

# Developments in trespass law and coastal restoration cases

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While land ownership rights in some states may be “relegated to the status of a poor relation,” in Louisiana these rights are the very cornerstones upon which our state’s constitution is built.<sup>1</sup> The Louisiana First Circuit Court of Appeal declared that the rights of land ownership are “fundamental” and therefore to remain “free and unmolested.”<sup>2</sup>

The law of trespass is based on the “fundamental sanctity of private property from arbitrary invasion.”<sup>3</sup> A trespass occurs when there is “an unlawful physical invasion of the property or possession of another.”<sup>4</sup>

Louisiana law is clear that acting outside the terms and scope of a servitude, or a right-of-way, is a trespass.<sup>5</sup> Established Louisiana law distinguishes between three types of trespass: (1) good faith,<sup>6</sup> (2) legal bad faith,<sup>7</sup> and (3) moral bad faith.<sup>8</sup>

The settled law of trespass harshly penalizes bad faith trespass for two reasons. First, private property rights are fundamental and enjoy sweeping constitutional protection.<sup>9</sup> Second, trespass can only be disincentivized by making the business risk of being caught too high for a company to insure against.<sup>10</sup>

At a minimum, disgorgement of profits is the remedy for bad faith trespass. According to settled Louisiana law, the forfeiture rule of recovery is intended to deter any man from “profit[ing] from his own wrongdoing.”<sup>11</sup> The trial court has vast discretion to determine the appropriate measure of damages under La. C.C. art. 1999.<sup>12</sup>



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The damage caused by a bad faith violation of the right to be free of intrusion on one’s own property is by definition insusceptible of precise calculation. In *Amoco Production Co. v. Texas Meridian Resources Exploration Inc.*, Texas Meridian forfeited two producing wells because it drilled them on Amoco’s property without Amoco’s permission.<sup>13</sup> The standard used is preponderance of the evidence, which may be met by direct or circumstantial evidence.<sup>14</sup>

In one of the first land-loss cases tried in federal court,<sup>15</sup> the trial judge engaged in an *Erie* guess and ruled that the defendants did not trespass when they allowed pipeline canals to exceed the promised widths in the right-of-way agreements.<sup>16</sup>

However, in January, the Louisiana Fourth Circuit

reviewed this issue in another land-loss case — *Morgan City Land and Fur Company, L.L.C. v. Tennessee Gas Pipeline Company, L.L.C.* — and reversed the trial court’s grant of the defendants’ summary judgment motion that under no set of facts could exceedance of the servitude by the widening of a pipeline canal be a trespass.

The *Morgan City* Fourth Circuit panel unanimously held that whether the defendants’ failure to honor the maximum widths of the right-of-way agreements was a product of mere “negligence” or an “intentional business decision” was a factual inquiry best decided by the jury.<sup>17</sup> In so holding, the panel relied upon *Terre Aux*

*Boeufs Land Co., Inc. v. J.R. Gray Barge Co.* for the principle that “a defendant may be held liable for an inadvertent trespass resulting from an intentional act[.]”<sup>18</sup>

This finding by the Fourth Circuit fits squarely within traditional Louisiana jurisprudence. For example, in *Lavergne v. Lawtell Gravity Drainage Dist. No. 11*, the court held that dredging a drainage canal constituted a trespass.<sup>19</sup> In *Turner v. La. Dept. of Highways*, the court held that erosion of a drainage channel outside any servitude area constituted a trespass.<sup>20</sup>

In *Miller v. Prairie Canal Co.*, the Third Circuit wrote in dicta that if a canal had widened beyond the dimensions of a pipeline servitude because of the canal company’s actions, rather than the narrowing of the canal that occurred in that case, then trespass would have been a viable cause of action.<sup>21</sup> Not only are intentional acts like trespasses triggered when defendants consciously desire an outcome, but they are also implicated when a defendant knows that “the result is substantially certain to follow from his conduct, whatever his desire may be as to that result.”<sup>22</sup>

Under the law, there is no material distinction between a pipeline trespass through dry land and a canal trespass through wetlands.

Recently, California legislators stiffened the penalty for trespass.<sup>23</sup> In doing so, they brought California law on trespass in harmony with Louisiana law.<sup>24</sup> California law now recognizes two categories of bad faith trespass: One that is a simple mistake (Louisiana’s legal bad faith), and one that is the product of malice, oppression, or fraud (Louisiana’s moral bad faith).

In 2019, a Bakersfield jury held Shell Pipeline Company, Alon Bakersfield Property, Inc., and Paramount Petroleum Corporation accountable for four trespassing pipelines in *C & C Properties v. Shell Pipeline Co.*<sup>25</sup> The jury found the defendants “acted with malice, oppression or fraud in connection with their trespassing on plaintiff’s property.”<sup>26</sup> In *Bailey v. Outdoor Media Group*, the court held that under certain facts, gross profits must be disgorged.<sup>27</sup>

Some defendants have argued that disgorgement of revenues would be punitive in nature. Decades ago, however, Judge Albert Tate, Jr., explained why disgorgement of



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revenues is appropriate in a state where “only compensatory and not punitive damages” are available.<sup>28</sup> Judge Tate explained, “The key to resolution of this [paradox] seems to be that in [] circumstances [of an illegal and deliberate violation of property rights] such awards in Louisiana are regarded as compensatory for violations of a recognized property right, rather than punitive.”<sup>29</sup>

Similarly, in *Belgarde v. City of Natchitoches*, the Third Circuit held that the damages for the violation of a landowner’s “constitutional right to be free of unlawful trespasses upon and takings of his land” were compensatory damages.<sup>30</sup>

When a trial court is faced with a motion for summary judgment on whether (1) erosion and subsequent widening of a pipeline canal constitutes a bad-faith trespass and (2) the trespass is in legal or moral bad faith, the inquiry will turn on the credibility of the witnesses. As fact-intensive matters, both are best resolved by the fact finder at a trial on the merits.

## Endnotes

1. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).
2. *Central Louisiana Electric Co., Inc. v. Covington & St. Tammany Land & Improvement Co.*, 131 So.2d 369, 373 (La. App. 1 Cir. 1961).
3. *Loeblich v. Garnier*, 113 So.2d 95, 106 (La. App. 1 Cir. 1959).
4. *Richard v. Richard*, 09-539, p. 5 (La. App. 3 Cir. 11/04/09), 24 So.3d 292, 296.
5. E.g., *Booth v. Madison River Comm., Inc.*, 02-0288 (La. App. 1 Cir. 12/3/03), 851 So.2d

1185, 1187-88 (laying of a fiber optic cable outside of the right-of-way was a trespass); *Gaspard v. St. Martin Parish Sewerage Dist.* #1, 569 So.2d 1083, 1084 (La. App. 3 Cir. 1990) (a sewer line outside the limits of the right-of-way is a trespass); *Mary v. QEP Energy Co.*, — F.4th —, 2022 WL 154483, \*3-4, \*7 (5th Cir. 1/18/2022) (a pipeline outside the pipeline right-of-way constituted a trespass).

6. Good faith exists only when there is a defect in the title that leads the trespasser to ask permission of the wrong record owner. *Morgan v. Fuller*, 441 So.2d 290, 298 (La. App. 2 Cir. 1983).
7. A trespass is in legal bad faith when the trespasser believed that he was on the correct property but he could have ascertained otherwise. E.g., *McGee v. Seco Timber Co.*, 350 So.2d 1265, 1268 (La. App. 3 Cir. 1977); *Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co.*, 162 La. 403, 110 So. 630 (1926); *Corbello v. Iowa Production*, 01-567, pp. 6-7 (La. 2003), 806 So.2d 32, 39-40 (requiring Shell to disgorge the profits it made from its gas-mixing operations on the premises after Shell allowed the lease to expire).
8. *Kennedy v. Perry Timber Co.*, 219 La. at 268 (“moral bad faith” is a trespass committed “through [defendants’] recklessness and wanton disregard of plaintiff’s property rights ....” See also *Boyet’s Estate v. L.L. Brewton Lumber Co.*, 223 So.2d 495, 498 (La. App. 2 Cir. 1969) (defining willful and wanton as possessing “an intent to perform the act with utter disregard for the rights of others”); *United States v. St. Anthony R. Co.*, 192 U.S. 524, 542, 24 S.Ct. 333, 339, 48 L. Ed. 548 (1904) (“willful trespassers, acting in bad faith, [] ought to be made to suffer some punishment for their depredations[]”).
9. See, e.g., *Belgarde v. City of Natchitoches*, 156 So.2d 132, 135-36 (La. App. 3 Cir. 1963).
10. See, e.g., *Amoco Production Co. v. Texas Meridian Resources Exploration, Inc.*, 180 F.3d 664 (5th Cir. 1999); *Knoll v. Delta Development Co.*, 218 So.2d 109 (La. App. 3 Cir. 1969).
11. E.g., *Smith v. So. Farm Bureau Cas. Ins. Co.*, 247 La. 596, 710, 174 So.2d 122, 128 (1965).
12. See *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993).

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## Trespass law

*Continued from page 14*

13. *Amoco Prod. Co. v. Texas Meridian Resources Exploration Inc.*, 180 F.3d 664, 671-72 (5th Cir. 1999).
14. See *Lacombe v. Carter*, 07-1063, p. \*2 (La. App. 3 Cir. 2008); 975 So. 2d 687, 689 (citing *Griffin v. Abshire*, 04-37, p. 11 (La. App. 3 Cir. 6/2/04); 878 So. 2d 750, 757-58, writ denied, 04-1663 (La. 10/8/04); 883 So. 2d 1018).
15. The federal incarnation of *Vintage Assets* was later vacated for lack of subject matter jurisdiction and remanded back to state court.
16. *Vintage Assets, Inc. v. Tennessee Gas Pipeline Company, L.L.C.*, 2017 WL 3601215 (E.D. La. 2017).
17. *Morgan City Land and Fur Company, L.L.C. v. Tennessee Gas Pipeline Co., L.L.C.*, 2022-C-0045 (La. App. 4 Cir. 2/14/22).
18. 00-2754, p. 13 (La. App. 4 Cir. 11/14/01), 803 So. 2d 86, 96 (emphasis in the original).
19. 562 So. 2d 1013, 1015-16 (La. App. 3 Cir. 1990).
20. 319 So. 2d 840, 842 (La. App. 1 Cir. 1975).
21. 229 So. 2d 752, 755 (La. App. 3 Cir. 1969) (where the canal company's work narrowed the canal within the pipeline right-of-way, no trespass occurred).
22. *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981); *Higgins v. Williams Energy Partners, L.P.*, 2017-1662, 2017-1663, 2017-1665, and 2017-1666 (April 10, 2019), 280 So. 3d 195 (reversing the trial court's grant of the defendant's motion for summary judgment because genuine issues of material fact remained as to whether the defendant's conduct rose to the level of an intentional tort, namely whether the defendant knew with substantial certainty that a chemical explosion was going to occur given the particular facts of the case and the laws of chemistry).
23. California Civil Code section 3334.
24. California acknowledges a "harsh rule" and a "mild rule" in cases of wrongful extraction of minerals; the "harsh rule" is applied to willful misappropriation, and the mild rule is applied to unintentional or mistaken misappropriation. *Whittaker v. Otto*, 248 Cal. App. 2d 666, 675 (1967). See also *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554 (1977) ("One who misappropriates the property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct.").
25. *C & C Properties v. Shell Pipeline Company*, 2019 WL 6341047 \*14 (E.D. Cal. 11/27/19) (affirming the jury's verdict because the link between the trespass and Shell's profit was so obvious it hardly needed to be stated: "Shell, a major energy company, transported oil it intended to sell across plaintiff's property without permission, and ultimately made a great deal of money from doing so.>").
26. *Id.* at \*1.
27. *Bailey v. Outdoor Media Group*, 155 Cal. App. 4th 778, 784 (2007) (opining that the issue of gross versus net profits is within the discretion of the trial court).
28. *Loeblich*, 113 So. 2d at 105.
29. *Id.*
30. *Belgarde*, 156 So. 2d at 135-36.



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