**Affirmed as Modified and Memorandum Opinion filed June 21, 2016.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-14-00445-CV**

**PHYLLIS PITTMAN, Appellant/Cross-Appellee**

**V.**

**R. TRENT CAMPBELL, JR. AND BETTE B. CAMPBELL, Appellees/ Cross-Appellants**

**On Appeal from the 234th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2011-11815**

## M E M O R A N D U M  O P I N I O N

This case involves an appeal and cross-appeal from the trial court's judgment in a property dispute between townhome neighbors. Appellant/cross-appellee Phyllis Pittman contends that the trial court erred by failing to adjudicate the dispute presented by her request for declaratory relief and by adjudicating title to real property in favor of the Campbells, expressly or implicitly, when such relief was not pleaded or supported by evidence. Appellees/cross-appellants R. Trent

Campbell, Jr. and Bette B. Campbell contend that the trial court erred by finding that Pittman adversely possessed a small triangle of property near her patio area based on the ten-year adverse possession statute. For the reasons explained below, we modify the trial court's judgment and affirm the judgment as modified.

## FACTUAL BACKGROUND

Phyllis Pittman lives at 2325 Mimosa in Stanford Oaks, a small townhome community in Houston. Pittman's home is located on lot 7 of the community. Lot 7 contains only the property beneath the home; much of the surrounding property is designated as a common area. Trent and Bette Campbell live next door at 2321 Mimosa on lots 8 and 9. The disputed property encompasses portions of lots 8 and 9 located between the Campbells' home and the common area next to Pittman's home, except for a small, enclosed area where the Campbells' air conditioning units are located (the "Property"). The Property covers about 595 square feet of land.

Stanford Oaks was originally developed in 1989 as a "planned unit development" of 21 building lots. The rights of the property owners in the development are subject to the "Declaration of Covenants, Conditions and Restrictions for Stanford Oaks" (the "Declaration"). The Declaration provides that all property owners are members of the Stanford Oaks Homeowners' Association (the "Association"). Under the Declaration, the common areas of the development are owned by the Association and are for the enjoyment of all members of the Association.

Pittman's property at 2325 Mimosa was originally owned by Ted and Linda Orner. The Orners built the home on lot 7 in 1992. The Orners' plans included a small patio area toward the back of the home. On the construction company's recommendation, the Orners had the patio area enclosed by a brick wall and

wrought iron fence, creating a rectangular area. However, because lot 7 was positioned at an angle toward the back of lot 9, the brick wall bisected the back corner of lot 9, enclosing a small triangle of property within the boundary of lot 9 as part of the Orners' patio area (the "Triangle"). The remainder of the patio area was common area. A copy of a diagram of the lots and their improvements as they currently exist appears in the Appendix below.[1]

When the Orners moved into their home, the property that is now 2321 Mimosa was a vacant lot. Around 1996, a builder purchased lots 8 and 9 and began constructing the home at 2321 Mimosa. As construction progressed, Linda Orner expressed her concerns to the Association about some of the home's design elements. For example, the home's air conditioning units were visible from the Orners' dining room, and because Orner thought they were unattractive, she requested that they be enclosed by a partial brick wall. The enclosure was ultimately approved and constructed. A stucco wall also was constructed from the back corner of the home to the back fence of the community, directly across from the Orners' patio area. Orner did not object to the stucco wall, however, because she believed it fit within the architectural design of the community.

The Campbells bought the property at 2321 Mimosa in 1997. When the Campbells purchased their home, most of the construction already had been completed by the builder, with the exception of some interior finishing. The Campbells employed a landscaping company to install bushes and plants on the Property between their home and the Orners' home. Over the years, the Campbells continued to maintain their bushes and plants in the area. The Campbells also paid

[1] On the diagram, the Campbells' property appears in yellow and their property line appears in red. The green area represents the common areas surrounding Pittman's property. At the top of the diagram, the angled brick wall enclosing a yellow area is the Triangle. The stucco wall lies directly across from the brick wall and is represented by a short pink line. This diagram was part of the evidence at trial.

property taxes on lots 8 and 9.

In 1999, the Orners sold lot 7 at 2325 Mimosa to John and Susan Boles, who lived there until 2003. The Boles made no improvements to the Property in front of their home and did not care for the plants there. Between 1999 and 2003, the Boles did not exclude the Campbells from the Property, and the Campbells entered the Property and the common area between the homes to maintain their plants and air conditioners.

In June 2002, John Boles got permission from the Association to place a locked gate in front of his house where his front walkway went through the common area to his front door. The gate was installed for security purposes and was not intended to exclude the Campbells. After the front gate was installed, Boles did not exclude the Campbells from the Property.

Pittman purchased lot 7 at 2325 Mimosa from the Boleses in June 2003. After that, the Campbells continued to use the Property for maintaining plants and air conditioners. The Campbells entered the fenced area in front of lot 7 by their side gate and by the locked gate in front of Pittman's home. Pittman did not seek to exclude the Campbells at this time.

In 2008, Pittman asked permission from Bette Campbell to plant a tree on the Property and Campbell approved. Pittman planted three trees and later put pavers on the Property.

In August 2010, Trent Campbell wrote a letter to Pittman asking her to verify that she was not claiming ownership of the Property. The Campbells also indicated that they planned to add a gate to the stucco wall to access the Property from that direction. Pittman did not reply, but the subject was discussed at a meeting of the Association later that year. At that time, Pittman did not claim that

she owned the Property or the common area between her home and the Campbells' home. However, in November, Pittman's attorney sent a letter to the Campbells disputing the Campbells' right to install the gate. The attorney explained that it was Pittman's position that the stucco wall was a "party wall" that demarcated the boundary line between the properties, and that the property on Pittman's side of the party wall was for her exclusive use.

In February 2011, Pittman filed suit against the Campbells seeking declaratory and injunctive relief. By the time of her sixth amended petition, filed in April 2013, Pittman requested numerous types of relief, including the following declarations: (1) "that the stucco wall separating the southernmost point of the property between that of Plaintiff and that of the Campbells is a Party Wall, as such term is defined by the Declaration"; (2) that "the property more particularly identified as all portions of Lots 8 and 9 of Stanford Oaks . . . located between Plaintiff's house as presently situated and the boundary lines of the common area between Defendants' house and Plaintiff's house . . . is her property to enjoy as she wishes, subject to the Declaration and applicable law"; (3) "any property on the Campbells' side of the Party Wall is to be enjoyed as they wish, subject to the Declaration and applicable law"; (4) "the Campbells cannot modify or alter any wall between their and Plaintiff's property"; (5) "[Plaintiff] is the owner by adverse possession [of] the Property and all of its improvements . . ."; (6) "the stucco wall . . . is a Party Wall and under the Declarations Plaintiff is the owner of the Property"; (7) "the stucco wall is a Party wall subject to the Declarations . . . [and] was part of the original construction/development of 2321 Mimosa"; (8) "the Declarations are expressly incorporated into the Deeds of Plaintiff and Defendants', respectively"; (9) "the Party Wall was built intentionally or due to an error in construction"; and (10) "[Plaintiff is the owner of the Property and all of

its improvements."

Alternatively, Pittman requested a declaration that "she and her privies have an easement and permanent right to use and enjoy the Property because Plaintiff and her privies acquired an easement by implication, estoppel and/or prescription or by express easement." Pittman also alleged a trespass to try title action, claiming that she and her privies have owned the Property since 1993 under the adverse possession laws of the Texas and pursuant to the Declarations. Additionally, Pittman alleged title by acquiescence and title by circumstantial evidence, as well as easement by estoppel, implication, prescription, and express easement.

The Campbells countersued. In the Campbells' fifth amended petition, they requested that the trial court "remove the cloud on Campbell's title and quiet title to lots 8 and 9." They also counterclaimed for attorney's fees based on the declaratory judgment statute.

Shortly before trial, Pittman dismissed her trespass to try title claim. On October 31, the case was tried to the court over three days.

On March 12, 2014, the trial court signed a judgment declaring that the provisions of the Declaration were "enforceable, valid, and in effect, including but in no way limited to Article V, which will concern any future modification to the stucco wall." The trial court also held that Pittman was "deemed to have title" by adverse possession to the Triangle, as well as the wall and fence enclosing the Triangle. The trial court ordered that Pittman take nothing on her remaining claims and that the Campbells take nothing on their claims. The trial court also made findings of fact and conclusions of law.

## ANALYSIS OF PITTMAN'S ISSUES

On appeal, Pittman raises two issues. In her first issue, Pittman asserts that

the trial court erred by failing to declare that that the Campbells have no right to change the stucco wall in any way because the Association approved the stucco wall as it was originally built, and Article V of the Declaration provides that approval once given "shall be irrevocable." Pittman requests that the trial court's judgment be reversed in part or modified in part to so declare. In her second issue, Pittman contends that the Campbells did not plead or prove a claim of trespass to try title, and therefore any adjudication of title in their favor, whether express or implied, is unsupported by the record.

## I. The Trial Court's Declaratory Relief Concerning the Stucco Wall

Pittman contends that "this is a contract construction case" concerning the interpretation of the Declaration and the parties' respective rights under it. According to Pittman, the trial court failed to give effect to the unambiguous terms of the Declaration and, consequently, failed to declare the parties' respective rights under it. Pittman argues that, contrary to the judgment, the Campbells are precluded from altering the stucco wall or any other architectural feature on or adjacent to the Property. Pittman also argues that she "should be declared entitled to continue her (and her predecessors') historic use of the entirety of the area between 2325 Mimosa and 2321 Mimosa, including the Property."

The Declaration is a contract and is interpreted according to the rules governing contract construction. *See Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). In construing a contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). We presume the parties to the contract intended every clause to have some effect. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). We construe contracts from a utilitarian standpoint, bearing in mind the particular

activity sought to be served. *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005). We will avoid, when possible and proper, a construction that is unreasonable, inequitable, and oppressive. *Id.*

### A. Standing

As an initial matter, the Campbells assert for the first time on appeal that Pittman lacks standing to claim that the Campbells may be prohibited from applying to the Association to alter or tear down the stucco wall based on Article V's language that "[a]pproval, once given, is irrevocable." According to the Campbells, such a claim was not pleaded or supported by evidence, but even if it were, Pittman has no right to complain if the Campbells want to apply to the Association for approval to tear down the wall on their property.[2] Further, the Campbells argue that any challenge under Article V is premature since there has been no approval by the Association to tear down or alter the wall. Because standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control*

[2] The Campbells contend that Pittman's counsel first raised Article V's "irrevocable" language during closing argument and elicited no testimony to support the claim. The record does not reflect that the Campbells objected to any deficiency or obscurity in Pittman's pleading by special exception or otherwise brought their complaint to the trial court's attention at any time before or after judgment. Absent special exceptions, we liberally construe Pittman's pleading. *See* Tex. R. Civ. P. 90, 91; *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). As set out in greater detail above, Pittman's live petition sought numerous declarations, including declarations that the stucco wall is a party wall, that it is subject to the Declaration, and that she is the owner of the property on her side of the party wall "subject to the Declaration and applicable law." Pittman also sought a declaration that "the Campbells cannot modify or alter any wall between their and [Pittman's] property." Although Pittman's petition did not specifically refer to Article V of the Declaration, we conclude that her allegations were sufficient to put the Campbells on notice that Pittman was requesting that the trial court interpret the Declaration and determine how it applied to the stucco wall, including whether the stucco wall was a party wall and whether the Declaration prohibited the Campbells from modifying or altering it. *See Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982); *Stone v. Lawyers Title Ins. Co.*, 554 S.W.2d 183, 186 (Tex. 1977).

*Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993).

The Texas Declaratory Judgments Act allows a person whose rights, status, or other legal relations are affected by a contract to have determined any question of construction or validity arising under the contract and to "obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). But, a declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the declaration will resolve the controversy. *Devon Energy Prod. Co., L.P. v. KCS Res., LLC*, 450 S.W.3d 203, 210 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (citing *Bonham Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995)).

As support for her claim that she has standing, Pittman points to Article X of the Declaration, which provides that the Association "or any Owner shall have the right to enforce, by any proceeding at law or inequity, all restrictions, conditions, covenants, [or] reservations . . . hereafter imposed by the provision of this Declaration." The Campbells acknowledge that that this provision "would probably give Pittman the right to require that Campbell and the [Association] follow the procedures of Article V for application and approval." Nevertheless, they assert, Article V does not give Pittman the right to require that the wall remain standing if the Campbells and the Association agree to have it torn down, and therefore Pittman would not have standing because "the right to approve has been delegated" to the Association.

We agree with the Campbells that any action by Pittman to challenge the Association's approval of plans submitted by the Campbells to alter or remove the stucco wall would be premature at this point because no plans have been submitted and the Association has made no decision. Pittman therefore would lack standing to raise such a complaint. *See Patterson v. Planned Parenthood of Houston and Se.*

*Tex., Inc.*, 971 S.W.2d 439, 443 (Tex. 1998) ("A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass."); *see also Village of Tiki Island v. Premier Tierra Holdings, Inc.*, 464 S.W.3d 435, 439 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (explaining that the Declaratory Judgments Act "gives the court no power to pass upon hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual controversy, even though such questions may in the future require adjudication").

In this case, however, Pittman sought a judicial declaration that the stucco wall was approved by the Association as built and when built, and once approved, Article V renders that approval "irrevocable." She also sought a declaration that the stucco wall was a party wall as defined in the Declaration. Because Pittman was asking the trial court to interpret and apply the provisions of the Declaration to the existing facts, we conclude that Pittman has standing to seek this declaratory relief. *See Kings River Trail Ass'n, Inc. v. Pinehurst Trail Holdings, L.L.C.*, 447 S.W.3d 439, 447–48 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (holding that plaintiffs had standing to seek declaratory relief concerning application of deed restrictions to defendant's property).

### B. Pittman's Requested Declaratory Relief is Not Supported by the Record

In support of her requested declaratory relief, Pittman relies on a construction of several provisions of the Declaration, including:

> ARTICLE V
> ARCHITECTURAL CONTROL
>
> No building, fence, wall or other structures shall be commenced, erected or maintained upon any Lot, or the patio or garage used in connection with any Lot, after the purchase of any Lot from Declarant, its successors or assigns, nor shall any exterior

addition to or change or alteration thereof be made until the plans and specifications showing the nature, color, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an Architectural Committee composed of three (3) or more Owners appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with. Approval, once given, shall be irrevocable.

. . .

ARTICLE VI
EXTERIOR MAINTENANCE

. . .

Section 4. Authority of Association. . . . The Association shall own all fences, whether of wood or iron . . . and the Association shall be responsible to maintain and replace said fences . . . . .

. . .

ARTICLE VII
PARTY WALL

Section 1. General Rules of Law to Apply. Each Wall which is built as a part of the original construction of the Townhouses upon the Properties and placed on the dividing line between the lots shall constitute a party wall, and, to the extent not inconsistent with the provisions of this Article, the general rules of law regarding party walls and liability for property damages due to negligence or willfull acts or omissions shall apply thereto. If a wall which is intended as a party wall is situated entirely or partly on one Townhouse building lot instead of on the dividing line between Townhouse building lots, due to error in construction, such wall shall nevertheless be deemed to be on the dividing line and shall constitute a party wall for the purpose of the Article. Reciprocal easements shall exist upon and in favor of the adjoining Townhouse building plots for the maintenance, repair and reconstruction of the party walls.

. . .

ARTICLE X
GENERAL PROVISIONS

. . .

Section 8. Extension Beyond Building Lines. In the original construction of homes upon the Property, Declarant expressly reserves the right, in order to facilitate construction and to avoid monotony to design, to extend front, back, or side walls of buildings across building lines, as reflected on the recorded plat, and Declarant reserves the right to convey in fee simple such areas to the Owner of any Townhouse which extends beyond said building lines.

Pittman also points to Linda Orner's testimony that the original Declarant and developer of Stanford Oaks, Guardian Development Corporation, built Orner's house; Orner was advised by Guardian that the entire area in front of her house was for her exclusive use; and Orner was not concerned about the location of the stucco wall because Guardian informed her that it could make decisions where walls would go and what was needed for the aesthetic appearance of the community.

Based on the Declaration's provisions and Orner's testimony, Pittman argues that she conclusively established the following: (1) "each wall which is built as part of the original construction of the Townhouses upon the Properties and placed on the dividing line between the Lots" is a "Party Wall"; (2) even if through an error in construction the stucco wall was not on the dividing line, "such wall shall be deemed on the dividing line" and constitutes a "Party Wall"; (3) in the construction of the townhouses, the front, back or side walls of buildings may extend across building lines; and (4) architectural approval once given is "irrevocable." Therefore, Pittman argues, giving full effect to the terms of the Declaration as the trial court should have done, the stucco wall is a party wall that separates 2325 Mimosa from 2321 Mimosa. And, even if not a party wall, the stucco wall's construction and placement was approved and "[a]pproval, once given, shall be irrevocable."

The trial court rejected Pittman's requested declarations and held instead that the provisions of the Declaration "are enforceable, valid, and in effect, including but in no way limited to Article V, which will govern any future modifications to the stucco wall . . . ." Contrary to Pittman's assertions, the Declaration and the record support the trial court's rulings.

First, the record contains no evidence that the stucco wall was approved by the Association. Linda Orner did not testify that the Association approved the stucco wall; she merely testified that she had no objection to the placement of the wall when it was built. No other evidence was presented that approval of the wall was sought or received from the Association when the wall was built.

Even assuming that the Association approved the stucco wall, there is no evidence that the stucco wall was intended to be a party wall. Article VII of the Declaration provides that each wall "built as a part of the original construction of the Townhouses . . . and placed on the dividing line between the lots shall constitute a party wall." Additionally, a wall placed entirely or partly on a building lot instead of on the dividing line between the lots due to an "error in construction" is "deemed to be on the dividing line and shall constitute a party wall" if the wall was "intended" to be a party wall. The trial court found that "the stucco wall is not on the dividing line between lot 9 and lot 7 and was not intended to be." This finding is supported by Trent Campbell's unchallenged testimony that the stucco wall is at least 15 feet from the dividing line between lots 7 and 9. Campbell also testified that the stucco wall was not intended to be a party wall and he knew of no errors in its construction. Pittman presented no controverting evidence. Nor was there evidence of any agreement that the stucco wall would be a party wall, and there is nothing in the Declaration identifying the stucco wall as a party wall. Thus, the trial court would not have erred by concluding that the stucco wall was

not intended to be a party wall.[3]

Pittman also contends that she is entitled to declaratory relief that the stucco wall was approved as part of the original construction of the Campbells' home and, once approved, the approval is irrevocable. According to Pittman, Article V reflects that the Association requires approval of any building, fence, wall, or other structure built on the lot to maintain the "harmony of external design and location in relation to surrounding structures and topography" of the community. Further, Article V expressly provides that approval, once given, is "irrevocable." Therefore, Pittman argues, the trial court failed to give effect to Article V of the Declaration and declare that the Campbells have no right to change the "nature, color, kind, shape, height, materials and location" of the stucco wall.

Pittman's construction overemphasizes the purpose behind requiring approval while disregarding the written procedure for obtaining approval in which the "irrevocable" language is used. The part of Article V containing the "irrevocable" language provides that an application for approval of a building, fence, wall, or other structure is to be submitted and approved in writing either by the Association's Board of Directors or a designated committee. If the Board or its committee fails to approve or disapprove the design and location of the structure within 30 days, "approval will not be required and this Article will be deemed to

[3] Pittman asserts that the only evidence regarding "intent" came from Linda Orner, who testified that "when the wall was built the builder just made the statement to us that they could make decisions where walls would go and what was needed for the [a]esthetic appearance of the community." However, Orner's testimony is no evidence that the builder intended to change the Campbells' lot line by constructing the stucco wall where the builder did. To the extent that Pittman relies on section 8 of Article X to support her argument, her reliance is misplaced. Article X discusses the developer's prerogative to place the walls of buildings across building lines and reserves to the developer the right to convey in fee simple such areas to the owner of any townhouse which extends beyond the building lines. No evidence was presented that the developer placed any walls of buildings across building lines or conveyed additional property to either Pittman or any of the previous owners of 2325 Mimosa.

have been fully complied with." The next sentence provides that "[a]pproval, once given, is irrevocable." In other words, the Declaration provides that the Association must act on a request for approval within thirty days or the application will be approved automatically, and the Association may not later attempt to deny or revoke a request deemed approved after the thirty-day period has expired. Thus, reviewing Article V in its entirety and in the context of the Declaration as a whole, it becomes clear that the language on which Pittman relies is intended to encourage timely action by the Association on requests for approval and to provide consequences for the Association's failure to act.

This construction of the provision is reasonable and furthers the purpose of Declaration, which is to maintain the architectural and aesthetic integrity of the community. Pittman's interpretation, in contrast, is unreasonable because it would require that once a wall, fence, or other structure is approved it could never be removed or altered under any circumstances. Such an interpretation would tie the hands of future boards and prohibit future modifications no matter how reasonable or desirable they may be. We conclude that the trial court correctly interpreted Article V to "govern any future modifications to the stucco wall." *See Frost Nat'l Bank*, 165 S.W.3d at 312. Consequently, Pittman is not entitled to the declarations she seeks or to acquire the Property through her party wall theories.

In the alternative, Pittman contends in a single sentence that "the Declaration and established facts entitle her to the judicial declaration that she has an easement and permanent right to use and enjoy the property, whether express, by implication, by estoppel, or by prescription." Pittman provides no analysis of these easement theories and makes no citations to the record or any authorities to support her cursory argument. Nor does Pittman challenge the trial court's numerous findings of fact and conclusions of law that are contrary to Pittman's easement

theories. Parties asserting error on appeal must present some specific argument and analysis showing that the record and the law support their contentions. *See* Tex. R. App. P. 38.1(i); *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). We conclude that Pittman's bare assertion that she has some kind of an easement on the Property is inadequately briefed, and therefore we do not address it. For the same reason, we do not address Pittman's general assertion that she is entitled to continue her "historic use and enjoyment" of the Property. We overrule Pittman's first issue.

### 2. Express or Implied Adjudication of Title

In her second issue, Pittman contends that "to the extent" the judgment can be read to adjudicate title to real property in favor of the Campbells, the trial court erred because there are no pleadings and legally insufficient proof to sustain the judgment. Pittman does not complain of any specific language in the judgment.

We disagree with Pittman that the trial court's judgment may be read to adjudicate title to the real property, either expressly or implicitly, in favor of the Campbells. Indeed, the judgment reflects that the only party "deemed to have title" to any property was Pittman, who was awarded the Triangle by adverse possession. Because Pittman's second issue rests on a faulty premise, we overrule it.

## ANALYSIS OF THE CAMBELLS' CROSS-APPEAL

In a cross-appeal, the Campbells contend that the trial court erred in finding that Pittman was entitled to ownership of the Triangle based on the ten-year adverse possession statute. *See* Tex. Civ. Prac. & Rem. Code § 16.026(a). The Campbells also request that, if this Court reverses the award of the property to Pittman, the case be remanded to the trial court for consideration of an award of attorney's fees under the declaratory judgment statute.

On appeal, Pittman does not challenge the trial court's denial of her claim to the majority of the Property by adverse possession, and she does not defend the trial court's award of the Triangle on that basis. At oral argument, Pittman asserted that "there is no trespass to try title claim before the court" and that she sought only to obtain the declaratory relief she was denied. Pittman also asserted that the trial court correctly awarded the Triangle but did so for the wrong reasons, because the trial court was empowered to declare the boundaries of her property rather than to award the Triangle based on adverse possession. Further, in her appellate briefing, Pittman maintains that "the judgment should be reversed to the extent it purports to adjudicate title to the [P]roperty or any of the property in dispute."

This Court has recognized that a trespass to try title action is the exclusive method for determining title to real property. *Kennedy Con., Inc. v. Forman*, 316 S.W.3d 129, 135 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing Tex. Prop. Code § 22.001(a)).[4] Trespass to try title suits have detailed pleading and proof requirements and do not permit the recovery of attorney's fees. *I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 475 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). In contrast, the Declaratory Judgment Act "provides an efficient vehicle for parties to seek a declaration of rights under certain instruments," and permits an award of attorney's fees subject to the trial court's discretion. *Id.* (citing *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004) (internal citations omitted)).

[4] Section 22.001(a) of the Property Code mandates that "[a] trespass to try title action is the method of determining title to lands, tenements, or other real property." Tex. Prop. Code § 22.001(a). The Uniform Declaratory Judgments Act, however, provides that "[a] person interested under a deed ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). Further, notwithstanding Property Code § 22.001, a person may obtain a determination under the Texas Declaratory Judgment Act "when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties." *Id.* § 37.004(c).

Texas courts consider the substance and not the form of the pleadings to determine whether an action is properly considered as a trespass to try title or declaratory judgment action. *Id.* at 476; *see Forman*, 316 S.W.3d at 135 ("Any suit involving a dispute over the title to land is an action in trespass to try title, whatever its form and regardless of whether legal or equitable relief is sought."). Here, even though Pittman dismissed her trespass to try title claims before trial, she sought essentially the same relief in her declaratory judgment action when she sought, among other things, declarations that (i) the portions of the Campbells' lots 8 and 9 between Pittman's home and the common area between them is "her property to enjoy as she wishes"; (ii) Pittman "is the owner by adverse possession [of] the Property"; and (iii) Pittman "is the owner of the Property and all of its improvements." Consequently, despite Pittman's appellate assertions that her case involves only declaratory relief, we interpret Pittman's requested declaratory relief as a trespass to try title claim. *See I-10 Colony*, 393 S.W.3d at 476. Having rejected Pittman's characterization of her case, we turn to the substance of the Campbells' cross-issue.

To prevail on her adverse possession claim under the ten-year statute of limitations, Pittman was required to prove, among other things, that she cultivated, used, or enjoyed the property for ten years. *See* Tex. Civ. Prac. & Rem. Code § 16.026(a); *Kazmir v. Benavides*, 288 S.W.3d 557, 560–61 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Under section 16.026(a), the elements to prove by a preponderance of the evidence are: (1) actual and visible possession of the disputed property; (2) that is adverse and hostile to the claim of the owner of record title; (3) that is open and notorious; (4) that is peaceable; (5) that is exclusive; and (6) involves continuous cultivation, use, or enjoyment for ten years. *Kazmir*, 288 S.W.3d at 561. Because the period of Pittman's alleged adverse possession of the

Triangle was less than ten years, Pittman was required to tack on the adverse possession, if any, of the previous owner, Boles. *See Ellis v. Jansing*, 620 S.W.2d 569, 571 (Tex. 1981).

The Campbells contend that Pittman has not met the adverse possession requirements for the Triangle for three primary reasons: (1) the brick wall which prevents the Campbells from entering the Triangle was not built by either Pittman or Boles and is merely a "casual fence"[5] that does not support an adverse possession claim; (2) Pittman mistakenly believed she owned the Triangle when she purchased her home and did not claim it until 2011, when she first pleaded adverse possession, and her predecessors, the Boleses, thought the Triangle was common area owned by the Association and never claimed to own it; and (3) it would be inconsistent to award the Triangle to Pittman when the adjacent triangle of property (creating a rectangle) within her patio remains common area owned by the Association, and Pittman has made no adverse possession claim against the Association for its property within her patio area. We conclude that the absence of any evidence of adverse or hostile possession by Pittman's predecessors, the Boleses, controls the disposition of this issue.

For there to be an adverse possession of property, the possession must be "inconsistent with" and "hostile to" the claims of all others. *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006). "Hostile" use does not require the intention to dispossess the rightful owner, or even knowledge that there is a rightful owner. *Id* at 915; *Kazmir*, 288 S.W.3d at 564. "Belief that one is the rightful owner and has

[5] The Supreme Court of Texas has explained that there are two kinds of fences: "casual fences" and fences that "designedly enclose" an area. *Rhodes v. Cahill*, 802 S.W.2d 643, 646 (Tex. 1990). If a fence existed before the adverse possession claimant took possession of the land and the claimant fails to demonstrate the purpose for which it was erected, then the fence is a "casual fence." *Id.* We express no opinion concerning whether the "casual fence" analysis applies to these facts.

no competition for the ownership of the land is sufficient intention of a claim of right." *Kazmir*, 288 S.W.3d at 564. However, there must be an intention to claim property as one's own to the exclusion of all others; the mere occupancy of land without any intention to appropriate it will not support the statute of limitations. *Tran*, 213 S.W.3d at 915.

We conclude that that no evidence supports the trial court's finding that the Boleses, Pittman's predecessors, intended to or did claim the Triangle as their own property to the exclusion of all others. John Boles testified that when he purchased 2325 Mimosa from the Orners, he understood that he was purchasing only the residence itself and the property directly under the residence. Boles explained that he knew that he did not own the common property surrounding the residence. Boles also knew that the Campbells owned some of the property in his front yard, but he did not know exactly where their property line was, and he did not know that their property line extended into part of the back patio. Boles testified that he thought the entire patio area was "common property" owned by the Association and he did not claim it as his own. Although Boles did testify that he thought the patio area was for his "exclusive use," he nevertheless understood that all of the patio area was "common property" owned by the Association.

John Boles's testimony does not establish that the Boleses asserted a claim of exclusive ownership of the Triangle. At most, the testimony establishes only that the Boleses believed that they had a right to use property owned by another. This evidence is insufficient to support a claim of adverse possession. *See id.* (stating that mere occupancy of land without any intent to appropriate it will not support adverse possession); *Ellis*, 620 S.W.2d at 571–72 ("No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to

make it so.") (citations and internal quotations omitted); *Rick v. Grubbs*, 214 S.W.2d 925, 927 (Tex. 1948) (explaining that the law of adverse possession is not satisfied "if the occupancy is shared with the owner or his agents or tenants"). Absent evidence that the Boleses satisfied all the elements of adverse possession of the Triangle before Pittman purchased her home from them, Pittman cannot show adverse possession for ten consecutive years. *See Ellis*, 620 S.W.2d at 571.

We therefore sustain the Campbells' cross-appeal in part and hold that the trial court erred by adjudicating Pittman the owner of the Triangle by adverse possession. However, because Pittman's claim was in substance a trespass to try title action rather than one for declaratory judgment, the Campbells are not entitled to a remand for consideration of attorney's fees. *See Martin*, 133 S.W.3d at 267; *I-10 Colony, Inc.*, 393 S.W.3d at 475.

## CONCLUSION

We overrule Pittman's issues. We sustain the Campbells' cross-appeal in part and reform the trial court's judgment to delete that portion of the judgment awarding Phyllis Pittman ownership of and title to the Real Property behind the brick wall of her back patio, which is marked in yellow on the Exhibit A attached to the trial court's judgment, including the wall and fence in the highlighted area, by adverse possession. We overrule the Campbells' request that the case be remanded for consideration of an award of attorney's fees. We affirm the judgment as modified.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.

# Appendix


PLAINTIFF'S EXHIBIT 23
EXHIBIT 1-D
2-STORY BRICK HOUSE
LOT-7
LOT-9
LOT-8
BRICK WALK
PAVED PRIVATE DRIVE
COMMON AREA
N81°23'34"E 43.50'
N08°36'26"W 150.00'
H.C.M.R.