# ORAL ARGUMENT – 10/01/03
# 02-0731
# MARTIN & MARTIN V. AMERMAN

SNIDER: There is a body of law in real estate law that exist that distinguishes property disputes and trespass to try title cases. As we all know trespass to try title cases are a creature of statute and the substantive rights of the parties are governed by those statutes.

With regard to a boundary dispute, if the case is truly a boundary dispute and not a trespasser to try title, there are other avenues available than the trespass to try title statute to bring that case.

PHILLIPS: What's a little quick taxonomy by which a generalist could decide which of these two categories a dispute over who owned what falls into?

SNIDER: A generalist could decide if there is no dispute but for the physical location of the property, then it is a boundary dispute. If there is no dispute as to title...

PHILLIPS: So no problem in the chain of title where this line is?

SNIDER: It's just physically where is the line located on the ground, then it's a boundary dispute.

HECHT: Does it matter that the claims are overlapping? It seems to be a large point made in the briefing that there are no overlapping claims here. But what difference does that make?

SNIDER: In this particular case there are no overlapping claims to the properties by title description. There is a difference in the boundary line in this case.

HECHT: Would it matter whether it was a title dispute or a boundary dispute? Whether the claims were overlapping is what I'm asking?

SNIDER: It doesn't matter if the claims were overlapping, but if the case is truly a boundary dispute, then there are avenues of recovery that are available to the plaintiff in the lower court that are not available in a trespass to try title case.

OWEN: Why should the rules be different?

SNIDER: Because the legislature made the rule different. In the trespass to try tile situation the statute as set forth in the property code does not allow for the recovery of attorney fees. There's really no reason why there couldn't be a recovery of attorney fees except that the legislature simply did not include that in the statute.

OWEN: Why should this court say well we recognize that's the legislative policy there, but we're going to allow attorney fees in boundary disputes?

SNIDER: Well attorney fees are allowed in boundary disputes if they are a creature and brought pursuant to the declaratory judgment statute.

OWEN: But why? Why would you have a different policy for the two different types of claims?

SNIDER: My personal opinion there probably should not be two different two policies. I believe in a real estate case if a person whose title is weak, because in a trespass to try title situation typically it's an adverse possession, someone who does not have a clear title to the property, and that person brings a trespass to try title case, and the only issue is the resolution of title. In that case, if that person is unsuccessful then he does not have to pay the defendant's attorney fees. In a boundary dispute case, the courts have consistently allowed these cases to be brought as a declaratory judgment action. The end result being because there's really no damages in these cases. I mean in this case we had a fence torn down but there's no damage to rebuilding a cyclone fence. But the damages, the expense to bringing the case because they are expert intensive. You have a surveyor, and you have a title expert. And if a plaintiff as in this case has to bring a case not of his own choosing, but because his neighbor tore down his fence and says I'm claiming that property, I'm tearing your fence down and tossing it in your backyard, then the Martins were obligated to avail themselves of the court to remedy this situation.

OWEN: All of that can be true in a trespass to try title case?

SNIDER: The courts acknowledge that a boundary dispute can be brought as a trespass to try title suit.

WAINWRIGHT: And even as between two neighbors as you said, and even as property holders determining the boundary line in effect determines the title as between those two parties doesn't it?

SNIDER: It can be brought as a trespass to try title. That is correct.

WAINWRIGHT: So how would the two be substantively different?

SNIDER: Because in a boundary dispute title is not an issue. Title to the property is not an issue. The only dispute is the physical location of the property on the ground. In a trespass to try title, you actually have a greater burden of proof because you have to prove title back to the sovereign. If it's not a trespass to try title case, it's a boundary dispute case you only have to prove your chain of title. How you arrive title.

O'NEILL: Would it be a too simplistic taxonomy to say that a title dispute arises from problems with the deed, whereas a boundary dispute involves conflicting interpretations of a survey?

SNIDER: A title dispute can involve interpretations of deed. And in this case the boundary dispute - simply we had - the testimony in this case there was testimony of this line having been established for a period of 35 years by five separate surveyors.

O'NEILL: But I guess what we're struggling with is how to distinguish in a simple straightforward way when something is more about title verses when it's more about a boundary. And could we cast that distinction in terms of problems with the deed, ambiguities with the deed, chain of title involving the language of the deed equals title dispute verses conflicting surveys equals boundary dispute?

SNIDER: Yes, we could. And in this case the reason it's not a title dispute is because there were no discrepancies or deficiencies in the Martin's title. The Martins acquired their property from a man named Nelson, who acquired it from people named Kroll, who acquired it from people named Duffy. His title was in this 10 acre Kroll tribe. Mr. Duffy back in 1901 conveyed this property to Kroll, and then he conveyed it 91 years later to Nelson, who conveyed it to the Martins.

Mr. Amerman, his title went from Duffy to DuVoss(?), then there were several owners to _____. The testimony from the title examiners and the surveyors stated that by title description these two properties do not overlap. They abut each other.

O'NEILL: Let me take this beyond this case. Let me pose it this was. If you took that test that I just put forth and applied it to the Kennedy Foundation case, I believe there was a statement albeit dicta in that case that that was a title dispute. Now would that be because determining the water at the edge of the Laguna Madre would be an interpretation of the deed and therefore it involves title, and it wasn't so much a survey issue. In other words would that test work to draw a distinction in that case?

SNIDER: In the Foundation case, the issue was the costal line and it was an issue of while there may have been issues of boundary, but it was an issue of title. Who physically owned that piece of property?

O'NEILL: Determining the title did determine the boundary, but because it required interpretation of the deed does that make it a title dispute?

SNIDER: It involved the interpretation of a deed - not necessarily. It involved the interpretation of a deed or some instrument of title. In this case, we do have a deed that purports to create a title dispute but it was a deed that was created by the Amermans. And it was a title dispute that did not exist prior to the Amerman's acquisition of their property. When Mr. Amerman acquired his property he created a deed that said, I'm putting the West line of my property 30 feet past Mr. Martin's line. He knew where the boundary line was for the Martin tract. And he created a deed that said, I'm creating a line 30 feet East of that. Prior to that time in the deed into the _____, and even if the ____ had acknowledged by the grant of an easement to a drainage district the existence of this line. So I think just because you have a deed that needs interpretation does not automatically make

it a title dispute.

JEFFERSON: What did that 30 feet give him? What was advantageous about having the line 30 feet?

SNIDER: That's always something that we really don't know. This was a residential neighborhood. Mr. Martin had acquired a 2.005 acre tract. Mr. Amerman bought the property next to it of 1.2 acre tract. He subsequently has built a house on that. So I guess he was trying to just expand the boundary line of a 1.2 acre tract to a 1.3 or 1.4 acre tract. I don't know of any other difference.

But when Mr. Amerman created that deed, he was aware of Mr. Martin's line. And he was aware that the Martins had bought that property 5 years prior, had obtained a title policy, had obtained a survey and had actually fenced that property. And that fence had been in place for 5 years.

Sometimes in a trespass to try title possession is an issue. In this case possession was never an issue. Because Mr. Amerman never acquired possession of this property. Mr. Martin was 100% in possession at all times. And when Mr. Amerman tore down the fence it was my understanding that he did so trying to interrupt some type of adverse possession claim by Mr. Martin. And that was his sole purpose as I understand it for tearing down the fence. And of course when he tore down the fence, then it forced Mr. Martin to go to court to get a restraining order.

SCHNEIDER: You're not saying that these two causes of action are mutually exclusive are you?

SNIDER: No. They are not mutually exclusive. I think a trespass to try title case obviously cannot be tried under the rules of a boundary dispute in a declaratory judgment. It can't be done that way.

SCHNEIDER: Don't you agree that the real issue in this case is how far can you go with a trespass to try title and at what point in time have you exceeded...

SNIDER: The real issue in this case is the distinction between a pure boundary dispute case and whether or not this case involves questions of title that require it to be a trespass to try title case. The TC decided that it was a pure boundary dispute case. In fact the 6th CA decided it was a pure boundary dispute case, but the argument that we have with the 6th CA was because they said, Okay this is a boundary dispute case because there's no issues of title. The question is the physical location of the line on the ground. But however, it's in the nature of a trespass to try title, and because it's in the nature of a trespass to try title we're going to delete the award of attorney fees. When they did that they relied on Eli v. Briley, which was not a boundary dispute case. It was a trespass to try title case.

I think in the context of whether or not a declaratory action is proper they are mutually exclusive. You can have a boundary dispute case that can be tried as a trespass to try title, but the reverse doesn't work. And a case can't be both: it can't be a pure boundary dispute case and at the same time be a trespass to try title case. It's basically one or the other with the caveat that if it's a boundary dispute you still have the right because the courts allow it to bring...

SCHNEIDER: Do you agree with the proposition that a trespass to try title action is really a legal action, and declaratory judgment type action is equitable type nature and if so how would that make a difference or would it make a difference in this case in our decision?

SNIDER: It makes a difference because of whether or not attorney fees as approved and awarded by the TC can stand. In a trespass to try title case there just simply is no provision for the recovery of attorney fees. In a declaratory judgment action it's discretionary as we know with the TC to award or not to award attorney fees. So it makes a difference in the recovery for the parties.

SCHNEIDER: I think you added to the laundry list of things that would include trespass to try title with the possession. For instance, I could see a situation when a landlord or a tenant situation when a tenant holds over and they get them out of the property. In this particular case is there any issue about getting possession of the property?

SNIDER: There was never an issue because Mr. Martin maintained possession. He had possession for the 5 years prior to the time this was lawsuit was filed. The court granted a restraining order. After a hearing the court granted a temporary injunction. So Mr. Martin remained in possession throughout. Mr. Amerman was never allowed to acquire possession.

* * * * * * * * * *

RESPONDENT

SMITH: I would like to address the possession issue. In responding to the CJ, in a generalist viewpoint possession is the issue. If possession is an issue in the case of the property it should be properly characterized as a trespass to try title case. If a party is losing property to the benefit of someone else, someone else is getting the possession of that property, if that is the issue it's a trespass to try title case.

PHILLIPS: If I own land next to J. Hecht, and we're not quite sure where the fence should be, whoever wants to bring this to court has got to go back to day one?

SMITH: Well you could agree to enter into a boundary agreement if there is some confusion as to where the legitimate boundary is. You could recognize it and put it down into a boundary agreement. You could bring an adverse possession claim, which would if you give the 10 day notice, potentially trigger attorney's fees if you prevail. Or, you could bring as the legislature has always told us to do a trespass to try title action.

HECHT: I don't see how possession can be the determinative because in a boundary dispute both sides here want the 30 feet.

SMITH: And that's where Mr. Snider and I disagree. And I think the courts in Brainard and in Kennedy Memorial, and even in Goebel say, you've got to have a true boundary dispute.

HECHT: When would you have a boundary dispute in which the parties were not quarreling over possession?

SMITH: Several examples. A zoning question. Where do zoning boundaries fall? Easement: Where is the proper location of the easement? For a party to enforce a boundary agreement that's already in place. Bring a cause of action under the declaratory...

OWEN: Let's just say we have adjoining property and the call is from a metal stake in the NW corner of some tract. And we go out there and there are two metal stakes and they are 5 ft apart. And we have a lawsuit to determine which metal stake governs it. But that's just a pure old boundary dispute isn't it?

SMITH: Not if title and possession is settled. And that's what the court was talking about...

OWEN: And I don't quarrel with my neighbor's title, and he doesn't quarrel with mine. The only question is which stake determines where you draw the line?

SMITH: If you're not contesting ownership and/or possession...

OWEN: But we are contesting who gets to possess that strip. It's going to be determined by which stake. Possession is determined by which stake where the fence goes. So possession can't be the test can it?

SMITH: I argue possession is a big part of the test. And in that situation, if you are going to relinquish possession and one parties going to get...

OWEN: You are always going to relinquish possession once the boundary is decided.

SMITH: Then I think that's a title case. And I think that's why everything has become so confusing. It was very simply set out in a trespass to try title action. And the amicus brings this up very well. When the courts start allowing parties to just say, Oh, I will just call this a boundary dispute. And it will even be better if I can just call it a boundary dispute. If I can stick it under the declaratory judgment act I can get attorney fees.

OWEN: That's a whole other issue. Surely parties can go into court and decide is it this stake or this stake without having to prove title back to the sovereign.

SMITH: The Plumb court tells us you can do that outside the formal trespass to try title statute. But you still have to prove some kind of sufficient right to that property. Now that becomes an issue in this case. And that's why I think this case is better characterized as a title case. Because the other party is contesting that ownership and showing that they have better ownership. And at that point you've got two parties, both saying they've got good title to that property. Which goes back to the Kennedy Memorial...

OWEN: Your case basically hinges on which physical markers on the ground you go to?

SMITH: Right. It's not the situation in Brainard where the court says you're using correct surveys. It's which is the legal theory that should be used in those surveys.

OWEN: But this doesn't involve legal theories.

SMITH: It involves the correctness of the surveys. You've got two parties contesting those issues. And I think when you have that situation as the statutes have set forth that that is the trespass to try title cause of action.

OWEN: You have to go all the way back to the sovereign?

SMITH: You either have to go back to the sovereign, regular chain of title from the sovereign. You prove superior title out of common source, which the Martins did not do either. You prove prior possession. That possession had not been abandoned. And possession was contested here. This was a vacant lot behind the Martin's backyard and the Amerman's backyard. Mr. Amerman on the very backend of it by the ditch had erected a gate and somewhat of a fence to contest possession within that 30 feet. That was on the backside of the fence that the Martin's built. The TC in its judgment where it declared title directs the Amermans to remove that fence. That was one of the things they had to go and do, and that was an issue after the judgment because they were ordered not to be on the property but they were told to remove that fence. So possession was an issue. So the Amerman's assert that the Martins did not prove prior possession that it had not been abandoned.

And then finally you can prove it by adverse possession, title by limitations. And that was dropped.

OWEN: My point is, none of that fits my example. I don't dispute my neighbor's title. He doesn't dispute mine. The only question is, which stake do you mark from? That does not fall under any of the trespass to try title scenarios. Surely you can go in and litigate that.

SMITH: I think that's correct and I think that's what happened in the Plumb case. The court directed us in Plumb: look at what the case is about, what the witnesses talked about. In Plumb they just talked about boundary. That was really the issue.

OWEN: And your case was do you go to that concrete marker or do you go to some other marker?

SMITH: Well you've got to get into the case and look at what was the character of the case. What was pled? Title. The Martins pled title. They asked the court to award them title. The court did award them title.

OWEN: But you're going to get title in a boundary dispute case too.

SMITH: In Plumb they just talked more about boundaries. And that's what the court said: you know they are just arguing here over the boundary. Let's declare the boundary; didn't award any attorney fees; didn't say it could use the declaratory judgment act to get the attorney fees. It just said you don't have to use the formal trespass to try title action. You still have got to show a sufficient right to the property. That worked fine in Plumb. It did not work here. Because the way this thing was set up, although it was a boundary, the Martins pled title. They asked for a determination of fee simple ownership. The Amermans pled not guilty. They put the Martins on to their proof to prove their title. The problem came when it came time for jury submission, the Martins dropped their title cause of action, they dropped the boundary issue wrapped up into the trespass to try title action, which I think is problematic for them because that only left them with the recognition and acquiescence cause of action in the boundary area. If it was a Plumb case, they should have kept it with that trespass to try title cause of action and submitted it to the jury. They got the TC to let them just - well let's just see which survey is correct, and that's going to determine who wins. And the agreement that is referenced by the Martins is not an agreement by the Amermans to let that happen. That was an agreement the Martins made with the TC that if you don't submit the Amerman's issue on title, we will agree, we will stipulate when all this is said and done if we lose we will deed the property over to the Martins.

Again, having to do something - deed it back over to the Amermans to show who has ownership, who has title. That is a title question and that's how this case should have been tried. It was set up that way. It was tried that way. The Martin's title examiner stated from the witness chair, Amermans have deficient title. He explained why they had deficient title.

HECHT: We understand that the attorney fees are at stake. What else is at stake in the two ways to try this?

SMITH: Whether or not the Martins are entitled to the attorneys fees, which we assert you can't put under a declaratory judgment act. The other thing is ownership. Who proved title to the property. The Amerman's assert the Martins dropped their trespass to try title action. Regardless if it was just a boundary dispute it should have still been some kind of title action just like Plumb was.

PHILLIPS: So you don't think they have title?

SMITH: The Amermans assert the Martins did not establish title at trial.

OWEN: You're saying a boundary dispute only resolves it between the two living parties that go to court. It has no binding affect in the chain of title?

SMITH: I go back to Plumb because that's really the only guidance we have in this case. If that's how the parties want to litigate it, and one party proves sufficient title, what you don't see in the Plumb case is what Mr. Stus_____ is doing. He kind of seem to have won by accident in the TC. What he's doing to defeat the Plumbs' claim. The court says, Mr. Plumb did all he needed to do. He showed sufficient title. That didn't occur.

OWEN: Let me try to get very specific. You've got two stakes 10 ft. apart. And one of them is going to determine where the boundary line is. No one is disputing each other's title. It's just down to which of those two stakes governs. We go to court. We litigate it and we get a judgment. The judgment describes which stake and where the calls will be from and that goes in to the deed records. Now why isn't that binding on every title holder thereafter as to where the boundary actually is?

SMITH: I think that's an improper way to submit that. I think the legislature has directed us - whether it's convenient or not that's what you have to do. You have to take it back and go through the trespass to try title.

OWEN: So what does a boundary dispute ever resolve?

SMITH: Again, my examples earlier - I think that's very difficult. And I really think a better way to do it is perhaps if you've already got a boundary agreement and you need the court and you're disagreeing over what you agreed to previously or what your predecessors agreed to and you need the court to interpret that, or to actually enforce an agreement. If you had an agreement and the other party is violating to get them to enforce. That's a boundary agreement. Or if you want to talk about zoning. Where does the zoning lines fall?

HECHT: Assume that we disagree with you, and that you can try some of these cases as declaratory judgment actions instead of trespass to try title. And we have to worry about which are which. What change does that make in the way cases are tried except for attorney fees?

SMITH: I believe again if the parties are in there and they are fighting over title and they've even gone to the extent that they've tried to prove two of the separate elements you can prove under a trespass to try title case, you've got to go back and look at the character of that lawsuit. And if you're actually asking the court and the court does decide and declare a title, I don't think that that is a proper lawsuit to put in a DJA.

HECHT: I understand that. But what difference will it make in the way the case is tried? In how you put on the proof or how you plead it? What practical differences will there be between

the two ways of trying it other than attorney fees?

SMITH: If it is a trespass to try title case or tried like a trespass to try title case once the defendant says not guilty, the plaintiffs have got to prove their title one of the four ways. And if it's not, if it's just strictly a boundary, plaintiffs can go in there and just prove, Heah, I've got title. Not better title. Not the title. I've got title. Some title. That's all they've got to do, and then it can be over. When you've got the parties actually putting title into issue by not guilty plea you've got to go through the steps of the four separate elements in proof under trespass to try title action.

It's difficult to grasp. And I've had difficulty in trying to read these cases and understand where the fine lines are. I still think you must go back to the character - what was brought, the character in the lawsuit. Then you can decide which way you go. Do you simply decide it as a boundary and just let the plaintiffs put on some evidence of title. Or do you go the title route and have a full blown who has the best title. Who has superior title. And once you do that, if you've gone that route it is strictly a title case.

HECHT: Now your applying that. In your view was the dispute in the Kennedy Foundation case a title dispute or boundary dispute?

SMITH: That was a title dispute. And the court said, Look at this. What do they really want? They are talking about possession. What really was at issue was the oil and gas, and who had the possession? Who owned it? Who had title? That's what the issue was. And the court said that's what a title case is. Not such as in Brainard where the parties agree that they are just talking about boundaries. You've got a very specific area of law with repairian(?) rights in which there is a subsection of law as how to interpret all of that. And now we're just trying to see which survey applied the correct legal theory, not which survey was technically correct on the ground. That was not the dispute. And the court, I believe it was J. Hankinson that said, that that was simply a boundary dispute.

OWEN: But it determined who got possession based on where the boundary was.

SMITH: And that goes back to your example as once they set the boundaries that was possession. But in that case the court and the best I can do to analyze that is you've got to go back and look at the character of what the parties were fighting over.

OWEN: They were fighting over who got to be on that land. Whether the public got to be on it or not.

SMITH: But looking at where the river ____, where the Canadian river strikes, we get additional land. But the way that was tried, the way that was setup the parties agreed that it was a boundary dispute. There didn't seem to be a title issue. And that case it was kind of ancillary to the case.

O'NEILL: And what was different about Kennedy that made that a title dispute?

SMITH: They didn't agree it was just a boundary issue. They weren't concerned as much with which was the correct legal theory used by the surveyors. It was who actually owned that land. You didn't have a situation as much where the Laguna Madre was moving much like the Canadian River did. It was pretty much stationary. But additional land had been added over the years. And they were actually contesting possession because who had possession was getting the oil and gas.

O'NEILL: It's hard for me to distinguish that from Brainard.

SMITH: And because of that, I think it's better and more in keeping with the legislative intent to try all these as a trespass to try title action. And when the door was open with Plumb, I think it becomes a character question. You have to look at the character of what was brought to the TC.

JEFFERSON: So would you say here that the jury's findings on the surveys are just a nullity. There is no legal consequences of those findings? They couldn't become part of the judgment and establish the boundary between the parties or it does?

SMITH: I believe that they should not be binding, that there are missing questions that should have been submitted to the court...

JEFFERSON: Trespass to try title withstanding, and so that there was no - as if there was no trial at all. I mean the boundary is still in question. They would have to bring another trespass to try...

SMITH: The TC committed error when he did not - the Martins dropped their trespass to try title case. The Martins dropped their adverse possession case.

JEFFERSON: So in your estimation is it a - it's a nonsuited case that could be brought again, or has something that's determined by the fact that the trespass to try title was not submitted?

SMITH: I believe the Amermans proved superior title. They proved title - regular chain of conveyances from the sovereign to themselves.

JEFFERSON: As a matter of law, so there would be no _____.

SMITH: As a matter of law. I think it could be rendered that they have title.

JEFFERSON: Now if there were a fact question...

SMITH: It would be sufficient for remand. And the Amermans did request, they had

a pending cross-claim, they had pled not guilty, they requested a jury question on title. It was refused. The judge said he was refusing it because of this agreement.

SCHNEIDER: Do you believe these two causes of actions are mutually exclusive, that you can't have one overlapping the other?

SMITH: I don't believe there should be separate ones. I believe if you are contesting title it should be a trespass to try title action. I believe when the CA's have gone astray from that and started allowing these boundary disputes, I think they opened up the door for a lot of problems that could easily be closed if the property code was followed.

SCHNEIDER: So if the two parties basically tried their lawsuit incorrectly as a declaratory judgment that would be subject to collateral attack?

SMITH: I don't think so.

SCHNEIDER: Why?

SMITH: Because I don't think it was a proper vehicle to use. I don't think it was a valid judgment because I think the thing that's supporting it is flawed.

* * * * * * * * * *

REBUTTAL

O'NEILL: Are Brainard and Kennedy reconcilable?

SNIDER: Yes. Because Brainard was a boundary dispute case and then dicta under the court in Braindard acknowledged that a boundary dispute case if there were no questions of title could be brought as a declaratory judgment action in the discretion of the TC or alternative.

O'NEILL: I don't mean so much on the availability of declaratory relief as I mean - I mean it's hard for me to distinguish why one would be a boundary dispute and Kennedy would be a title dispute. Are they reconcilable on that piece?

SNIDER: They probably are, but I mean one was a boundary case and one was a title dispute.

O'NEILL: Why was Kennedy a title dispute?

SNIDER: Because in a title case just like in this case why it was not a title case somebody loses physical possession of property, but they also lose the title to that property. This case is not a title case because if the jury had determined that the Amerman's survey was correct, the

Martins title description to their 2.05 acre tract came from the Kroll tract and that would not have changed. All it would have done would have moved the line.

O'NEILL: The Kennedy case, how would that have affected title? I mean all we were determining was where the shore of the Laguna Madre was, and that's just a line that's moving on the ground. Why is that a title dispute?

SNIDER: As I understand it in the Kennedy Foundation case, somebody put title in issue, and by moving the boundary line somebody physically loses title to property and possession of property. And that's not the issue in this case.

PHILLIPS: In the Kennedy case, polarized caps melt and the ocean dries 3 inches, so that there is a clear distinction between Padre Island and the land. The ownership is going to change in Kennedy based on the 1804 grant isn't it?

SNIDER: Yes. That's true.

PHILLIPS: And in Brainard if we all of a sudden un-dam the Canadian River and let that go back to prairie like the ecologist want to, that title is going to change isn't it?

SNIDER: Yes. And in those two cases, I mean there was an issue of whether it was a title or whether it was an issue of the physical location of the boundary between two titles where titles - if it's a boundary dispute titles do not change. In this case, if the jury had determined that the Amerman's survey was correct it would have established the physical line. Mr. Martin would not have lost title to his 2.005 acre tract.

OWEN: We wouldn't have had 2.005 acres anymore and he wouldn't have had possession of the 30 foot strip anymore. So why isn't that title to that 30 foot strip?

SNIDER: Because the two tracts never overlapped. The reason we put on testimony of the predecessors was that the witnesses for both said that these two properties are joined. Mr. Martins comes from Kroll. Mr. Amerman comes from the DeVotes(?). DeVotes(?) never crosses into Kroll. Kroll never crosses into DeVotes(?). They abut. They are side by side. So you have to determine the line. Mr. Amerman's surveyor acknowledged the line of the Martins as being the recognized line. But the determinative factor was where is that physical line located? Title is not affected. If you move the physical line over 30 feet, then that's Mr. Martin's boundary line. He still has title to the same 2.005 acre. There's no title for him to lose.

HECHT: Did you see a policy reason to recover attorney fees in one kind of case and not in another kind of property case?

SNIDER: Yes. There is a distinction, because simply in a trespass to try title case where the issue is title the legislature simply has not provided for attorney fees.

HECHT: I understand that. But then the question was, do you see a policy reason for it to be one way and not the other?

SNIDER: Yes. I think Mr. Smith would require that all property disputes be brought as trespass to try title. A distinction can be made as far as a policy reason you know these are expensive cases to try. They are expensive from attorney fees. You have surveyors and you have title experts. In title cases there are no damages involved. There is no real property damages. And the loser should have to pay the damages. And one of those damages is attorney fees.

HECHT: But he doesn't.

SNIDER: In a title case he does not pay damages.

HECHT: So you say he should have to, but he doesn't.

SNIDER: He should have to but he doesn't. In a boundary dispute case, if it's brought as a declaratory judgment then it's within the sound discretion of the TC to decide whether or not the loser pays. And there may be circumstances where the loser does not have to pay.

HECHT: All I'm asking you is why should you distinguish as a matter of policy between the two kinds of actions?

SNIDER: Because the courts have distinguished and the legislature has distinguished.

PHILLIPS: But if you were starting from ground zero, you're saying that trespass to try title probably has a stronger justification for attorney fees than a boundary case.

SNIDER: Yes. I do. I would say that because a lot of times those cases are brought by a true adverse possessor. There was an amicus curiae filed in this case. And that case was brought by a true adverse possessor. And that adverse possessor lost. And in that case, the attorney made the comment that depending on the outcome of this case, depends whether or not he has to pay attorney fees. And maybe he should have to pay attorney fees because he was the adverse possessor or claimed by adverse possession and he lost.