jurisdiction of **a proceeding instituted by the State of Louisiana, a parish, a municipality or an agency of any of them vested with the power of expropriation**, to acquire real property by expropriation, shall award the owner of any right, or title to, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney fees actually incurred because of the expropriation proceeding, if the final judgment is that the plaintiff cannot acquire the real property by expropriation or if the action is abandoned by the plaintiff.

La. R.S. 19:201 (1972) (emphasis added).<sup>6</sup> Construing the bolded language, two courts of appeal (including the Third Circuit) held that attorney’s fees could **not** be awarded against a private pipeline entity under the statute’s plain language, as such entities are not “agents” of state government when expropriating property. *See Pipeline Tech. VI, LLC v. Ristroph*, 2007-CA-1210 (La. App. 1st Cir. 5/2/08), 991 So. 2d 1, 4-5, *writ denied*, 2008-C-1676 (La. 10/24/08), 992 So. 2d 1037, *cert. denied*, 556 U.S. 1106 (2009); *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So. 2d 4, 7 (La. App. 3d Cir.), *writ denied*, 350 So. 2d 901 (La. 1977). In both cases, this Court denied writs.

In *Ledoux*, the Third Circuit held that “19:201 allows attorney fees under the specified conditions to an owner, *only* when the appropriating authority is the *State of Louisiana, a parish, a municipality or an agency of any of them.*” 347 So. 2d at 7 (emphasis in original). The court reasoned that:

[t]he Legislature in enacting this section, for whatever reason, limited recovery of attorney fees to unsuccessful expropriation proceedings brought by the State, its political subdivisions and agencies. We are powerless to extend its provisions by analogy to expropriators not included within its scope. Private entities with the power to expropriate are not subject to the **penalty** set out in LSA-R.S. 19:201.

*Id.* (emphasis added).

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<sup>6</sup> The then-applicable statutory language is cited in full in *Ristroph*, 991 So. 2d at 3.

In *Ristroph*, the First Circuit reached the same holding. There, the court distinguished the *Mongrue* decision that had been rendered by the United States Fifth Circuit Court of Appeals after *Ledoux* was decided (and upon which the Third Circuit expressly relied in the present case), noting that the relevant “agency” language<sup>7</sup> in *Mongrue* was: (1) “dicta”; (2) “taken out of context”; (3) “not about an individual’s right to attorney’s fees”; and (4) not decided by a Louisiana court. *Ristroph*, 991 So. 2d at 4. The court further noted that the “discussion of ‘agency’ or ‘agent’ was not the basis of the *Mongrue* holding,” then went on to reject the landowner’s argument of “agency” based upon the generic, common law meaning of the term given that the pipeline had no contract with the State and did not transact affairs on behalf of the state (or any of the other listed governmental bodies). *Id.* Finally, the court noted that the structure of the “expropriating authorities” statute, Louisiana Revised Statutes 19:2, itself implies that the various private entities with the power of expropriation are not state agents because those entities are described separate and apart from “the state” and its “political subdivisions.” *Id.* Therefore, for all of these reasons, the court agreed with the Third Circuit’s prior decision in *Ledoux*, holding that:

[a]s in *LeDoux*, the expropriating authority here is a private entity, and not the state, a parish, a municipality, or an agency of any of them; hence the provisions of La. R.S. 19:201 do not apply. We agree with the holding in *LeDoux*, and **no straining of the word “agency” can make the statute apply**. Therefore, we are powerless to extend to [the landowner] the attorney fees set forth in La.R.S. 19:201; [the pipeline company] does not fit within the statute.

*Id.* at 5 (emphasis added).

The *Ristroph* decision apparently did not go unnoticed by the Louisiana Legislature, which thereafter specifically amended Section 19:201 to allow attorney’s 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 Section 13:5111, which retains the listing of state governmental expropriating authorities that was contained in the original version of Section 19:201. Clearly, the Legislature knew how to change the statutory language to capture private expropriating entities when it wanted to; it simply chose not to do so in the context of Section

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<sup>7</sup> In *Mongrue*, the federal court of appeals held that a private entity not statutorily authorized to expropriate property could not be liable for a “taking.” The court stated in dicta that “[f]or a private entity to qualify under Louisiana law as an agent of the government for the purposes of establishing liability for an unconstitutional taking, the entity must have been expressly delegated the power of eminent domain.” 249 F.3d at 429.

13:5111 as it did in the amended version of Section 19:201. Indeed, the Legislature amended the Louisiana Governmental Claims Act (La. R.S. 13:5101-5113) of which Section 13:5111 is part, on multiple occasions since the 2012 amendment of Section 19:201 but did not change the language of Section 13:5111. *See* La. R.S. 13:5105; 13:5106; 13:5107; 13:5108.1; 13:5109.1. *Cf Rivet v. DOTD*, 96-C-0145 (La. 9/5/96), 680 So. 2d 1154, 1160 (holding that the legislature’s failure to amend the language of Section 13:5111 when it reenacted the statute after amending identical language in related statutes (there, La. R.S. 19:8 and La. R.S. 48:453(E)) “evidence[d] a clear intent on the part of the legislature” to limit Section 13:5111 to the language retained in that statute.).

The Third Circuit’s ruling in the present case ignores the statutory history of this parallel provision as well as the prior cases construing the virtually identical language of that provision, including the *Ledoux* decision rendered by a prior panel of its own circuit. Stated simply, there is no basis in Louisiana law to conclude that a private expropriating entity is an “agent” of the State of Louisiana for the purpose of Section 13:5111, and the courts that addressed the issue in the virtually identical circumstances of Section 19:201 are directly contrary to the position taken by the Third Circuit in the present case.<sup>8</sup> Therefore, considering these courts’ prior interpretations of the nearly identical language of Section 19:201 and the Legislature’s failure to alter the language of Section 13:5111 when it subsequently amended Section 19:201, the court of appeal’s holding that Section 13:5111 applies in the present case to private pipeline entity Bayou Bridge should be reversed, along with the court’s award of attorney’s fees and expert witness fees rendered pursuant to that statute.

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<sup>8</sup> In their writ opposition, instead of focusing on the specific language of Section 13:5111 and the pertinent authorities described above, Defendants discussed cases on the issue of whether an expropriating entity is a “state actor” for the purpose of 28 U.S.C. § 1983 and other unrelated statutes that do not share the same or similar language. Stated simply, it makes no difference whether Bayou Bridge would be considered a “state actor” or a “quasi public corporation” or a “public service corporation” under those other unrelated statutes (which Bayou Bridge denies). What is at issue in the present case is solely whether Bayou Bridge acted as an “agency” of the “state of Louisiana” within the meaning of Section 13:5111 such that it is amenable to the attorney’s fee award imposed by the court of appeal. The Louisiana courts of appeal that have addressed this specific issue in the context of the related and nearly identically-worded statute Louisiana Revised Statutes 19:201 have **uniformly and correctly held** that a private entity with expropriation power is **not** an “agency” of the state within the meaning of the statute. Defendants cannot simply ignore or wish these authorities away.

**II. In any event, Defendants' claims were not for "the taking of property . . . other than through an expropriation proceeding."**

Wholly aside from the "agency" issue, the Third Circuit's holding awarding attorney's fees is also erroneous because the present action does not involve a proceeding "for compensation for the taking of property by the defendant, other than through an expropriation proceeding." As discussed above, Bayou Bridge brought the present action **as an expropriation proceeding**, and the trial court **granted the expropriation** of Defendants' interests in a judgment affirmed by the Third Circuit in the present appeal. Though Defendants reconvened to allege trespass and violations of their due process rights, they expressly represented that these reconventional claims were **not** for inverse condemnation (which made sense given that Bayou Bridge had sought expropriation of the property at issue in the principal demand, so the issues of expropriation and just compensation were already set to be litigated in the action). The Third Circuit noted as much in its decision:

In addressing this contention [that the trial court 'mistakenly confused' Defendants' reconventional demands with other constitutional claims when awarding trespass damages], we point out that Defendants went to great lengths in [their] pre-trial memorandum to advise the trial court that their reconventional demands were not to be considered as a claim for inverse condemnation. Defendants state: "An inverse condemnation proceeding would allow BBP to treat this violation as an inadvertent mix-up or administrative error, and essentially back-date an expropriation judgment it has not yet obtained[.]" Defendants made no argument to the trial court or before this court that this matter should have been considered a claim for inverse condemnation. Rather, Defendants frame their reconventional demand as a claim against BBP "for violations of due process and the right to property under the United States and Louisiana constitutions" and that they suffered damage "resulting from the company's construction of the pipeline without full executable legal right to do so."

CA-19-565 at p.23 n.13.

However, despite noting that Defendants' claims were admittedly **not** takings/inverse condemnation claims, the Third Circuit awarded attorney's fees expressly pursuant to Section 13:5111, which, by its plain terms, applies **only** to such takings/inverse condemnation/appropriation claims. Numerous courts, including this Court, have recognized this limited applicability of the statute. *See Estate of Patout v. City of New Iberia*, 98-C-0961 (La. 7/7/99), 738 So. 2d 544, 555 (holding that prescriptive period of La. R.S. 13:5111 does not apply where the plaintiff's claims for city's unauthorized dumping of trash on their property "cannot be characterized as actions for compensation for property taken by the state"); *Rivet*, 680 So. 2d at 1160 (noting that La. R.S. 13:5111 applies to attorney's fee awards "in this inverse condemnation suit," while La. R.S. 19:8 applies to attorney's fee awards in expropriation actions); *Unlimited*

*Horizons, LLC v. Parish of E. Baton Rouge*, 99-CA-0889 (La. App. 1st Cir. 5/12/00), 761 So. 2d 753, 758 (refusing to apply Section 13:5111 to a declaratory judgment claim regarding the propriety of the parish’s action in revoking a statutory right-of-way dedication and reasoning that “[w]e find the language of this statute to be clear and unambiguous that the three-year prescriptive period applies only to actions that seek compensation for property taken by a parish”); *Whipp v. Bayou Plaquemine Brule Drainage*, 476 So. 2d 1047 (La. App. 3d Cir. 1985) (attorney’s fees are not available under Section 13:5111 in action for damaging, but not taking, of property or appropriation by the state). *See also Gravolet v. Board of Comm’rs*, 95-CA-2477 (La. App. 4th Cir. 6/12/96), 676 So. 2d 199, 204 (stating that Section 13:5111 provides the standard for an attorney’s fee award in inverse condemnation cases); *Huckabay v. Red River Waterway Comm’n*, No. 27,113, 1995 La. App. LEXIS 3168, at \*18 (La. App. 2d Cir. Nov. 22, 1995) (“As we have determined that a ‘taking’ occurred as the result of the Commission’s actions, we find that the trial court was correct in concluding that the Huckabays were entitled to an award for attorney fees.”). The present case is not a case like the *Williams* decision<sup>9</sup> cited by Defendants in their writ opposition in which the entity enjoying expropriation authority did not **ever** seek and obtain the required expropriation judgment such that a taking occurred and the landowner had to expend attorney’s fees suing for inverse condemnation to obtain the just compensation he or she was owed. Thus, it falls outside of Section 13:5111.

To avoid their prior disavowal of their reconventional demand as an “inverse condemnation” claim, Defendants made (in their writ opposition) a convoluted argument that Louisiana law recognizes a difference between “inverse condemnation” actions, which they claim involve only “unintentional, inadvertent” conduct, and “takings” actions, which they claim involve “willful, wanton, and reckless” action. The law makes no such distinction. As this Court recently made clear, an inverse condemnation action is merely the procedural vehicle for asserting a “takings” claim. *See Crooks v. State*, No. 2019-C-0160 (La. 1/29/2020), 2020 La. LEXIS 217, at \*14 (“The ‘inverse condemnation’ action ‘provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain **where no expropriation has commenced.**’ *Id.* Inverse condemnation claims derive from the Takings Clauses contained in both the Fifth Amendment of

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<sup>9</sup> *Williams v. City of Baton Rouge*, 98-1981 (La. 4/13/99), 731 So. 2d 240.

the U.S. Constitution and Art. I, § 4 of the Louisiana Constitution. ‘The action for inverse condemnation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid . . . .’”) (emphasis added). This principle is not changed by the fact that the law allows for the imposition of additional, **tort-based** damages for trespass where the entity with expropriation authority acted in bad faith or unreasonably such that it committed a separate tort. *See Williams*, 731 So. 2d at 248 (where the city entered and occupied the plaintiffs’ property not out of “good faith error” but as a “bad faith trespasser,” the court held that “in addition to property damages resulting from th[e] inverse condemnation, plaintiffs are also entitled to general damages under Article 2315.”). Stated otherwise, *Williams* stands only for the proposition that tort-based damages may be imposed in addition to the “just compensation” regularly awarded in an inverse condemnation (or expropriation) proceeding; it does not hold that such damages distinguish a “taking” claim from an “inverse condemnation” claim as Defendants suggest.

Here, both the court of appeal’s description of the basis for its award and Defendants’ own representations to the trial court make clear that the damages awarded to Defendants by the court of appeal were for the “due process” violation, not a “taking.” This makes perfect sense given that Bayou Bridge successfully expropriated the requested right of way burdening Defendants’ interest in this action. Louisiana law sets up a system in which a landowner is awarded statutory attorney’s fees if: (1) the expropriating entity sues **unsuccessfully** for expropriation, causing the landowner to incur attorney’s fees to defend the meritless claim (*see* La. R.S. 19:201)<sup>10</sup>; (2) the governmental expropriating entity takes the property **without ever undertaking an expropriation proceeding**, causing the landowner to incur attorney’s fees to file suit to obtain just compensation for the taking of his or her property (*see* La. R.S. 13:5111)<sup>11</sup>; or (3) in a **successful** expropriation proceeding, the court’s **just compensation award exceeds the highest offer** made by the expropriating entity

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<sup>10</sup> *See, e.g., St. Tammany Parish Hosp. Serv. Dist. No. 2 v. Schneider*, 96-CA-2798 (La. App. 1st Cir. 2/20/98), 707 So. 2d 156, 157 (holding that property owner’s right to recover attorney’s fee under La. R.S. 19:201 was contingent upon either the rendition of a final judgment to the effect that the expropriating authority cannot acquire the property or the abandonment of the expropriation proceeding by the expropriating authority); *Terrebonne Parish Police Jury v. Kelly*, 472 So. 2d 229, 233 (La. App. 1st Cir. 1985) (because the trial court’s dismissal of the expropriation proceeding was reversed on appeal, the trial court’s attorney’s fee award under La. R.S. 19:201 was also reversed as “improperly awarded.”)

<sup>11</sup> *See, e.g., Mitter v. St. John the Baptist Parish*, 05-CA-375 (La. App. 5th Cir. 12/27/05), 920 So. 2d 263, 266, *writ denied*, 2006-C-0254 (La. 5/26/06), 930 So. 2d 21 (remanding for award of attorney’s fees under La. R.S. 13:5111 after finding that a taking had occurred in action brought against Parish, which had caused erosion and flooding of the plaintiff’s property but had not filed an expropriation action); *Taylor v. State*, 03-219 (La. App. 3d Cir. 6/23/04), 879 So. 2d 307, *writ denied*, 2004-C-1887 (La. 10/29/04), 885 So. 2d 595 (awarding attorney’s fees under La. R.S. 13:5111 in successful takings action in which the public entity had not filed an expropriation action).

during the required negotiations (*see* La. R.S. 19:8(A)(3)). None of these statutes applies in the present case to allow for an attorney’s fee award to a landowner who was a defendant in a successful expropriation action like the present action brought by Bayou Bridge where the (unappealed) just compensation award equaled Bayou Bridge’s highest offer.<sup>12</sup>

In sum, Defendants’ reconventional demand was not for a taking/inverse condemnation seeking just compensation for Bayou Bridge’s servitude over their property; rather, it was a claim for tort and due-process-based damages outside of the “just compensation” that was awarded to them in the expropriation claim brought by Bayou Bridge as the action’s main demand. Because Section 13:5111 provides for the award of attorney’s fees **only** in conjunction with an inverse condemnation claim, the court of appeal’s award of attorney’s fees and expert costs under that statute cannot stand even if Bayou Bridge were considered an “agent” of the state (which is denied, as discussed in the preceding section).

### CONCLUSION

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

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<sup>12</sup> *See* 5 R. at 1021.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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