

THE JOHN G. and MARIE STELLA  
KENEDY MEMORIAL  
FOUNDATION

VS.

SYLVIA MENCHACA BALLÍ  
AGUILERA, ET AL.

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IN THE DISTRICT COURT OF

KENEDY COUNTY, T E X A S

105<sup>TH</sup> JUDICIAL DISTRICT

**MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Counter-Plaintiffs, SYLVIA MENCHACA BALLÍ AGUILERA, ET AL. by and through their counsel of record, Hector H. Cárdenas, Jr. and Ramon Garcia; the “Lucia M. Adame Intervenors” by and through their counsel of record Eileen Fowler; the “Jimmy Cardenas Defendants” by and through their counsel of record, George L. Willingham and Michael D. Jones; the “Andrew Aranda Intervenors” by and through their counsel of record, Harry Olsen and Christopher Jonas; the “Simona Balli Avila Ochoa Intervenors” by and through their counsel of record, Sofia Arizpe and Jesus Villalobos; the “Anita Almanza Gomez Loya Intervenors” by and through their counsel Fabian Guerrero; the “John Gallegos Intervenors” by and through their counsel of record, Herbert A. Janzen and James R. Davis; and the “Laura Escamilla Charles Alvarado Intervenors” by and through their counsel of record, Jonathan Preston and Eileen Fowler (collectively referred to hereinafter as “Movants”) and pursuant to Rule 166a(c) of the Texas Rules of Civil Procedure file this their Motion for Summary Judgment and in support thereof, would respectfully show unto the Court as follows:

**Summary of the Argument**

1. This litigation will adjudicate title of the *La Barreta* land grant in issue to either the Kenedy Foundation or to the heirs of Jose Manuel Ballí Villarreal.

2. A Trespass to Try Title action is the exclusive method of determining title to real property in Texas and attorney's fees are not recoverable in either a Trespass to Try Title case or in a case "that is in the nature of a Trespass to Try Title." *Ely v. Briley*, 959 S.W.2d 723, 727-28 (Tex.App.—Austin 1998, no writ) (string citation omitted); Tex. Prop. Code §22.001(a).

3. In an attempt to recover attorney's fees, the Kenedy Foundation is asserting a declaratory judgment cause of action. However, it is an abuse of discretion to use the Declaratory Judgment Act to settle a land title dispute and award attorney's fees under the Act. *Bardfield v. Holland*, 844 S.W.2d 759, 771 (Tex.App.—Tyler 1992, writ denied).

4. The ploy of attempting to use the Declaratory Judgment Act and other forms of creative pleading in land title litigation has been attempted at least 12 times and in each of the 12 cases briefed below, attorney's fees were not allowed on appeal.

5. This suit is for the recovery of land and the substantive rights of the parties are governed by the Trespass to Try Title statutes. Tex. Prop. Code §22.001 *et seq.* The Court should therefore dismiss the Kenedy Foundation's declaratory judgment cause of action because attorney's fees and declaratory relief cannot be recovered in this litigation as a matter of law.

**Trespass to Try Title is the Exclusive Method  
of Determining Title to Real Property in Texas**

6. Section 22.001(a) of the Texas Property Code provides that "A trespass to try title action is the method of determining title to lands, tenements or other real property." Texas courts have repeatedly held that a Trespass to Try Title action is the proper method of adjudicating rival claims to title of real property. *Rogers v. Ricane Enters.*, 884 S.W.2d 763, 768 (Tex.1994); *Yoast v. Yoast*, 649 S.W.2d 289, 292 (Tex.1983); *Johnson v. Bryan*, 62 Tex. 623 (1884). If litigation involves a *dispute as to title*, it is an action in Trespass to Try Title. *Bell v. State Dept. of Highways and Pub. Transp.*, 945 S.W.2d 292, 294 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1997, writ den.) (emphasis added). *Even in a case based upon equitable title*, it is an action for

Trespass to Try Title. *Bardfield v. Holland*, 844 S.W.2d 759, 771 (Tex.App.—Tyler 1992, writ denied) (emphasis added). A Trespass to Try Title action “*is the exclusive remedy* by which to resolve competing claims to property.” *Ely v. Briley*, 959 S.W.2d 723, 727 (Tex.App.—Austin 1998, no writ) (emphasis added); *Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 117-18 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1985, writ ref’d n.r.e.) (declaratory judgment act inappropriate vehicle to establish rights in property because trespass to try title is only remedy); *Yoast v. Yoast*, 649 S.W.2d 289, 292 (Tex.1983) (court of appeals should have characterized suit disputing ownership of property as trespass to try title rather than suit for partition).

7. A Trespass to Try Title action is governed by Rules 873 – 809 of the Texas Rules of Civil Procedure. Pursuant to Rule 873 *et seq.*, Movants have properly asserted a Trespass to Try Title action to determine their title and ownership of *La Barreta*.<sup>1</sup> In a Trespass to Try Title case, the “defendant shall be the person in possession...” Tex.R.Civ.P. 784. Pursuant to Rule 788, the Kenedy Foundation has placed title in issue by filing an answer of “not guilty” as well as by asserting a claim of title to *La Barreta* by adverse possession.<sup>2</sup> As explained by the Texas Supreme Court, the filing of a plea of “not guilty” has special legal significance:

In an action in trespass to try title, the answer of the defendant to the merits of the case *by a plea of not guilty* relieves the plaintiffs of the necessity of proving a trespass, *since the plea constitutes an admission by the defendant* for the purpose of the action *that he was in possession of or claimed title to the premises* sued for by the plaintiffs.

*Brohlin v. McMinn*, 341 S.W.2d 420, 422 (Tex. 1960) (emphasis added). Since this suit is for the recovery of land, the substantive rights of the parties are governed by the Trespass to Try Title statutes as a matter of law.

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<sup>1</sup> Movants request that the Court take judicial notice of, and allow Movants to incorporate by reference herein their live pleading entitled “Defendants/Intervenors’ Third Amended Original Answer, Affirmative Defenses and Counterclaim filed in this litigation on September 11, 2002 for all purposes as if set forth at length.

<sup>2</sup> Movants request that the Court take judicial notice of, and allow Movants to incorporate by reference herein the Original Answer filed on October 1, 2002 by the Kenedy Foundation to “Defendants/Intervenors/Counter-Plaintiffs’ Counter-Claim” in which they filed a plea of “not guilty” to Movants’ Trespass to Try Title action for all purposes as if set forth at length.

**Attorney's Fees Are Not Recoverable In Trespass To Try Title Cases  
Or In Cases In The Nature Of A Trespass To Try Title Action  
As A Matter Of Law**

8. The Trespass to Try Title statutes, Tex. Prop. Code §22.001 – 22.045 do not provide for the recovery of attorney's fees. In an attempt to circumvent the rule that attorney's fees are not recoverable in Trespass to Try Title litigation, the Kenedy Foundation's Fourth Amended Petition<sup>3</sup> (and all prior Petitions) requests attorney's fees and declaratory relief pursuant to the Texas Declaratory Judgment Act. Tex. Civ. Prac. & Rem. Code §37.001 *et seq.* However, "a plaintiff may not artfully plead a title dispute as a declaratory judgment suit to obtain attorney's fees otherwise not available." *McCrae Exploration & Prod. v. The Reserve Petroleum Co.*, 962 S.W.2d 676, 684 (Tex.App.—Waco 1998, writ denied). The Kenedy Foundation's Fourth Amended Petition places title in issue by requesting: (1) an "***adjudication of property rights***" (*see* p. 2 ¶ 3); (2) a declaration "***in order to quiet the title of the property in which the Plaintiff has an interest.***" (*see* p. 2 ¶ 4); and (3) attorney's fees incurred to "***quiet title to its lands.***" (*see* p. 10 ¶ 29). Despite artfully pleading a declaratory judgment action, which is contrary to the relief requested since it cannot vest title, the Kenedy Foundation's pleadings conclusively establish that this suit is in the nature of a Trespass to Try Title since it involves competing claims to real property. *Fly v. Briley*, 959 S.W.2d 723, 727 (Tex.App.—Austin 1998, no writ) (trespass to try title is the exclusive method of determining title to real property in Texas); *Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 117-18 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1985, writ ref'd n.r.e.) (declaratory judgment act inappropriate vehicle to establish rights in property because trespass to try title is only remedy); *Yoast v. Yoast*, 649 S.W.2d 289, 292 (Tex.1983) (court of appeals should have characterized suit disputing

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<sup>3</sup> Movants request that the Court take judicial notice of, and allow Movants to incorporate by reference herein the "Fourth Amended Petition for Declaratory Judgment Action" filed by the Kenedy Foundation on October 31, 2002 for all purposes as if set forth at length.

ownership of property as trespass to try title rather than suit for partition). Moreover, *it is an abuse of discretion* to use the Declaratory Judgment Act to settle a land title dispute and award attorney's fees under the Act. *Bardfield v. Holland*, 844 S.W.2d 759, 771 (Tex.App.—Tyler 1992, writ denied) (emphasis added).

9. The ploy of attempting to use the Declaratory Judgment Act and other forms of creative pleading in land title litigation has been attempted at least 12 times and in each of the following 12 cases, attorney's fees were not allowed on appeal: *Ely v. Briley*, 959 S.W.2d 723, 727-28 (Tex.App.—Austin 1998, no writ) (attorney's fees not recoverable in a trespass to try title case or in a case that is in the nature of a trespass to try title despite request by both parties for attorney's fees under declaratory judgment act); *McCrae Exploration & Prod. v. The Reserve Petroleum Co.*, 962 S.W.2d 676, 684-686 (Tex.App.—Waco 1998, writ denied) (reversed award of attorney's fees because a plaintiff may not artfully plead a title dispute as a declaratory judgment suit to obtain attorney's fees otherwise not available); *Bardfield v. Holland*, 844 S.W.2d 759, 771 (Tex.App.—Tyler 1992, writ denied) (reversed award of attorney's fees because it is an abuse of discretion to use the declaratory judgment act to settle a land title dispute and award attorney's fees under the act); *Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 117-18 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1985, writ ref'd n.r.e.) (reversed award of attorney's fees because declaratory judgment act is inappropriate vehicle to establish rights in property because trespass to try title is only remedy); *Amerman v. Martin*, No. 06-00-00153-CV, 2002 WL 992116 (Tex.App.—Texarkana, May 16, 2002) (reversed award of attorney's fees in case asserting causes of action for trespass to try title, declaratory judgment and action to quiet title); *State v. Brainard*, 968 S.W.2d 403 (Tex.App.—Amarillo 1998, *aff'd in part, rev'd in part on other grounds* 12 S.W.3d 6 (Tex.1999) (reversed award of attorney's fees on appeal); *Southwest Guaranty Trust Co. v. Hardy Road 13.4 Joint Venture*, 981 S.W.2d 951 (Tex.App.—

Houston [1<sup>st</sup> Dist.] 1988, writ denied) (request for \$293,000 in attorney's fees denied on appeal); *Bell v. State Dept. of Highways and Pub. Transp.*, 945 S.W.2d 292, 294 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1997, writ den.) (litigation involving a dispute as to title is an action in trespass to try title); *Sadler v. Duval*, 815 S.W.2d 285, 293-94 (Tex.App.—Texarkana 1991, writ denied) (reversed award of attorney's fees in suit to remove a cloud on title); *Cecola v. Ruley*, 12 S.W.3d 848 (Tex.App.—Texarkana, 2000) (declaratory judgment and partition suit); *Nat. Gas Pipeline Co. of America v. Pool*, 30 S.W.3d 618 (Tex.App.—Amarillo, 2000, pet filed) (reversed award of attorney's fees in trespass to try title and conversion action); *Garza v. Maddux*, 988 S.W.2d 280 (Tex.App.—Corpus Christi 1999, pet. denied) (adverse possession, trespass to try title, declaratory judgment, and quiet title action).

### Conclusion

10. This suit is for the recovery of land. The foregoing cases as well as the pleadings filed by the Kenedy Foundation conclusively establish that the substantive rights of the parties are governed by the Trespass to Try Title statutory scheme, rather than by the Declaratory Judgment Act. This Court should therefore dismiss the Kenedy Foundation's declaratory judgment cause of action because attorney's fees and declaratory relief cannot be recovered in this litigation as a matter of law.

WHEREFORE, Movants pray that this matter be set for hearing, and after said hearing for the following relief:

- (1) For a finding that this case is in the nature of a Trespass to Try Title action;
- (2) For a finding that the law of this case and the substantive rights of the parties are governed by the Trespass to Try Title statutes, Tex. Prop. Code §22.001-.045 and by Rules 873 – 809 of the Texas Rules of Civil Procedure;
- (3) That neither the Trespass to Try Title statutes, Tex. Prop. Code §22.001-.045 nor Rules 873 – 809 of the Texas Rules of Civil Procedure provide for the recovery of attorney's fees;

- (4) Dismissing the Kenedy Foundation's cause of action for attorney's fees and declaratory relief pursuant to the Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code §37.001 *et seq.*; and
- (5) For all such other and further relief, both in law and in equity, to which Movants may be justly entitled.

Respectfully submitted,



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