THIS LAND IS YOUR LAND: *TRAN V. MACHA* AND THE HOSTILE INTENT STANDARD IN TEXAS ADVERSE POSSESSION LAW

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I. INTRODUCTION

A cherished hallmark of Texan identity is the individual's right to privately possess real property.[1] Accordingly, Texas property law generally reflects this value—with one notable exception.[2] In 2006, the Texas Supreme Court's holding in *Tran v. Macha* endorsed a hostile intent standard for adverse possession that awards only those individuals who have knowingly infringed upon their neighbors' property rights.[3] With this decision, the court requires an adverse possessor to demonstrate intent to *take* property, rather than intent to merely *possess* it.[4] This Comment addresses the *Tran v. Macha* decision, as well as the persisting lack of clarity in the Texas definition of "hostile intent." Part II will note conflicting standards prior to *Tran*; Part III will discuss the affirmation of the bad faith standard in *Tran* itself; and Part IV will discuss the potential effects of *Tran*, along with recommendations for remedying the current state of the law.

II. PRE-*TRAN*: CONFLICTING STANDARDS

In Texas, a person may gain limitations title to real property by

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[1] *See Commonsense Conservation: Texas Farm and Ranch Lands Conservation Program*, TEXAS GENERAL LAND OFFICE (Feb. 8, 2012), http://www.glo.texas.gov/what-we-do/state-lands/_publications/FarmRanch-brochure.pdf. ("Privately owned land in Texas accounts for 84 percent of the state's entire land area.").

[2] *See infra* Part IV.A.3.

[3] *See* 213 S.W.3d 913, 915 (Tex. 2006) (per curiam).

[4] *Id.*

peaceably and adversely possessing the property for a certain period of time.[5] Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person."[6] Of these elements, Texas courts have most struggled to define hostility.[7] It is unclear whether "hostile" describes the abstract juxtaposition of the adverse claim and the title claim, or the literal attitude of the adverse possessor towards the true titleholder.[8] Prior to *Tran*, the Texas Supreme Court had articulated two opposing definitions of hostility.[9] This section describes the two approaches to intent and chronicles the continuing coexistence of both approaches in Texas.

A. Hostile Intent Standards in American Property Law

In American property law, there are two standards—one objective, one subjective—for gauging whether an adverse claim is "hostile."[10] The majority rule is an objective standard.[11] First articulated in the 1831 Connecticut case of *French v. Pearce*, the objective standard uses "hostile" to describe the possessor's claim in relation to the claim of the true titleholder.[12] "Hostile" does not refer to the attitude of the possessor, so the adverse possessor's state of mind is irrelevant, as is whether possession resulted from mistake, ignorance, inadvertence, or intentional trespass.[13]

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[5] TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.021–.028 (West 2011). Texas has five different limitations statutes that award land to adverse possessors. The adverse possession statute in which the hostile intent standard most often becomes an issue is the in the 10-year limitations title statute, sometimes referred to as the "naked possession" statute, indicating that no color of title is needed to achieve adverse possession. *See id.*

[6] *Id.* § 16.021.

[7] *See* Judson T. Tucker, Comment, *Adverse Possession in Mistaken Boundary Cases*, 43 BAYLOR L. REV. 389, 389 (1991).

[8] *See infra* Part II.A.

[9] *Compare* Ellis v. Jansing, 620 S.W.2d 569, 571–72 (Tex. 1981) (requiring bad-faith intent to take the land), *with* Calfee v. Duke, 544 S.W.2d 640, 642 (Tex. 1976) (setting objective standard that does not require intent to dispossess another).

[10] *See* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1038–39 (2006) (describing how the objective standard looks to the possessor's actions instead of the possessor's state of mind).

[11] *Id.* at 1047.

[12] 8 Conn. 439, 442 (1831).

[13] *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2426 (2001).

Accordingly, hostility is determined by focusing on the actions of the adverse possessor and his actual use of the land.[14] Testimony as to his intent may be relevant but is not determinative.[15]

The other approach to hostile intent, followed by a minority of jurisdictions, is a subjective standard.[16] There are two permutations of a subjective standard: a good faith standard that awards land only to those who mistakenly believed that they had title, and a bad faith standard that awards land only to those who intended to dispossess the true title holder.[17] Not surprisingly, a subjective standard places heavy emphasis on the testimony of the adverse possessor, as well as that of any predecessors the adverse possessor needs to achieve the limitations period.[18]

The bad faith standard, sometimes called the Maine Rule, requires a possessor to be aware of other claims of ownership.[19] Possession stemming from mistake, inadvertence, or ignorance—in other words, possession motivated by any other impetus than the intent to dispossess—fails to satisfy the intent standard.[20] Understandably, this standard has been subject to criticism due to policy concerns, and, as a result, it is recognized in very few jurisdictions.[21] Alternatively, the good faith subjective standard requires the possessor to have possessed in good faith.[22] At first blush, a good faith standard seems to be the most equitable standard. However,

[14] *Id.* at 2426 n.48.

[15] *Id.* at 2455.

[16] *See* Fennell, *supra* note 10, at 1039 n.10.

[17] *See* Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 746–47 n.20 (1986).

[18] *See* Stake, *supra* note 13, at 2431, 2451–53.

[19] Preble v. Me. Cent. R.R. Co., 27 A. 149, 150 (Me. 1893), *overruled by* Dombkowski v. Ferland, 893 A.2d 599 (Me. 2006). Though the bad faith standard for hostile intent in adverse possession is sometimes still referred to as the "Maine Rule," the legislature of Maine itself superseded the rule in *Preble* through legislation that adopted an objective test. *See* Bruce A. McGlaufin, *Some Confusing Things Happened on the Way to Modernizing Maine's Adverse Possession Law*, 25 ME. B.J. 38, 38 (2010).

[20] *See, e.g.*, *Preble*, 27 A. at 150.

[21] *See* Fennell, *supra* note 10, at 1039 n.10. Currently, South Carolina and Arkansas (as well as Texas, as this article will demonstrate) are the only jurisdictions that espouse a bad faith hostile intent standard. *See id.* Even Maine, the jurisdiction credited with creating the bad faith standard, has since opted for an objective definition of "hostility." *See* McGlaufin, *supra* note 19, at 38.

[22] *See, e.g.*, Simmons v. Cmty. Renewal & Redemption, LLC, 685 S.E.2d 75, 77 (Ga. 2009) (stating that a possessor entering on the property knowing it is not his and without a good faith claim of right to do so is simply a trespasser).

inherent problems, including difficulty in defining "good faith," have resulted in limited use of the standard.[23]

No Texas courts have required a showing of good faith in order to prevail. However, there are two separate lines of decisions that endorse objective and the subjective bad faith standards, respectively.[24]

B. The Objective Hostile Intent Standard in Texas

The Texas Supreme Court has long endorsed an objective standard for hostile intent in adverse possession cases.[25] *Calfee v. Duke*, decided in 1976, is a popular articulation of this standard.[26] In that case, Calfee, the grandson of J. H. Duke, lived on approximately 250 acres, all of which were enclosed by a fence.[27] The deed conveying the land to Calfee from his mother (Duke's daughter) did not include 24 of the enclosed acres.[28] The other Duke heirs brought suit, claiming that they and Calfee had become cotenants with respect to the 24 acres.[29] Though Calfee considered himself the rightful owner and had never thought of himself as claiming adversely to anyone, the court held that Calfee possessed the requisite intent to satisfy adverse possession.[30] Because Calfee had actually and visibly possessed and used the land, his adverse possession "[could not] be defeated by [his] lack of knowledge of the deficiency of his record title or by the absence of a

[23] Currently, Iowa, Oregon, and Georgia are the only states with a good faith standard. *See* Per C. Olson, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 ENVTL. L. 1297, 1319 (1993).

This trend, however, may be changing: the New York Legislature recently adopted a modified good faith standard that required an adverse possessor to have a "reasonable basis" for believing he owns the disputed land. *See* Jason Greenberg, Note, *Reasonableness Is Unreasonable: A New Jurisprudence of New York Adverse Possession Law*, 31 CARDOZO L. REV. 2491, 2505 (2010). This legislation was ultimately vetoed by then-Governor Eliot Spitzer. *Id.* at 2504–05. The passage of that bill may be indicative of a growing trend against bad faith adverse possession, perhaps correlative with increasing urbanization.

[24] *See infra* Part II.B–C.

[25] *See, e.g.*, Pearson v. Doherty, 183 S.W.2d 453, 456 (Tex. 1944) (noting that deposition testimony showed possessor was not trying to take land away from the true owner did not prevent the possessor from establishing limitations title).

[26] 544 S.W.2d 640, 642 (Tex. 1976).

[27] *Id.* at 641.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 642.

realization that there could be other claimants for the land."[31] This holding crystallized the objective standard: assuming all other statutory requirements were met, lack of intent to dispossess another did not defeat the claim.[32]

In the thirty-five years following *Calfee*, Texas appellate courts have repeatedly applied its objective standard.[33] Even more notably, in 2003, *Calfee* was reaffirmed by the Texas Supreme Court in *Natural Gas Pipeline Co. of America v. Pool*.[34] In *Pool*, predecessors to the owners of mineral interests had executed leases with oil and gas companies in the 1920s and 1930s.[35] The primary terms of these leases had long expired, and the leases were now in their secondary terms.[36] The wells had continued to produce over the years, and the oil and gas companies had continued to pay the mineral owners the economic interests to which they were entitled under the leases.[37] When reviewing the Texas Railroad Commission production records years later, however, the mineral owners found that there had been several cessations of production over the course of the leases.[38] These hiatuses had each ranged from 30 to 153 days in length and had occurred between 14 and 29 years before the suit was filed.[39] All of these suspensions, however, had been temporary; new wells had been drilled, production had been revived, and the mineral owners had continued to receive royalties according to the original lease terms.[40] Nevertheless, under common law, cessation of production during the secondary term

[31] *Id.*

[32] *See id.*

[33] *See, e.g.*, Ybarra v. Newton, 714 S.W.2d 353, 355–56 (Tex. App.—Corpus Christi 1986, no writ); Boerschig v. Sw. Holdings, Inc., 322 S.W.3d 752, 765 (Tex. App.—El Paso 2010, no pet.).

[34] 124 S.W.3d 188, 198 (Tex. 2003).

[35] *Id.* at 190.

[36] *See id. See also* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 31 (LexisNexis ed., 4th ed. 2008). An oil and gas lease is temporally divided into two segments: the primary term and the secondary term. *Id.* The primary term is typically set for a certain number of years. *Id.* Following the expiration of the primary term, the lease can continue indefinitely, in the secondary term, so long as production in paying quantities is taking place. *Id.* at 31, 35. If production ceases during the secondary term, however, the lease terminates. *See id.* at 31.

[36] *See Pool*, 124 S.W.3d at 191.

[37] *Id.* at 191.

[38] *Id.* at 190.

[39] *See id.* at 199.

[40] *See id.* at 197.

terminates the lease.[41]

Consequently, the mineral owners filed suit against the oil and gas companies, arguing termination of the leases due to the temporary cessations.[42] Because the oil and gas companies had continued to drill after the leases terminated, they were trespassers and were liable to the mineral owners for all subsequent profits from the leases (rather than mere royalties).[43] Essentially, then, the case was framed as an opportunity for the Texas Supreme Court to determine whether a lease could survive despite a temporary cessation and whether such a cessation could be justified by economic as well as mechanical reasons.[44]

The court, however, declined to answers questions concerning temporary cessation and instead decided the case based on the alternative defense offered by the oil and gas companies—adverse possession.[45] The oil and gas companies argued that, even if temporary cessation had terminated the lease, they had become lessees by means of adverse possession.[46] The court agreed.[47] The lease had been repudiated by the open and exclusive possession by the oil and gas companies that was inconsistent with the mineral owner's title.[48] For at least fourteen years, the companies had continuously produced oil and gas, paid royalties to the lessors, and drilled replacement wells when needed.[49] Because these acts would be inconsistent with the mineral owners' title in the absence of a lease, the oil and gas companies had adversely possessed the same interest that had initially been conveyed to them in the lease.[50]

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[41] *See* SHADE, *supra* note 36, at 31.

[42] *Pool*, 124 S.W.3d at 190.

[43] *See id.* at 198. *See also* SHADE, *supra* note 36, at 96–97.

[44] *See* SHADE, *supra* note 36, at 107.

[45] *Pool*, 124 S.W.3d at 198.

[46] *See* SHADE, *supra* note 36, at 107–08 & n.154. It is important to note that an oil and gas lease is an anomaly in Texas property law. *See id.* at 13. More than a tenancy situation, it is analogous to a fee simple determinable conveyance, whereby the mineral owner conveys development and drilling rights to the oil and gas companies for a specified time (the primary term) to continue thereafter so long as production is taking place (the secondary term). *See id.* at 13, 31. Though the parties are termed "lessor" and "lessee," a present interest greater than mere possession is conveyed. *See* W.T. Waggoner Estate v. Sigler Oil Co., 19 S.W.2d 27, 28–29 (Tex. 1929).

[47] *Pool*, 124 S.W.3d at 198.

[48] *Id.*

[49] *See id.* at 197, 199.

[50] *Id.* at 198.

In so holding, the court emphasized the *Calfee* definition of "hostility."[51] The mineral owners countered that, because both parties were unaware of the lease's expiration, the oil and gas companies' continued drilling was insufficiently hostile.[52] The court disagreed—as in *Calfee*, actual and open use satisfied the statutory requirements for adverse possession and could not be defeated by the claimant's lack of knowledge of the deficiency of record title or by the absence of a realization that there could be other claimants for the land.[53] Here, interpreting "hostile" to require knowledge on the part of the possessor would have required the oil and gas companies to inform the mineral owners both that the lease had terminated *and* that the fee interest in the minerals had reverted to the lessors.[54] The court rejected this "novel proposition," stating it had "never been the law in Texas."[55] The objective standard thus seemed clearly established.

C. The Bad Faith Hostile Intent Standard in Texas

Given the line of cases above, it would seem that an objective standard for hostile intent is unquestionable. However, in 1981, the Texas Supreme Court issued an opinion in diametric opposition to the *Calfee* rule and, in doing so, has created a parallel line of case law that requires bad faith.[56]

In *Ellis v. Jansing*, the Jansings owned Lot 3 of a subdivision in Waco.[57] Their neighbor, Ellis, owned Lot 4.[58] Both lots had title that originated with A.B. Shoemake, who had, in 1937, granted an easement to the city that began on Lot 4 and extended the western boundary of that lot, eventually joining the eastern boundary of Lot 3.[59] After granting the easement, but prior to selling the lots, Shoemake erected a retaining wall along the easement that extended three and a half feet over into Lot 4.[60] Lot 3 was eventually sold to Copeland, who was the Jansings' predecessor in title,

[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *See* Ellis v. Jansing, 620 S.W.2d 569, 571 (Tex. 1981).
[57] *Id.* at 569.
[58] *Id.*
[59] *Id.*
[60] *Id.*

while Ellis bought Lot 4.[61] When the error was discovered, the Jansings claimed title through adverse possession.[62] Because they had not owned Lot 3 for the requisite period, the Jansings also depended upon Copeland's possession to satisfy the limitations period.[63] At trial, Copeland testified that he had taken possession of all the land up to the retaining wall and had maintained the land as part of his yard.[64] Although he assumed the land in question was his, Copeland stated that he had not intended to claim any property that belonged to his neighbors.[65] The Texas Supreme Court denied the Jansings' claim, holding that Copeland's possession had not been hostile because he had not intended to take his neighbor's land.[66] With this holding, which did not even mention the *Calfee* decision of five years earlier, the court established a hostile intent standard that required bad faith.[67]

When the court was next faced with a question of hostile intent, however, it did not apply the *Ellis* standard.[68] Four years later, *Bywaters v. Gannon* presented a similar factual situation of a boundary dispute between residential lots.[69] The Gannons, claiming that they had adversely possessed the disputed strip, argued that their maintenance of the flowerbed on the land demonstrated appropriation.[70] The court held that adverse possession had not been achieved because there was not sufficient evidence of actual use.[71] The court could have easily applied *Ellis* framework: because the Gannons assumed that they were the true owners and were unaware of the Bywaters' title, they lacked sufficient hostile intent. Instead, the court failed to even mention *Ellis*, much less perform the subjective intent inquiry that *Ellis* purported to require.[72]

Similarly, appellate decisions immediately following *Ellis* not only

[61] *Id.* at 569, 571.

[62] *Id.* at 570–71.

[63] *Id.* at 571. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.023 (West 2011) (allowing tacking of successor interests).

[64] *Ellis*, 620 S.W.2d at 571.

[65] *Id.*

[66] *Id.*

[67] *See id.*

[68] *See* Bywaters v. Gannon, 686 S.W.2d 593, 595 (Tex. 1985).

[69] *Id.* at 594.

[70] *Id.* at 595.

[71] *Id.*

[72] *See id.*

failed to apply the bad faith standard but ignored the existence of *Ellis* altogether.[73] In San Antonio, *Garcia v. Palacios* involved a deed that conveyed a 948-acre tract to the Garcias.[74] Though the grantor indicated that a fence correctly demarcated the tract, that fence actually included 60 acres of the neighboring tract.[75] When the error was discovered, the neighboring landowners filed suit.[76] The San Antonio Court held that, even though the Garcias had only intended to possess the 948 acres deeded to them, they had possessed all of the land within the fence as their own.[77] Therefore, despite the mistake—and the lack of malicious intent—Garcia's claim was sufficiently hostile to that of the true titleholder Palacios.[78]

In 1988, the Fort Worth Court of Appeals likewise ignored *Ellis*.[79] *Boyle v. Burk* involved a disputed strip that had been enclosed on the wrong side of the fence.[80] The adverse possessor, Burk, depended on the possession of his predecessor in title, Way, to meet the statutory period.[81] At trial, Way testified that he had used and maintained the disputed land as his own; as the land was on his side of the fence, he had always considered it his.[82] At the same time, he stated he was unaware of the true titleholder's interest in the land and had no intention to claim another's land.[83] Despite Way's testimony, Burk was awarded the land.[84] The Fort Worth Court of Appeals held that knowledge of the true owner's interest was not a requirement for adverse possession.[85]

The same year brought two more appellate court decisions that flew in the face of *Ellis*.[86] First, in *Fish v. Bannister*, the San Antonio Court of

[73] *See, e.g.*, Garcia v. Palacios, 667 S.W.2d 225, 229 (Tex. App.—San Antonio 1984, writ ref'd n.r.e).

[74] *Id.* at 227.

[75] *Id.* at 226–27.

[76] *Id.* at 226.

[77] *Id.* at 229.

[78] *See id.*

[79] *See* Boyle v. Burk, 749 S.W.2d 264, 267 (Tex. App.—Fort Worth 1988, writ denied).

[80] *Id.* at 265.

[81] *Id.* at 266.

[82] *Id.*

[83] *Id.* at 267.

[84] *Id.*

[85] *Id.*

[86] *See* Julien v. Baker, 758 S.W.2d 873, 876–77 (Tex. App.—Houston [14th Dist.] 1988, writ denied); Fish v. Bannister, 759 S.W.2d 714, 718 (Tex. App.—San Antonio 1988, no writ).

Appeals echoed its *Garcia* holding that subjective hostility towards the titleholder was not necessary to satisfy adverse possession.[87] The Houston Fourteenth Court of Appeals followed suit later that year in *Julien v. Baker*, again involving neighboring residential plots.[88] In 1958, Baker purchased a lot and had it surveyed, demarcating the four corners of her lot with iron posts in order to facilitate landscaping.[89] A 1985 survey revealed that the earlier survey had incorrectly allotted additional land to Baker.[90] Despite Baker's clear intention—by commissioning a survey *and* marking the four corners—not to appropriate another's land, the court held that Baker's adverse possession claim could not be defeated by her lack of knowledge of the true owner.[91]

These four appellate cases never mentioned *Ellis* or its stipulation that an adverse possessor must intend to possess the land of another. Furthermore, their subsequent histories do not indicate that their neglect of *Ellis* was notable: the writs of *Julien* and *Boyle* were both denied by the Texas Supreme Court, and a writ for *Garcia* was refused, no reversible error.[92] Despite the repeated failure of the appellate courts to apply the bad faith standard, the Texas Supreme Court passed on opportunities to remedy the appellate rejection of *Ellis*.

III. *TRAN* AND THE AFFIRMATION OF THE *ELLIS* BAD FAITH STANDARD

For twenty-five years, *Ellis* was cited infrequently by appellate courts. When courts did cite *Ellis*, they relied upon the case primarily for its statement that a public easement could not be adversely possessed.[93] Otherwise, the bad faith standard in *Ellis* could well be considered dormant; while it had never been overruled, it had never again been referenced by the Texas Supreme Court. The holding—and its hostile intent standard—might

[87] *Fish*, 759 S.W.2d at 718 ("Appellant's contention that appellees could not formally intend to claim land unless they knew that such land was not part of their record title is without merit.").

[88] 758 S.W.2d at 874.

[89] *Id.* at 874–75.

[90] *Id.* at 875.

[91] *Id.* at 876–77.

[92] Fish has no subsequent history. Because all three of these appellate decisions predated the 1997 adoption of the petition-based appeal, the Supreme Court should have granted the writs if it felt the appellate courts had misstated the law or committed reversible error.

[93] *See, e.g.*, Bowen v. Ingram, 896 S.W.2d 331, 335 (Tex. App.—Amarillo 1995, no writ); Roberson v. City of Austin, 157 S.W.3d 130, 135 (Tex. App.—Austin 2005, pet. denied).

well have faded into obscurity but for the court's three-page decision in *Tran v. Macha*.[94]

Tran, like the other cases discussed above, was a mistaken boundary case involving a shared driveway in a Houston suburb.[95] In the 1920s, developers of a West University Place neighborhood platted lots that were each 55 yards wide.[96] However, when construction began in the 1930s, several houses were built on the presumption that the lots were only 50 yards wide.[97] As a result, each house was increasingly shifted to the east.[98] *Tran* concerned a driveway that appeared to belong to Lot 5 but in reality belonged to Lot 6.[99] When Lillian Haliburton bought Lot 5 in 1970, her brother's family, the Buddes, owned Lot 6.[100] For over twenty years, Ms. Haliburton assumed ownership of the driveway but shared it with the Buddes.[101] In 1995, the Buddes sold Lot 6 to Tran, and, in 2001, Mrs. Haliburton sold Lot 5 to the Machas.[102] Upon the latter sale, a survey revealed that the driveway belonged to Lot 6 rather than Lot 5.[103] Tran erected a fence around the strip, and suit shortly followed.[104] The trial court held that Halliburton had achieved adverse possession of the strip and that limitations title therefore belonged to her successors, the Machas.[105] The First District Court of Appeals in Houston affirmed, holding that Halliburton's possession of the strip, combined with universal presumption of her ownership, was sufficient to achieve adverse possession.[106]

The Texas Supreme Court, however, disagreed in a per curiam opinion that relied heavily upon *Ellis*.[107] Holding that Haliburton's possession was insufficiently hostile, the court used the *Ellis* hostility definition, requiring

[94] 213 S.W.3d 913 (Tex. 2006) (per curiam).

[95] *Id.* at 914.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* Tran v. Macha, 176 S.W.3d 128, 133–34 (Tex. App.—Houston [1st Dist.] 2004) *rev'd*, 213 S.W.3d 913 (Tex. 2006) (per curiam).

[107] *See Tran*, 213 S.W.3d at 915 (quoting Ellis v. Jansing, 620 S.W.2d 569, 571 (Tex. 1981)).

"an intention to claim property as one's own to the exclusion of all others."[108] The court attempted to qualify this statement by admitting that hostility did not necessarily require "an intention to dispossess the rightful owner, or to even know that there is one."[109] However, this qualification failed to encompass ignorant or inadvertent encroachers, such as those in the *Calfee* line of cases.[110] Such a possessor cannot harbor an intent to claim to the exclusion of other owners or claimants if she has no knowledge that any such owners or claimants exist.[111] In other words, the *Tran* court held that you don't have to intend to possess another's land, but you have to intend to possess land to the exclusion of another's claim—two indistinguishable postures.[112] With this requirement of intentional dispossession, the court resuscitated *Ellis* and solidified the bad faith standard.[113]

The problem with *Tran* was not that it was wrongly decided. Indeed, the Machas failed to meet the statutory elements, but their failure resulted from lack of exclusivity rather than lack of hostility.[114] Exclusive—not shared—possession is required to support an adverse possession claim.[115] In order to satisfy the limitations period, the Machas tacked their possession to that of Mrs. Haliburton.[116] The latter's sharing of the driveway with the Buddes, therefore, was not a sufficiently exclusive use.[117]

Alternatively, the court could have ruled that the shared use of the driveway was not sufficiently conspicuous. In Texas, a claim must be manifested by declaration or by an open or visible act.[118] "If there is no verbal assertion of claim . . . brought to the knowledge of the landowner, the adverse possession must be so open and notorious and manifested by such open or visible act or acts that knowledge on the part of the owner will

[108] *Id.*

[109] *Id.* (citing Calfee v. Duke, 544 S.W.2d 640, 642 (Tex. 1976)).

[110] *See, e.g.*, *Calfee*, 544 S.W.2d at 642.

[111] *See Tran*, 213 S.W.3d at 914.

[112] *See id.* at 915.

[113] *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (West 2011).

[114] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026.

[115] *See, e.g.*, Terrill v. Tuckness, 985 S.W.2d 97, 107 (Tex. App.—San Antonio 1998, no pet.); *see also* Kleckner v. McClure, 524 S.W.2d 608, 613 (Tex. App.—Fort Worth 1975, no writ).

[116] *See Tran*, 213 S.W.3d at 914; TEX. CIV. PRAC. & REM. CODE ANN. § 16.023.

[117] *See Tran*, 213 S.W.3d at 914.

[118] *See* Orsborn v. Deep Rock Oil Corp., 267 S.W.2d 781, 787 (Tex. 1954).

be presumed."[119] The mutual use of the driveway, without verbal assertion of any claim, failed to signal that Mrs. Haliburton was adversely possessing the strip.[120] Again, because the Machas depended on the possession by Mrs. Haliburton to tack to their own, the open and notorious element was not met.[121]

The above two alternative—and correct—bases are consistent with the related concept of easement by prescription.[122] Though the end results differ—a successful adverse possession claim leads to limitations title, while a prescriptive easement awards a trespasser a servitude on another's estate—the two property concepts have a similar logical basis. Had the Machas argued instead that a prescriptive easement had arisen through Mrs. Halliburton's continuous use of the driveway, such a claim would have also been defeated by lack of exclusivity and notice, but not by lack of subjective intent. For example, in *Callan v. Walters*, a claimant asserted prescriptive easement of a stairway.[123] Because the owner and the claimant both used the passage, the claimant had not established an easement because the use had not been exclusive: "The use of a way over the land of another when the owner is also using the same is not such adverse possession as will serve as notice of a claim of right."[124] Thus, a prescriptive easement analysis would have—and the adverse possession inquiry should have—defeated the Machas' claim but on exclusivity and openness bases.[125] Thus, the *Ellis* bad faith standard, though unnecessary to correctly decide *Tran*, reemerged as a viable standard.[126]

IV. THE FALLOUT: HARMFUL EFFECTS OF THE *ELLIS/TRAN* BAD FAITH STANDARD AND PROPOSED SOLUTIONS

This section will first illustrate the reasons why a bad faith subjective standard is undesirable and inconsistent with Texas law. Next, this section will address the different approaches to remedying and clarifying the current hostile intent standard.

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[119] *Id.*

[120] *See Tran*, 213 S.W.3d at 914–15.

[121] *See id.*

[122] *See id.*

[123] 190 S.W. 829, 830 (Tex. Civ. App.—Austin 1916).

[124] *Id.* at 832.

[125] *See Tran*, 213 S.W.3d at 914.

[126] *See id.* at 915.

A. The Disadvantages of a Bad Faith Standard in Texas

The *Ellis*/*Tran* bad faith hostile intent standard raises practical concerns, introduces theoretical anomalies, and presents inconsistencies with the property policy of Texas.

1. Practical Concerns

Practically, a bad faith hostile intent standard presents three primary problems for judges and counsel alike. First, a subjective standard is more expensive and less efficient to adjudicate, as an inquiry into a party's subjective intent requires more judicial resources than would an analysis based on objective criteria.[127] Second, and related, the subjective standard has a greater risk of abuse and presents counsel with a potential ethical dilemma as to how best prepare witnesses.[128] For example, in *Ellis*, Copeland testified that he had purchased the lot under the assumption that it extended to the retaining wall.[129] He accordingly believed that that property was his and used it as part of his yard.[130] The epitome of an innocent encroacher, Copeland also testified that he had not intended to claim more land than that in his deed and that he had never intended to claim any land that belonged to his neighbors.[131] The court viewed these two statements, even when coupled with Copeland's use of the property, as "legally insufficient to sustain a claim of adverse possession."[132] Counsel representing such adverse possessors are thus in a quandary when preparing for trial. To encourage the ignorant encroacher to manufacture an "intent to take" would not only be untruthful but would also likely be distasteful to the encroacher himself. On the other hand, encouraging the encroacher to honestly relate his mistaken possession would risk an unfavorable ruling. Use of the objective standard eliminates the guesswork in the trial preparation of mistaken adverse possessors.

Finally, the bad faith standard creates uncertainty as to the moment the limitations period begins to run. If the elements—actual, open, exclusive use coupled with hostile intent—are required to all be present and continual

[127] *See, e.g.*, Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 357 (1983).

[128] *See* Ellis v. Jansing, 620 S.W.2d 569, 571 (Tex. 1981).

[129] *See id.*

[130] *See id.*

[131] *See id.*

[132] *Id.*

throughout the limitations period, does the period not commence until there is a manifestation of mal intent?[133] Stated another way, must the possessor first demonstrate the requisite "intent to take" before the clock begins to run?[134] If so, such a requirement exacerbates the two aforementioned practical concerns. Under the objective standard, however, the limitations period begins to run as soon as the record property owner has a trespass cause of action against the adverse possessor.[135] The limitations clock is judged by the physical presence of the possessor and not his testimony as to when he first intended to claim "to the exclusion of all others."[136]

2. Theoretical Concerns

In addition to practical concerns, a bad faith hostile intent standard is theoretically inconsistent with related legal theories in Texas. Most significantly, a bad faith standard severs adverse possession from trespass, the tort from which adverse possession originates.[137] Because the adverse possessor has no (or imperfect) title to the land, she necessarily consummates adverse possession with an initial trespass; this is why objective standard jurisdictions consider the limitations period to begin when the adverse possessor first begins to occupy another's land as a trespasser.[138] Regarded as an intentional tort in Texas, trespass requires an intent to commit an act which violates a property right, or would be substantially certain to have that effect.[139] However, it is irrelevant whether the actor knew that the act she intended to commit was such a violation.[140] So long as the actor's entry itself upon another's land was intentional and voluntary, it doesn't matter whether the actor mistakenly thought the land was hers or whether she knew it belonged to another.[141] Thus, it follows

[133] *See, e.g.*, Helmholz, *supra* note 127, at 335.

[134] *See id.*

[135] *See id.* at 334.

[136] *See* Tran v. Macha, 213 S.W.3d 913, 915 (Tex. 2006) (per curiam) (requiring that an adverse possessor claim land "to the exclusion of all others").

[137] *See* Peavy-Moore Lumber Co. v. Spreckles, 153 S.W.2d 325, 328 (Tex. Civ. App.—Beaumont 1941, writ ref'd w.r.m.).

[138] *See* Helmholz, *supra* note 127, at 334–35.

[139] *See* City of Keller v. Wilson, 86 S.W.3d 693, 714 (Tex. App.—Fort Worth 2002), *rev'd on other grounds*, 168 S.W.3d 802 (Tex. 2005). *See* Stukes v. Bachmeyer, 249 S.W.3d 461, 466 (Tex. App.—Eastland 2007, no pet.).

[140] *Stukes*, 249 S.W.3d at 463, 466.

[141] *See id.*

that adverse possession—an extended trespass—should require only the intent to possess and use the land and not the intent to take against the claim of another. Requiring a hostile intent to take, as the bad faith standard does, divorces adverse possession from its conceptual source.

Theoretical concerns also arise when adverse possession functions in tandem with other Texas property law concepts. A notable example is the way in which the community property presumption affects the award of limitations title. According to *Brown v. Foster Lumber*, when a deed is granted to a married person but the grantor has no title to give, any title subsequently acquired under adverse possession of the married person and his or her spouse is community property, regardless of the parties' original intent that it should be the separate property of the grantee.[142] In *Brown*, a woman paid for land with her separate property, and the grantor deeded the land to Mrs. Brown only.[143] In reality, the grantor had no claim to the land himself, but Mrs. Brown and her husband, unaware of this fact, peaceably and adversely possessed the land for the statutory period.[144] Upon realization of the lack of title, Mrs. Brown asserted title to the land that she had subjectively intended to purchase and own as her separate property.[145] The court awarded the land, but only as community property because Mrs. Brown's husband had adversely possessed the property with her.[146] The result was not based on her subjective intent but on an objective analysis of the parties' actions.[147] If events similar to those in Brown occurred today, the *Ellis*/*Tran* rule would require the determining court to first objectively analyze the joint possession and then subjectively analyze the hostile intent of each spouse. Adherence to the subjective standard in such situations is theoretically incongruous, as well as unnecessarily complicated.

Finally, a bad faith standard does not fit with any of the accepted models of adverse possession. Traditionally, four theories rationalize the concept of adverse possession.[148] First, adverse possession provides a necessary time limitation in order to reduce the time and cost of litigating

[142] 178 S.W. 787, 789 (Tex. Civ. App.—Galveston 1915, writ ref'd).

[143] *Id.* at 788.

[144] *Id.* at 788–89.

[145] *Id.* at 789.

[146] *Id.*

[147] *See id.*

[148] Christopher H. Meredith, Note, *Imputed Abandonment: A Fresh Perspective on Adverse Possession and a Defense of the Objective Standard*, 29 MISS. C. L. REV. 257, 261 (2010).

stale property claims.[149] Second, adverse possession serves to quiet title defects.[150] Third, the threat of adverse possession encourages landowners not to be passive or absent.[151] The final theory is a moral argument: because an adverse possessor becomes attached to land over time, attempting to remove him from it much later could cause a disturbance of the peace.[152] All of these justifications vary conceptually, but none are grounded in the idea that an intentional trespasser should be rewarded for knowingly infringing on the property rights of another.[153]

3. Inconsistencies with Texas Property Traditions

Even though a bad faith hostile intent standard is by far the minority rule, there are potential justifications for such a rule.[154] Though detailed arguments for a bad faith standard are beyond the scope of this article, the primary advantages are utilitarian and efficient use of land.[155] In other words, the bad faith standard punishes absentee landowners who are not making efficient use of their land by awarding that land to someone who is actually using it.[156]

While this argument may have merit in other jurisdictions, the cultural and political mores of Texas appear to reject outright such an ideology.[157] Utilitarianism as a justification for the usurpation of real property rights is abhorrent to many Texans, evidenced recently in the ratification of Proposition 11.[158] The United States Supreme Court's decision in *Kelo v. City of New London*, which held that public economic benefit could justify the taking of private land,[159] prompted the Texas Legislature to amend the state's constitution in 2009.[160] Soundly ratified by the general population later that year, Proposition 11 was intended to prevent government takings

[149] *Id.*

[150] *Id.*

[151] *Id.* at 262.

[152] *Id.*

[153] *See id.* at 261–62.

[154] *See, e.g.*, Fennell, *supra* note 10, at 1066–69.

[155] *Id.*

[156] Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130 (1985).

[157] *See* Tex. H.R.J. Res. 14, 81st Leg., R.S. (2009).

[158] *Id.*

[159] *See* 545 U.S. 469, 472, 488–90 (2005).

[160] *See* Tex. H.R.J. Res. 14, 81st Leg., R.S. (2009).

of private property for non-government uses.[161] Admittedly, the actors in the two situations are different—adverse possession is the dispossession of a private individual's land by another private actor, while a public taking is the dispossession of a private individual's land by state action.[162] However, the ideology underlying the bad faith standard of adverse possession is similar to that bolstering a government taking: because a person other than the title owner could more beneficially use the land, he or she should be awarded that land.[163] Such an idea, though it may be supported in other jurisdictions, is in direct contrast to the vigilant protection of autonomous property ownership in Texas.[164]

Moreover, an objective standard is needed as adverse possession is grafted onto two other, non-traditional areas of property law: mineral interest and intellectual property.[165] Adverse possession of mines and mineral wells has become an increasingly litigated cause of action.[166] As *Pool* demonstrates, a bad faith intent standard is nearly impossible to prove, in the absence of actual fraud, where there has been a severance of the surface and mineral estates.[167] Efficiency in delineating mineral ownership—and producing energy—is greatly hampered if the bad faith intent standard continues to linger in case law.[168] The concept of adverse possession has also been introduced in the area of intellectual property disputes.[169] As one of the leaders in technological manufacturing and innovation, Texas needs clarity as to the requisite hostile intent standard in order to keep abreast of this developing area of law.

Furthermore, even if there are merits to awarding land to knowing trespassers, an objective standard would likely not punish those individuals.

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[161] *Id.* This article does not purport to endorse or criticize Proposition 11, but instead uses it only to illustrate the fact that a utilitarian approach to property allocation is disfavored among the Texas populous.

[162] *Compare* Meredith, *supra* note 148, at 260, *with* Tex. H.R.J. Res. 14, 81st Leg., R.S. (2009).

[163] *See* Fennell, *supra* note 10, at 1059.

[164] *See* Tex. H.R.J. Res. 14, 81st Leg., R.S. (2009).

[165] *See, e.g.*, Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 189–90 (Tex. 2003).

[166] *See id.*; BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 62–63 (Tex. 2011).

[167] *See Pool*, 124 S.W.3d at 198.

[168] *See id.*

[169] *See* Constance E. Bagley & Gavin Clarkson, *Adverse Possession for Intellectual Property: Adapting an Ancient Concept to Resolve Conflicts Between Antitrust and Intellectual Property Laws in the Information Age*, 16 HARV. J. L. & TECH. 327, 365–66 (2003).

In fact, a study by Richard Helmholz indicates that an objective standard might actually protect intentional adverse possessors.[170] The study demonstrated that, where there had been a subjective inquiry into the motivation and/or actual knowledge of the adverse possessor, intentional adverse possessors were less likely to prevail, even where good faith was not required.[171] These results hint at a—perhaps natural—tendency to deny land to a knowing trespasser, a tendency that would be less likely to influence the decision if an objective analysis were employed instead. With an objective standard, the action of the possessor, rather than mere testimony, is the operative factor.[172]

B. Towards an Objective Standard: Remedying the Adverse Effects of the Ellis/Tran *Standard*

There are three potential methods for dealing with *Tran* and its affirmation of a bad faith standard. First, courts may, as *McWhorter* did, attempt to rationalize *Ellis*/*Tran* as a bad faith exception to an otherwise objective standard.[173] Alternatively, courts may simply pretend that the *Ellis*/*Tran* bad faith standard does not exist, as the Texas Supreme Court has recently done.[174] A third option, however, is the most desirable solution: the Texas Supreme Court should explicitly clarify the objective standard, putting the *Ellis*/*Tran* bad faith standard unmistakably to rest.

1. *Ellis*/*Tran* as an Exception to the *Calfee* Objective Standard

The least drastic approach to minimizing adverse effects of the *Tran* standard would be to recharacterize the *Ellis*/*Tran* rule as an exception to an otherwise objective hostile intent standard. For example, why not apply the bad faith standard only in boundary disputes with fences, i.e., stipulate that the mere intent to possess the land on one's side of the fence is insufficient without more evidence of hostile intent? While easy to state, excepting *Ellis* and *Tran*, in practice, would mistake their holdings, while at the same time overcomplicating the adverse possession analysis.

After the *Pool* affirmation of the contrasting *Calfee* rule, one Texas

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[170] *See* Helmholz, *supra* note 127, at 341.

[171] *Id.* at 332. *See also* Fennell, *supra* note 10, at 1047.

[172] Fennell, *supra* note 10, at 1047.

[173] *See* Masonic Bldg. Ass'n of Houston, Inc. v. McWhorter, 177 S.W.3d 465, 473 n.4 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

[174] *See* BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 72 (Tex. 2011).

appellate court noted the glaring inconsistency between *Calfee* and *Ellis*.[175] Less than a year before the *Tran* decision, the First Court of Appeals in Houston attempted to rationalize the coexistence of *Calfee* and *Ellis* in *Masonic Bldg. Ass'n of Houston, Inc. v. McWhorter*.[176] There, the court stipulated that the unique facts of *Ellis*—the fact that a common owner erected a demarcation upon which a later possessor attempted to rely—accounted for the difference in outcome from *Calfee*.[177] The court upheld the unanimous *Calfee* rule: actual, visible possession and use was sufficient to support a jury's finding of adverse possession, despite evidence that the possessor was mistaken in his belief that he owned the property and did not intend to "take" it from the record owners.[178] The court then added the following caveat: "[T]o the extent that *Ellis* has been read to require an intent to *steal* the property in dispute, such is not a necessary inference, given its facts."[179] The court thus characterized *Ellis* as holding that a fence erected by the common source of title could not impute hostile intent on the possessor.[180]

While this explanation was a valiant attempt to make sense of the two holdings, the First Court of Appeals in Houston placed too much weight on the identity of the fence builder—a fact that, many times, is unknown or irrelevant.[181] True, in *Ellis*, the fact that the retaining wall had not been erected by Copeland may have suggested that the latter did not openly and actually possess the enclosed land.[182] At the same time, the mere fact that the common titleholder had erected the wall did not, by itself, indicate whether Copeland intended to take the land.[183] Moreover, the distinction made by the *McWhorter* court—that *Ellis* was unique because the retaining wall was erected by the common titleholder—is superficial.[184] It ignores the fact that, in *Calfee*, the disputed acreage had also likely been erected by the common titleholder, as no party could recall who had first erected the

[175] *See McWhorter*, 177 S.W.3d at 473 n.4.

[176] *See id.*

[177] *Id.*

[178] *Id.* at 473.

[179] *Id.* at 473 n.4.

[180] *See id.* at 473.

[181] *See id.* (stating that the fact that in *Ellis*, the fence builder was a common owner of the two parcels of property in dispute).

[182] *See* 620 S.W.2d 569, 571 (Tex. 1981).

[183] *See id.*

[184] *See McWhorter*, 177 S.W.3d at 473 n.4.

fence.[185]

Though flawed, the *McWhorter* rationale was perhaps affected by the ambiguous role of fences in Texas adverse possession law.[186] Texas courts had previously noted the distinction between a casual fence and a designed enclosure: a casual fence is one that existed before the claimant took possession of the land and cannot be relied upon as sole evidence of adverse possession.[187] In contrast, a designed enclosure is one erected for the purpose of demarcating a property line.[188] A claimant may maintain or repair a casual fence, even with the intent to restrain children or pets, without changing the character of the fence.[189] A "substantial modification," however, can change a casual fence to a designed enclosure.[190] This fact-based inquiry into the purpose of a property demarcation, however, does not function to prove or disprove hostile intent.[191] Instead, it serves to determine whether possession was accompanied by actual occupancy or open use.[192] Therefore, neither fence characterization requires the existence of bad faith in order for the claimant to prevail.[193]

The reason why this focus on the inception of the demarcation fails to reconcile *Calfee* and *Ellis* is illustrated more fully in the following two hypotheticals. First, suppose the common titleholder incorrectly demarcates her property and then subsequently presents those lots for sale. The subsequent owner of the lot with extra land has little incentive to adjust the fence. If he innocently assumes the boundary is correct, he will not move the fence. Alternatively, if he learns that extra land is enclosed in with his lot and intends to adversely posses it, he has no independent incentive to adjust the fence to deprive himself of land.

In the second instance, too much focus on the fence-builder can deny a landowner her rightful prerogative. Texas courts have upheld the right of landowner to fence part of her property without disclaiming or negating

[185] *See* Calfee v. Duke, 544 S.W.2d 640, 641–42 (Tex. 1976).

[186] *See id.*

[187] *See* Rhodes v. Cahill, 802 S.W.2d 643, 646 (Tex. 1990).

[188] *See* McAllister v. Samuels, 857 S.W.2d 768, 777 (Tex. App.—Houston [14th Dist.] 1993, no writ).

[189] *See* Dellana v. Walker, 866 S.W.2d at 360 (Tex. App.—Austin 1993, writ denied).

[190] *Rhodes*, 802 S.W.2d at 646.

[191] *See Dellana*, 866 S.W.2d at 360.

[192] Wall v. Carrell, 894 S.W.2d 788, 800 (Tex. App.—Tyler 1994, writ denied).

[193] *See Dellana*, 866 S.W.2d at 360.

ownership of her property outside the fenced area.[194] According to the *McWhorter* characterization of *Ellis*, hostile intent *can* be derived from the construction of a demarcation but only if that demarcation has been constructed after alienation from common title.[195] Exercising the right to erect a fence anywhere on her property, however, the true titleholder may build a fence inside her property line and still intend to possess the remaining property outside the fence.[196] She can do this without risk of imputed abandonment as to the land outside the fence.[197] Alternatively, an adverse possessor may build a fence correctly on the property line yet nevertheless actually and openly appropriate land outside the fence. This latter scenario can occur with or without knowledge of the true boundaries and with or without intent to take another's land. In either circumstance, the hostility analysis would necessarily hinge on who is appropriating the land and the extent to which he or she is appropriating it—not on the fact that the land was physically demarcated after derivation from common title.[198]

While a fence may be evidence of open, notorious, and/or actual use, *McWhorter*'s overemphasis on *who* initiated the demarcation failed to reconcile *Ellis* with *Calfee*.[199] Crafting *Ellis* as an exception is a temporary fix. Not only does it present these logical hurdles, but it overly complicates the hostile intent analysis—only a small part of the greater test of adverse possession.[200]

2. Ignoring the Existence of *Ellis* and *Tran*

Another solution to the conflicting standards is to simply ignore both *Ellis* and its reemphasis in *Tran*. This, the most recent approach of the

[194] *See* Cox v. Olivard, 482 S.W.2d 682, 686–87 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (holding that landowner, who placed his fence east of true boundary line due to nature of terrain, did not relinquish rights to his land west of the fence, when adjoining property owner occasionally grazed cattle in disputed area).

[195] Masonic Bldg. Ass'n of Houston, Inc. v. McWhorter,177 S.W.3d 465, 473 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

[196] *See id.*

[197] *See id.*

[198] *See Dellana*, 866 S.W.2d at 360.

[199] *See McWhorter*, 177 S.W.3d at 473 n.4.

[200] *See* Rhodes v. Cahill, 802 S.W.2d 643, 645 (Tex. 1990) (discussing the various elements that must be proved by a claimant seeking prescriptive title through adverse possession).

Texas Supreme Court,[201] irresponsibly encourages confusion and misapplication of the law. In 2011, the court reaffirmed *Calfee* in *BP American Products Company v. Marshall*, a mineral case concerning a terminated oil and gas lease similar to that in *Pool*.[202] Holding that the payment of royalties constituted evidence of a hostile claim, the court stated that adverse possession is not dependent on the possessor's intent to assert title hostile to a known true owner, but rather on the intent to claim the property.[203] Relying on *Calfee*, the court also cited *Tran*, stating that hostile use does not require an intent to dispossess the rightful owner.[204] However, the court ignored the remainder of the *Tran* holding that simultaneously requires an intent to possess to the exclusion of all other claims to the property.[205] Although the portion of *Tran* upon which the court relied does not establish a hostile intent standard, the court's failure to disapprove of the remainder of *Tran* only perpetuates confusion as to the true standard.[206] Ignoring *Ellis* doesn't make it go away; instead, it continues to allow bad faith to be good law in Texas.

3. Judicial or Legislative Rejection of the *Ellis*/*Tran* Standard

Clearly, the most desirable route to permanently negating the *Ellis*/*Tran* rule is a timely and responsible decision by the Texas Supreme Court. Should the court have the opportunity, it should clearly state that the objective *Calfee* standard is the law and expressly overrule the incongruous subjective standard in *Ellis*. Disapproval by implication has not been enough—the court needs to affirmatively reject the bad faith standard.

Given the passive nature of the judiciary in seeking such opinions, however, an equally desirable alternative would be legislative action. Section 16.021 of the Texas Civil Practice and Remedies Code defines certain terms that are used throughout the chapter governing limitations title.[207] The legislature could easily add a subsection disclaiming the relevancy of subjective intent in a hostility analysis. Such an amendment

[201] *See* BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 72 (Tex. 2011) (ignoring *Ellis* completely in determining adverse possession).

[202] *See id.*

[203] *Id.* (citing Calfee v. Duke, 544 S.W.2d 640, 642 (Tex. 1976)).

[204] *Id.* (citing Tran v. Macha, 213 S.W.3d 913, 915 (Tex. 2006) (per curiam)).

[205] *See id.*

[206] *See id.*

[207] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.021 (West 2002).

would be an unambiguous and unmistakable direction to the courts. When confronted with bad faith standards, legislatures in other jurisdictions have established objective hostile intent standards by means of statutory clarification.[208]

V. CONCLUSION

In February of 2012, a Denton County judge evicted Kenneth Robinson from a $340,000 house in Flower Mound, Texas.[209] When Robinson moved into the home, it had been abandoned by the owner and in foreclosure for over a year.[210] Not claiming to rent or own the home, Robinson lived for free in the home for nearly eight months before the successor lien holder, Bank of America, was made aware of his presence in the home.[211] When threatened with eviction, Robinson argued that he had a claim of right—by means of adverse possession.[212]

Though the judge summarily dismissed Robinson's claim, the incident illustrates the winners under a bad faith hostile intent standard. [213] Had Robinson been able to continuously occupy the home for ten years, he would have been awarded title.[214] The *Ellis/Tran* standard not only allows blatant trespassers like Robinson to prevail but it limits the award of land to bad faith trespassers only.[215] Equally alarming, the bad faith standard currently coexists with the *Calfee* objective standard, creating uncertainty as to which standard a court will choose to apply in any given case.[216] Though other solutions are easier, the most helpful remedy is a direct overruling or repeal of the standard. Regardless of the means, though, a clarification

[208] *See, e.g.*, McGlaufin, *supra* note 19, at 38.

[209] Nomaan Merchant, *'$16 House' Scheme Gets Man Kicked Out of $340,000 Home*, THE CHRISTIAN SCIENCE MONITOR–CSMONITOR.COM (Feb. 6, 2012), http://www.csmonitor.com/Business/2012/0206/16-house-scheme-gets-man-kicked-out-of-340-000-home.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *See id.*

[214] *See id. See also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (West 2002) (setting out 10-year statute of limitations).

[215] *See* Tran v. Macha, 213 S.W.3d 913, 915 (Tex. 2006); Ellis v. Jansing, 620 S.W.2d 569, 571–72 (Tex. 1981).

[216] *Compare Ellis*, 620 S.W.2d at 571 (requiring bad faith), *with* Calfee v. Duke, 544 S.W.2d 640, 642 (Tex. 1976) (setting forth an objective hostile intent standard).

must occur. As disadvantageous as a bad faith standard is, the ability of courts to apply either standard at random is just as unacceptable. A choice needs to be made. The objective hostile intent standard needs to be restored in Texas.