

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 0045

ENTERPRISE PRODUCTS OPERATING, LLC

VERSUS

SOUTHWOOD TERMINAL, L.L.C.

Judgment Rendered: NOV 08 2018

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Appealed from the  
23<sup>rd</sup> Judicial District Court  
In and for the Parish of Ascension, Louisiana  
Trial Court Number 115903

Honorable Jason Verdigets, Judge

\* \* \* \* \*

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\* \* \* \* \*

**BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.**

*JEW*  
*J*  
*J.P.*

## WELCH, J.

In this expropriation suit, Southwood Terminal, L.L.C. (“Southwood”) appeals a judgment rendered in accordance with a jury verdict awarding it just compensation in the total amount of \$242,400.00 for both the property and improvements taken and the severance damages. For the reasons that follow, we affirm the judgment.

### FACTUAL AND PROCEDURAL HISTORY

The underlying facts of this case are not in dispute. Enterprise Products Operating, LLC (“Enterprise”) is engaged in the business of transporting petroleum,<sup>1</sup> petroleum products, and liquid hydrocarbon products, including natural gas liquids, and as such, is a “common carrier” as defined by La. R.S. 45:251(1).<sup>2</sup> As a common carrier, Enterprise has the statutory right to expropriate private property under state expropriation law for use in its common carrier business. See La. R.S. 45:254<sup>3</sup> and La. R.S. 19:2.<sup>4</sup>

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<sup>1</sup> See La. R.S. 45:251(2) (defining “[p]etroleum” as “crude petroleum, crude petroleum products, distillate, condensate, liquefied petroleum gas, any hydrocarbon in a liquid state, any product in a liquid state which is derived in whole or in part from any hydrocarbon, and any mixture or mixtures thereof...” but not including “methanol synthetically produced from coal, lignite, or petroleum coke.”)

<sup>2</sup> Louisiana Revised Statutes 45:251(1) defines “[c]ommon carrier” as “all persons engaged in the transportation of petroleum as public utilities and common carriers for hire; or which on proper showing may be legally held a common carrier from the nature of the business conducted, or from the manner in which such business is carried on.”

<sup>3</sup> Louisiana Revised Statutes 45:254 provides, in pertinent part:

All persons included in the definition of common carrier pipe lines as set forth in R.S. 45:251 have the right of expropriation with authority to expropriate private property under the state expropriation laws for use in its common carrier pipe line business, and have the right to lay, maintain and operate pipe lines, together with telegraph and telephone lines necessary and incident to the operation of these pipe lines, over private property thus expropriated, and have the further right to lay, maintain and operate pipe lines along, across, over and under any navigable stream or public highway, street, bridge or other public place, and also have the authority, under the right of expropriation herein conferred, to cross railroads, street railways, and other common carrier pipe lines by expropriating property necessary for the crossing under the expropriation laws of this state. ...

<sup>4</sup> Louisiana Revised Statutes 19:2 provides, in relevant part:

Southwood is the owner of a tract of land situated on the bank of the Mississippi River in Geismar, Louisiana. On May 2, 2016, Enterprise filed a petition for expropriation seeking a perpetual servitude across the property for a pipeline to transport petroleum, as well as temporary workspace servitudes. Enterprise asserted that it had negotiated with Southwood for the purchase of the servitude, but had been unable to reach an agreement with Southwood as to the acquisition of the servitude or the compensation to be paid.

Southwood initially challenged both Enterprise's right to expropriate the land as well as the amount of compensation it offered.<sup>5</sup> However, Southwood and Enterprise subsequently settled the issue of the expropriation and entered into a consent judgment dated December 8, 2016. The consent judgment granted Enterprise a right-of-way, perpetual pipeline servitude, and temporary workspace servitudes on Southwood's property, which were further described in a servitude agreement attached to the consent judgment. One of the terms of the servitude agreement included language that would require Southwood to notify Enterprise of any future construction on the portion of the property within the servitude so that Enterprise could confirm in writing that such construction would not interfere with Enterprise's rights under the servitude agreement. The consent judgment also

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Prior to filing an expropriation suit, an expropriating authority shall attempt in good faith to reach an agreement as to compensation with the owner of the property sought to be taken and comply with all of the requirements of R.S. 19:2.2. If unable to reach an agreement with the owner as to compensation, any of the following may expropriate needed property:

\* \* \*

(8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251.

<sup>5</sup> At the time the expropriation suit was filed, Southwood had lease agreements with Carline's Geismar Fleet, Inc. and Carline Management Company, Inc. (collectively "Carline") for a portion of the bature. Carline, who provided services to barges and other traffic on the Mississippi River, filed a petition to intervene in the suit; however, the intervention was subsequently dismissed.

reserved the issue of the amount of just compensation owed by Enterprise to Southwood for the servitude to a jury trial.

A jury trial with respect to the amount of just compensation—both for the property taken and the severance damages—was subsequently held. Notably, Enterprise did not dispute that it owed just compensation for the land taken to build the pipeline and severance damages for the inland (also referred to as “upland”) portion of the tract. Indeed, each party’s expert appraiser placed similar values on the just compensation for both the value of land taken for the right-of-way and the severance damages for the inland portion of the property. What the expert appraisers disagreed on, and what the trial focused on, was the severance damages, if any, for the batture. Southwood essentially claimed that it intended to eventually sell or lease its land for further industrial development, that it had been contacted by interested parties regarding the purchase of the property, and that the pipeline rendered the prospect of any future industrial development unlikely. More specifically, Southwood contended that the pipeline on the batture precluded the construction of a dock. Enterprise, however, claimed that they were willing to work with Southwood or any future owner of the property regarding future industrial development and pointed to other instances where they allowed docks to be built over similar pipelines.

The jury subsequently returned a verdict of \$92,400.00 for “just compensation for the property and improvements taken from Southwood,” to build the pipeline and \$150,000.00 for “just compensation for the decreased value of, or severance damages to, the inland property owned by Southwood” as a result of the pipeline right-of-way.<sup>6</sup> However, the jury found that Southwood failed to meet its burden of proving that the pipeline right-of-way would prevent a future purchaser

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<sup>6</sup> Notably, the just compensation awarded by the jury to Southwood for the property and improvements to build the pipeline and the severance damages to the inland property was the value placed on those two elements of compensation by Southwood’s expert appraiser.

of the batture from constructing a dock; and therefore, the jury did not award Southwood severance damages for the batture.

A judgment in accordance with the jury verdict was signed on May 17, 2017, and it is from this judgment that Southwood has appealed.<sup>7</sup> On appeal, Southwood challenges the jury verdict form, arguing that it misstated the law by limiting the just compensation that the jury could award for severance damages to the batture. Southwood also argues that the jury verdict form was confusing and misleading because it required the jury to determine whether a future purchaser would be prevented from putting the property to a specific use, while at the same time telling the jury that it could not rely on speculation or mere possibility.

## LAW AND DISCUSSION

### Jury Interrogatories/Verdict Form

In reviewing a jury verdict form, this court employs a manifest error-abuse of discretion standard; the verdict form may not be set aside unless the form is “so inadequate that the jury is precluded from reaching a verdict based on correct law and facts.” **Ford v. Beam Radiator, Inc.**, 96-2787 (La. App. 1<sup>st</sup> Cir. 2/20/98), 708

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<sup>7</sup> The May 17, 2017 judgment also provided: “IT IS ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Enterprise granting Enterprise a right-of-way and servitude in accordance with this [c]ourt’s Consent Judgment of December 8, 2016.” This provision was the subject of a rule to show cause why the appeal should not be dismissed issued by this Court on January 22, 2018. The rule to show cause was issued because the May 17, 2017 judgment appeared to lack the specificity required to be a final judgment because the judgment referenced a document outside the judgment (the consent judgment of December 8, 2016), which was not attached to the judgment. The merits of the rule to show cause was subsequently referred to this panel. See Enterprise Products Operating, LLC v. Southwood Terminal, L.L.C. 2018-0045 (La. App. 1<sup>st</sup> Cir. 5/1/18)(*unpublished action*).

Based on our review of the parties’ response to the rule to show cause and the record on appeal, including the December 8, 2016 consent judgment, we find that the reference to the December 8, 2016 consent judgment in the May 17, 2017 judgment is surplus language that does not render the judgment invalid. See Hinchman v. International Broth. of Elec. Workers, Local Union No. 130, 292 So.2d 717, 719 (La. 1974) (holding that when a judgment is complete in all respects, the inclusion of surplus language does not affect the validity of the judgment). The only issues to be resolved in this expropriation case were the taking and the just compensation. See La. R.S. 19:2.1, 19:4 and 19:8. The parties entered into the December 8, 2016 consent judgment as to the taking; thus, the jury decided only the issue of just compensation. The reference to the consent judgment could be removed from the judgment without affecting its substance, and the jury’s verdict would still be accurately memorialized. Accordingly, we maintain this appeal.

So.2d 1158, 1160. Jury forms or interrogatories that are misleading or confusing may be reversible error. *Id.*

Jury interrogatories must fairly and reasonably point out the issues to guide the jury in reaching an appropriate verdict; if the verdict form does not adequately set forth the issues to be decided by the jury (*i.e.*, omits an applicable essential legal principle or is misleading and confusing), such interrogatories may constitute reversible error. **Abney v. Smith**, 2009-0794 (La. App. 1<sup>st</sup> Cir. 2/8/10), 35 So.3d 279, 283, writ denied, 2010-0547 (La. 5/7/10), 34 So.3d 864.

### Expropriation and Just Compensation

The Louisiana Constitution addresses the expropriation of private property by a private entity for public purposes and it 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; in such proceedings, whether the purpose is public and necessary shall be a judicial question.” La. Const. art. I, § 4(B)(4). The Louisiana Constitution also states that “[i]n 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.” La. Const. art. I, § 4(B)(5). See also La. R.S. 19:9(B) (providing that the defendant in an expropriation proceeding “shall be compensated to the full extent of his loss.”) “[T]he 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. La. Const. art. I, § 4(B)(5).

Louisiana Revised Statutes 19:9 provides additional guidance as to how to determine the “full extent of [the] loss.” It provides that “[i]n determining the value of the property to be expropriated, ... the basis of compensation shall be the

value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any general or specific benefits derived by the owner from the contemplated improvement or work.” La. R.S. 19:9(A); see also **Exxon Pipeline Co. v. Hill**, 2000-2535, 2000-2559 (La. 5/15/01), 788 So.2d 1154, 1159-1160. The legislature and courts have developed rules that accept fair market value of the property as a relevant consideration in determining just compensation. *Id.*; see also **West Jefferson Levee Dist. v. Coast Quality Constr. Corp.**, 93-1718 (La. 5/23/94), 640 So.2d 1258, 1277-1280, cert. denied, 513 U.S. 1083, 115 S.Ct. 736, 130 L.Ed.2d 639 (1995). Fair market value, in turn, has consistently been defined as the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to law. **Exxon Pipeline Co.**, 788 So.2d at 160; **West Jefferson Levee Dist.**, 640 So.2d at 1273.

Severance damages may be awarded in expropriation cases when appropriate or properly proven. **State, Department of Transp. and Development v. Restructure Partners, L.L.C.**, 2007-1745 (La. App. 1<sup>st</sup> Cir. 3/26/08), 985 So.2d 212, 221, writ denied, 2008-1269 (La. 9/19/08), 992 So.2d 937. The term “severance damages” describes those compensable damages that flow from the partial expropriation of a tract of land, *i.e.*, the difference between the value of the remaining property before and after the taking. **Restructure Partners, L.L.C.**, 985 So.2d 221. Stated differently, severance damages are warranted when a landowner proves he has been deprived of the full potential of future development of the property due to the taking. See **State Through Dept. of Highways v. Denham Springs Development Co., Inc.**, 307 So.2d 304, 307 (La. 1975); **State Through Dept. of Highways v. Wilson**, 372 So.2d 632, 634 (La. App. 1<sup>st</sup> Cir. 1979); **State Through Dept. of Highways v. Roland J. Robert Distributor, Inc.**, 405 So.2d 1174, 1177-1178.

The landowner has the burden of proving severance damages with *legal certainty* by a preponderance of the evidence. **Denham Springs Development Co., Inc.**, 307 So.2d at 307; **Wilson**, 372 So.2d at 634. *Speculation*, conjecture, *mere possibility*, and even unsupported probability are not sufficient to support a judgment. **Restructure Partners, L.L.C.**, 985 So.2d at 220; see also **West Jefferson Levee Dist.**, 640 So.2d at 1297 (stating that “[t]he burden of proving severance damages is on the landowner” and that “[s]everance damages must be shown to a reasonable certainty and must not be too remote or speculative, for the mere possibility of severance damages is an insufficient basis for an award”).

Thus, in this case, in order to recover severance damages, Southwood had to prove, with legal certainty (*i.e.* without relying on speculation, conjecture, mere possibility, or unsupported probability) that, after the taking, there was a diminution in the value of the remainder of its property or they were deprived of the full potential for the future development of the property.

Discussion of the Record

Herein, the interrogatories on the jury verdict form (R1563) asked the following:

1. What amount of money do you find is just compensation for the property and improvements taken from Southwood ... by Enterprise ... to build a pipeline?

\$ \_\_\_\_\_

2. What amount, if any, is just compensation for the decreased value of, or severance damages to, the inland property owned by Southwood ... as a result of Enterprise’s pipeline right-of-way?

\$ \_\_\_\_\_

3. Do you find, by a preponderance of the evidence, and without relying on speculation or mere possibility that Enterprise’s pipeline right-of-way will prevent any future purchaser of the batture property from constructing a barge dock on that property?

YES \_\_\_\_\_

NO \_\_\_\_\_



(If your answer is no, please sign and date this form and return it to the Court.)

4. If your answer to interrogatory number 4 [*sic*] is yes, what amount is just compensation for the decreased value of, or severance damages to the batture property owned by Southwood ... as a result of Enterprise's pipeline?

\$ \_\_\_\_\_

The jury returned its verdict by writing \$92,400.00 in response to interrogatory 1 and by writing \$150,000.00 in response to the interrogatory 2. The jury responded negatively to interrogatory 3; hence, the jury did not respond to interrogatory 4.

At trial, Southwood raised a number of objections with respect to the jury verdict form. Specifically, Southwood objected to the reference to specific parts of the property in interrogatories 1-3, such as "inland property," "pipeline right-of-way" and "batture," claiming that doing so could unduly limit their possible recovery. Southwood also objected to the wording of interrogatory 3, claiming that the use of the words "speculation" and "mere possibility" were potentially prejudicial, causing the jury to weigh too heavily this element of the analysis. Southwood contended that this language should not be used in the jury verdict form, but rather should appear in the jury charges or general law portion of the jury instructions. Southwood requested that the interrogatories regarding severance damages to the inland property and the batture be combined into a single question and not a "yes" or "no" question. On appeal, Southwood continues these arguments.

First, on appeal, Southwood contends that the jury verdict form, specifically interrogatory 3, misstated the applicable law. In this case, the trial revolved around three specific issues concerning the just compensation for Southwood's property: the land expropriated for the pipeline itself; the severance damages to the upland/inland portion of the property; and the severance damages to the batture.

Notably, there was generally no dispute that just compensation was due to Southwood for the taking of land for the pipeline itself and severance damages for the upland/inland portion of the property. Therefore, a jury interrogatory as to whether Southwood met its burden of proof as to those two elements of their just compensation was not necessary for those two categories, as reflected in jury interrogatories 1 and 2.

However, as previously noted, the severance damages for the batture, if any, was the primary dispute at trial. Southwood contended that it was entitled to severance damages due to a change in the potential future use of the batture, as Southwood maintained that it planned to sell or lease its land, including the batture, for further industrial development, which included the construction of a dock on the batture. Southwood's expert appraiser, Henry Tatje, both prepared a report and testified at trial as to, among other things, the severance damages for the batture. Mr. Tatje explained that he valued the entire property with riverfront access based on the assumption that the batture could be developed for a dock and then he valued the property without riverfront access based on the assumption that the batture could not be developed for a dock. Based on these assumptions, Mr. Tatje originally valued the severance damages for the batture, *i.e.*, the difference between the two values, at approximately \$3,500,000. However, at trial, he reduced this figure to approximately \$3,100,000 after he conceded the possibility that a dock could eventually be built on a different part of the batture (not over the pipeline), and consequently, he reduced his estimate for severance damages by about \$400,000.

On the other hand, Enterprise's expert appraiser, Michael Truax, valued the severance damages for the batture at \$0, which was based on the assumption that the pipeline would not interfere with the construction of a dock. In reaching this valuation, Mr. Truax consulted with two marine engineers and confirmed that

because of the depth of the pipeline, there would be no issues with the construction of a dock. In addition, Mr. Truax cited other instances where Enterprise had worked with other landowners in similar circumstances to accommodate the construction of docks. Mr. Truax explained that severance damages, which are based on a diminution in value of the remaining property, are a function of use, and if the potential use of the property does not change or is the same (*i.e.*, the potential use of the batture for a dock), then the value will remain the same. Hence, he maintained that in this case, because the construction of the pipeline did not interfere with the construction of a dock on the batture (the potential use of the batture), there were no severance damages.

In addition, Enterprise offered the testimony of John Denman, an engineer and the project manager for the pipeline. Mr. Denman explained that the pipeline was about 105 feet below the mud line (the water bottom of the Mississippi River) and goes through a very dense layer of sand, which is load bearing (*i.e.*, able to bear the load of a structure like a dock) and cannot be penetrated by pile drivings. Thus, a future buyer of the batture would not be precluded from constructing a dock over the pipeline. In addition, Mr. Denman noted that pursuant to the servitude agreement, Enterprise could not object to any structure, including a dock, from being placed over the pipeline, unless that structure created a hazard or interfered with pipeline operations and that Enterprise had allowed other docks to be built over its pipelines.

Southwood argues that because of the manner in which the trial court worded interrogatory 3, it was deprived of the opportunity to recover severance damages in the event that the construction of a future dock was indeed possible. However, the cornerstone of Southwood's case was essentially the opinion by Mr. Tatje and other lay witnesses that the pipeline would prevent or preclude the future development of the property because there was no chance that a dock could ever be

built in the future, and thus future potential buyers would be scared away by the pipeline's presence. Notably, Mr. Tatje never—in his testimony or expert report—assumed that it was possible to build a dock over the pipeline; rather, he acknowledged the possibility that the severance damages for the batture might be less, *i.e.* \$3,100,00.00, if the construction of a dock was possible in a different location on the batture, but not over the pipeline. Indeed, in a fleeting concession, Mr. Tatje recognized that if a dock could be built as planned, there “might not be” any additional diminution of value in the batture.

It is well settled that the jury verdict form must not only reflect the law, but also, the facts of the case. By focusing on the three categories of damages—compensation for the property taken for the pipeline, the severance damages for the inland portion, and the severance damages for the batture—we cannot say that the trial court was manifestly erroneous or abused its discretion in its attempt to capture the contextual issues of the case in the jury verdict form.

As to the trial court's use of the words “speculation” and “mere possibility” in regards to Southwood's burden of proof, we find that they are indeed rooted in the applicable law. Although those words are not expressly found in the applicable expropriation statutes set forth above, those terms and principles are utilized throughout the controlling jurisprudence from both the Louisiana Supreme Court and this Court with respect to the landowner's burden of proof in a claim for severance damages. See **West Jefferson Levee Dist.**, 640 So.2d at 1297 (stating that “[t]he burden of proving severance damages is on the landowner” and that “[s]everance damages must be shown to a reasonable certainty and must not be too remote or speculative, for the mere possibility of severance damages is an insufficient basis for an award”) and **Restructure Partners, L.L.C.**, 985 So.2d at 220-221; **State Department of Transportation & Development v. Acadian Properties Northshore, L.L.C.**, 2016-1108 (La. App. 1<sup>st</sup> Cir. 4/12/17), 218 So.3d

136, 141, writ denied, 2017-0775 (La. 9/22/17), 228 So.3d 741 (stating that the burden of proof on the property owner in an expropriation case is to establish his claims by a reasonable preponderance of the evidence; speculation, conjecture, mere possibility, and even unsupported probability are not sufficient to support a judgment and that the landowner has the burden of proving severance damages with legal certainty by a preponderance of the evidence). As such, we find the inclusion of this language in the verdict form did not misstate the law and was neither erroneous nor an abuse of the trial court's discretion.

Therefore, based on our review of the record, the facts, and the applicable law, we find the trial court did not err in stating the law in interrogatory number 3 on the verdict form and that the language used correctly reflected the issues at trial—*i.e.*, the viability of a future dock—and that the burden of proof was on Southwood to prove such claims.

Next, on appeal, Southwood contends that even if interrogatory 3 on the verdict form correctly stated the law, the language misled or confused the jury. Southwood maintains that interrogatory 3 should have resembled interrogatories 1 and 2 and read: “What amount, if any, is just compensation for the decreased value of, or severance damages to, the batture property owned by Southwood... as a result of Enterprise's pipeline right-of-way?” Notably, this suggested language is the substance of interrogatory 4, which the jury did not respond to, since it responded negatively to interrogatory 3.

However, we find that Southwood's suggested wording for interrogatory 3 ignores the factual realities of the trial. Enterprise essentially agreed that just compensation for the pipeline right-of-way and severance damages for the upland/inland portion of the property were warranted and each party's respective expert appraisers arrived at approximately the same value. What Enterprise contested at trial, and what Southwood, therefore, had the burden of proving, was

whether severance damages were warranted for the batture. If the trial court had used language suggested by Southwood, then it would have been misstating the law and confusing the jury as Southwood first had the burden of proving a diminution in the value of the batture, and only then could the jury continue on to the issue of the amount of damages. This was not necessary for interrogatories 1 and 2, due to the issues at trial; however, it was necessary for interrogatory 3.

Furthermore, the record before us does not reveal any evidence of jury confusion. A jury verdict can be set aside on grounds of jury confusion if that confusion probably contributed to the verdict. See Picou v. Ferrara, 483 So.2d 915, 918 (La. 1986); Haney v. Lewis, 2013-2053 (La. App. 1<sup>st</sup> Cir. 9/8/14)(*unpublished*), writs denied, 2014-2087, 2014-2089 (La. 11/26/14), 152 So.3d 907 and 908 (following a jury verdict, a new trial was warranted because it was apparent to the trial court during its discussions with the jury that the jury was confused on the liability issue). In this case, the record reflects that the jury received their instructions and verdict form, retired to deliberate, asked one question (for copies of competing appraisals) and returned their verdict after 54 minutes. While evidence of actual confusion is not required in order to find the verdict form was misleading or confusing, it does bolster our finding herein that the verdict form was not confusing or misleading.

Accordingly, we cannot say that the jury verdict form, specifically interrogatory 3, misled the jury or confused the jury to the extent that it was prevented from dispensing justice.

### CONCLUSION

For all of the above and foregoing reasons, we find that the trial court did not misstate the law in interrogatory 3 of the jury verdict form and that the language of the interrogatory correctly reflected the facts and the issues at trial, as well as Southwood's burden of proof. Furthermore, the jury verdict form,

specifically interrogatory 3, did not mislead the jury to the extent that it was prevented from dispensing justice. Therefore, the May 17, 2017 judgment in accordance with the jury verdict is affirmed. All costs of this appeal are assessed to the defendant/appellant, Southwood Terminal, L.L.C.

**APPEAL MAINTAINED; AFFIRMED.**