2020 IL App (4th) 190296-U

NO. 4-19-0296

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 13, 2020
Carla Bender
4th District Appellate
Court, IL

LYNN E. CLARKSON,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Macon County
JEFFREY A. WALKER, JACQUELYN D. WALKER,	)	No. 11CH364
and LAND OF LINCOLN CREDIT UNION,	)	
Defendants	)	Honorable
(Jeffrey A. Walker and Jacquelyn D. Walker,	)	Thomas E. Little,
Defendants-Appellees).	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred by granting summary judgment in favor of defendants and against plaintiff on all three counts of plaintiff's complaint.

¶ 2 In October 2011, plaintiff, Lynn E. Clarkson, filed a three-count complaint against defendants, Jeffrey A. Walker, Jacquelyn D. Walker, and Land of Lincoln Credit Union. On plaintiff's motion, the Macon County circuit court dismissed Land of Lincoln Credit Union as a party to this suit. The remaining two defendants are the legal title holders to the property at issue in this case (hereinafter disputed tract). In October 2015, plaintiff filed a motion for summary judgment, asserting he acquired the disputed tract by adverse possession. Defendants filed a response to the motion for summary judgment and a cross-motion for summary judgment. Plaintiff filed a reply to defendants' motion for summary judgment. In June 2018, the court entered a written order, granting defendants' cross-motion for summary judgment as to count I of

the complaint and denying plaintiff's motion for summary judgment. The court entered judgment in favor of defendants on only count I. Plaintiff filed a motion for reconsideration, which the court denied. Thereafter, plaintiff filed a motion for summary judgment as to the balance of the complaint, and defendants again filed a cross-motion for summary judgment. In December 2018, the court granted summary judgment in favor of defendants on count II, and in April 2019, the court granted summary judgment in favor of defendants on count III.

¶ 3 Plaintiff appeals, asserting (1) he is entitled to summary judgment because he holds title to the disputed tract under multiple legal theories and (2) in the alternative, issues of material fact exist precluding the entry of summary judgment in defendants favor. We reverse and remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 A. Disputed Tract

¶ 6 The disputed tract is roughly a triangular-shaped tract of land consisting of 2.14 acres near the Sangamon River. The area is mostly comprised of timber. The disputed tract is part of the legal description in an August 30, 1995, warranty deed conveying title of around 30 acres of land from Ruth and Lyle Van Horn to defendants. The disputed tract is in the northwest corner of defendants' property. Defendants have built a home on their 30 acres and reside there. Plaintiff owns the property north of defendants' property, which contains approximately 83 acres. He too has a home on his property. Plaintiff entered into a contract for deed for his property with Nannette Peck in November 1976. Peck conveyed plaintiff title to his property in June 1984. Photographs and a survey indicate remnants of a fence on defendants' property, which plaintiff contends constitutes the southern boundary of his property.

¶ 7 B. Pleadings

¶ 8 Plaintiff's October 2011 complaint contained the following three counts: (1) quiet title, (2) trespass, and (3) injunctive relief. The complaint mostly set forth facts regarding plaintiff's alleged possession of the disputed tract. Since Land of Lincoln Credit Union filed a release of its mortgage on defendants' property, plaintiff filed a motion to dismiss the credit union as a party to this litigation, and the circuit court granted the motion.

¶ 9 In October 2015, plaintiff filed a motion for summary judgment, asserting his ownership of the disputed tract was clear and free from doubt and no genuine issues of material fact existed. Like the complaint, the motion focused mostly on plaintiff's possession of the disputed tract. Plaintiff attached his deposition testimony and his affidavit to the motion for summary judgment. In his deposition, plaintiff testified about the timber harvesting on his property and the disputed tract. Plaintiff purchased his property subject to a timber contract entered into by Nannette. The contract allowed the contractor to remove any tree 10 or 12 inches in diameter. It took the contractor eight months to remove the trees "using Caterpillars, tree cutters, chainsaws, [and] full crews." The trees were removed from plaintiff's property and the disputed tract. Plaintiff testified the tree harvest was probably in 1980 but could have been between 1978 and 1984. A few years after he bought the property in 1976, he used a bulldozer to create pathways for that timber harvest. Plaintiff stated he made paths five or six times on the disputed tract over a two-year period for the first timber harvest. Plaintiff did bulldoze pathways again around 2011 for another harvest pursuant to his contract with the State for a timber management plan. Plaintiff explained a timber harvest occurred every 20 to 30 years.

¶ 10 Additionally, in his affidavit, plaintiff stated he installed "no trespassing" and "no hunting" signs on the disputed tract over the years. He also made regular efforts to remove deer stands erected by trespassers and patrolled the fence line with dogs. Plaintiff also engaged in

"forest management activities" on the disputed tract by checking on the timber, looking for new growth, and examining the area after floods. Moreover, plaintiff hiked the disputed tract every other year.

¶ 11 Plaintiff also attached the affidavits of the following individuals: (1) Ken Norcross, (2) Kelly Norcross, (3) Karen Yunker, and (4) James Dobson. All four had hiked plaintiff's property and the disputed strip. They believed the southern fence marked the boundary line of plaintiff's property. Plaintiff had directed all four of them not to cross south of the fence line because plaintiff did not want them trespassing on neighboring property. Ken and Kelly hiked on plaintiff's property and the disputed tract from "the late 1970's and early to mid 1980's." Kelly also mowed trails on plaintiff's property, some of which were along the southern fence line but none of them extended beyond the southern fence. Kelly further stated plaintiff had established those trails in the late 1970s with a bulldozer. Yunker hiked plaintiff's property and the disputed tract in the early 1980s and from 2005 to 2011. Dobson hiked plaintiff's property and the disputed tract from 1985 to the late 1980s. Plaintiff also provided a survey of the disputed tract done by Matthew A. Schwenk and Schwenk's deposition testimony.

¶ 12 Defendants filed a response to plaintiff's summary judgment motion and a cross-motion for summary judgment. In support of their cross-motion for summary judgment, defendants provided the affidavits of the following: (1) defendant Jeffrey Walker, (2) Nicholas Walker, (3) Michael Walker, and (4) Steven Schmitt. Defendants' four affidavits state they built a deer stand in a tree and a bridge over a small creek on the disputed tract in the fall of 1995. The four then hunted on the disputed tract for 10 days in 1995. The next year, the four built another deer stand in a tree and hunted for 20 days on the disputed tract. The four built another deer stand in 1999. One or more of the four have hunted on the disputed tract since 1995. Jeffrey also

installed portable deer stands over the years. No deer stand was ever removed. Also, over the years, defendants and their family have taken firewood from the disputed tract and gained access to the river by walking across the disputed tract. Defendants' family have also camped, played paintball, and ridden four wheelers on the disputed tract. Until plaintiff bulldozed a path on the disputed tract, none of the four had observed any evidence of someone else being on the disputed tract.

¶ 13 In August 2017, plaintiff filed a reply to defendants' response asserting (1) his use of the disputed tract was sufficient to establish actual possession and (2) he had met the 20-year requirement through tacking. He alleged facts of possession by his predecessors, the Pecks, beginning in 1955. Plaintiff attached another affidavit by him and an excerpt from Jeffrey's deposition to the reply. In his August 2017 affidavit, plaintiff stated he knew the Peck Family well and they granted him permission to hike on their property and the disputed tract from 1955 to 1976 when plaintiff took possession of the Peck property. Further, from 1955 through 1980, the southern border of the disputed tract was fenced, and the fence was fully intact. The fence had eroded over time, but remnants of it still remain. Plaintiff further stated the Pecks owned cattle and grazed the cattle on their property and the disputed tract from 1955 through "the late 1960s or early 1970s." After he purchased the Peck property, plaintiff had a conversation with Warren Van Horn, one of the former owners of defendants' property. Warren believed the southern fence line marked the property line and was comfortable with that boundary.

¶ 14 Defendants filed motions to strike plaintiff's reply and plaintiff's August 2017 affidavit. Plaintiff filed a motion for leave to file an amended affidavit and a response to the motion to strike. At a December 2017 hearing, the circuit court denied defendants' motion to strike plaintiff's August 2017 affidavit and gave defendants leave to file a responsive affidavit.

Defendants filed a December 2017 affidavit by Jeffrey, in which he stated Ruth Van Horn, his predecessor, had pointed out to him where her family had camped on the disputed tract. Ruth also told Jeffrey a fence had been put up around the property to keep the cattle out of the river bottom and explained the property line was behind the fence and "ran East and West through the river bottom to the river." Plaintiff filed a motion to strike Jeffrey's December 2017 affidavit.

¶ 15 On May 3, 2018, the circuit court held a hearing. It first addressed pending motions. The court granted plaintiff's motion for leave to file an amended affidavit. It denied defendants' motion to strike plaintiff's reply and plaintiff's motion to strike Jeffrey's December 2017 affidavit. The court then heard arguments on the cross-motions for summary judgment. In his argument, plaintiff did argue tacking. After hearing the parties' arguments, the court took the matter under advisement.

¶ 16 On June 11, 2018, the circuit court entered its written order, denying plaintiff's motion for summary judgment, granting defendants' cross-motion for summary judgment, and entering judgment in favor of defendants and against plaintiff on count I of plaintiff's complaint. Plaintiff filed a timely motion for reconsideration, which the court denied in October 2018.

¶ 17 In November 2018, plaintiff filed a motion for summary judgment as to the balance of the complaint, and defendants filed a cross-motion for summary judgment as to the balance of the complaint. After a December 4, 2018, hearing, the circuit court granted defendants' cross-motion for summary judgment and denied plaintiff's motion for summary judgment. The court then entered judgment in favor of defendants and against plaintiff on count II of the complaint. Plaintiff filed a notice of appeal, and this court granted plaintiff's agreed motion to dismiss the appeal. *Clarkson v. Walker*, No. 4-19-0013 (Apr. 10, 2019) (unpublished motion order under Illinois Supreme Court Rule 23(c)).

¶ 18 On April 16, 2019, the circuit court filed a written order granting judgment in favor of defendants and against plaintiff on count III of the complaint. The court noted it had now addressed all the counts in plaintiff's complaint.

¶ 19 On May 9, 2019, plaintiff filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 20 II. ANALYSIS

¶ 21 A. Standard of Review

¶ 22 A circuit court's ruling on a motion for summary judgment presents a question of law, and thus we apply the *de novo* standard of review. *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22, 957 N.E.2d 876. Section 2-1005(c) of the Code of Civil Procedure (735 ILCS 5/2-1005(c) (West 2014)) provides summary judgment is proper when the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Additionally, our supreme court has held the filing of cross-motions for summary judgment indicates the parties' mutual agreement only a question of law is involved and, thus, the parties have invited the court to decide the issues based on the record. *A.B.A.T.E. of Illinois, Inc.*, 2011 IL 110611, ¶ 22. Nevertheless, if a genuine issue of fact exists precluding summary judgment in favor of either party, the mere filing of cross-motions for summary judgment does not require a court to grant the requested relief to one of the parties. *Harwood v. McDonough*, 344 Ill. App. 3d 242, 245, 799 N.E.2d 859, 862 (2003).

¶ 23 In this case, plaintiff contends the circuit court erred both by denying his motion for summary judgment and granting defendants' cross-motion for summary judgment. While the

denial of a summary judgment motion is usually not appealable, our supreme court has recognized an exception to the rule when the parties have filed cross-motions for summary judgment and one party's motion is granted and the other party's denied. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 119, 955 N.E.2d 1065. The supreme court explained review of the denial of the summary judgment motion may be had because the order disposes of all issues in the case. *Clark*, 2011 IL 108656, ¶ 119.

¶ 24 B. Adverse Possession

¶ 25 To establish title by adverse possession under the 20-year statute (735 ILCS 5/13-101 (West 2010)), the party asserting adverse possession must establish "20 years' concurrent existence of the five elements: (1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, [and] (5) under claim of title inconsistent with that of the true owner." *Joiner v. Janssen*, 85 Ill. 2d 74, 81, 421 N.E.2d 170, 174 (1981). "Presumptions are in favor of the title owner, and the burden of proof upon the adverse possessor requires that each element be proved by clear and unequivocal evidence." *Joiner*, 85 Ill. 2d at 81, 421 N.E.2d at 174.

¶ 26 Plaintiff contends he can establish title based on two separate theories. First, he contends the possession of the disputed tract by his predecessors, the Pecks, fulfilled the elements of adverse possession. Under plaintiff's first theory, when Nannette Peck conveyed all her property to plaintiff, she also conveyed the disputed tract to plaintiff even though the disputed tract was not part of the legal description in the warranty deed plaintiff received. However, plaintiff cites no authority for the proposition ownership of a tract of land asserted due to adverse possession can be conveyed to another party before the adverse possessor has obtained legal, devisable title to the tract. Thus, we find plaintiff has forfeited this argument. See *Epstein v.*

Davis, 2017 IL App (1st) 170605, ¶ 24, 95 N.E.3d 1243 (finding an issue forfeited where the appellant failed to cite any legal authority in support of his argument). Second, plaintiff contends he can establish adverse possession by tacking his predecessors' possession of the disputed tract to his possession of that land. Defendants contends plaintiff cannot rely on tacking because that theory was not included in any of plaintiff's pleadings. However, plaintiff raised the theory in his reply to defendants' cross-motion for summary judgment, and the circuit court denied defendants' request to strike the plaintiff's reply on the basis plaintiff had not raised the theory in his complaint and summary judgment motion. Thus, we find plaintiff can raise his tacking argument on appeal.

¶ 27 1. *Plaintiff's Possession of the Disputed Tract*

¶ 28 a. Adverse/Hostile

¶ 29 This court has explained the adverse/hostility element " 'does not imply actual ill will, but only the assertion of ownership incompatible with that of the true owner and all others.' " *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 42, 12 N.E.3d 198 (quoting *Joiner*, 85 Ill. 2d at 81, 421 N.E.2d at 174). " 'Although evidence of the use and control over land is the typical manner by which any claimant establishes title by adverse possession, it must be clearly shown that the use of the land was adverse and not merely permissive, since permissive use of land, no matter how long, can never ripen into an adverse possessory right.' " *Brandhorst*, 2014 IL App (4th) 130923, ¶ 42 (quoting *Mann v. La Salle National Bank*, 205 Ill. App. 3d 304, 309-10, 562 N.E.2d 1033, 1037 (1990)). Moreover, under Illinois law, the "use of vacant, or wild and undeveloped and unoccupied land is presumed to be permissive and not adverse." *Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028, 1037, 663 N.E.2d 1094, 1099 (1996) (citing *Monroe v. Shrake*, 376 Ill. 253, 256, 33 N.E.2d 459, 461 (1941); *Parker v. Rosenberg*, 317 Ill. 511, 517,

148 N.E. 269, 272 (1925)). Specifically, the mere use of the trails for recreational purposes through timber "does not constitute clear and convincing evidence of dominion to 'provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control.' " *Estate of Welliver*, 278 Ill. App. 3d at 1037, 663 N.E.2d at 1099 (quoting *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 311 (Alaska 1990)).

¶ 30 Initially, we address plaintiff's argument the presumption of permissive use for undeveloped, wild, vacant, and unoccupied land does not apply to the disputed tract. We agree. At the beginning of plaintiff's possession, an intact fence separated the disputed tract from the rest of defendants' property and parts of the fence still remain. Defendants note no evidence was presented as to who built the fence. However, it is a reasonable inference the Pecks built the fence since the fence kept their cattle out of the river bottom. Thus, an improvement on the disputed tract did exist, and the presumption does not apply in this case.

¶ 31 Moreover, while plaintiff did hike the disputed tract and gave others permission to do so as well, the most significant use of the disputed tract by plaintiff was timber harvesting. Defendants contend the evidence of timber harvesting was vague. We disagree. According to plaintiff's deposition testimony, the contract for deed for his property was subject to a timber agreement entered into by Nannette with a forest contractor. The agreement allowed the forest contractor to take any tree larger than 10 or 12 inches in diameter. We note a question of fact does exist as to the existence of the timber contract because it is not referenced in the contract for deed between plaintiff and Nannette. Plaintiff stated he ran a bulldozer on the disputed tract shortly after he acquired his property to make pathways for the harvesting of timber. The harvesters were on his property and the disputed tract for eight months and used "Caterpillars, tree cutters, chainsaws, [and] full crews." Plaintiff testified the tree harvest was probably in 1980 but

could have been between 1978 and 1984. After that harvest, plaintiff entered into a timber management plan with the State. Again, a question of fact remains as to plaintiff's timber contract since he did not provide a copy in support of his motion for summary judgment. Plaintiff explained a timber harvest happens every 20 to 30 years. In 2010, plaintiff again bulldozed pathways on the disputed tract for timber harvesting. Jeffrey noticed the 2010 pathways and contacted plaintiff. A significant timber harvest of a wooded area is an assertion of ownership incompatible with the legal titleholder's ownership of the land. Moreover, even if the presumption of permissive use did apply, the timber harvesting and related preparations would overcome the presumption of a permissive use. Thus, plaintiff presented enough evidence showing adverse/hostile use of the disputed tract to defeat defendants' motion for summary judgment. However, we have noted some questions of fact remain preventing an award of summary judgment in plaintiff's favor.

¶ 32 b. Actual

¶ 33 To establish "actual" possession, the plaintiff must prove he or she made " 'improvements or [performed] acts of dominion' (*Joiner*, 85 Ill. 2d at 82, 421 N.E.2d [at 174]) sufficient to 'provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control' (*Nome 2000* [ ], 799 P.2d [at] 311 [ ])." *Estate of Welliver*, 278 Ill. App. 3d at 1036, 663 N.E.2d at 1099. Moreover, Illinois law provides " '[t]he possession necessary to constitute adverse possession is not required to be fuller than the character of the land admits.' " *Estate of Welliver*, 278 Ill. App. 3d at 1036, 663 N.E.2d at 1099 (quoting *McMillin v. Economics Laboratory, Inc.*, 127 Ill. App. 3d 517, 523, 468 N.E.2d 982, 987 (1984)). With wild and undeveloped land, courts have recognized "a lesser exercise of actual ownership by affirmative act than with other property" but "the actual ownership must still be more than mere mental

enclosure." (Internal quotation marks omitted.) *Estate of Welliver*, 278 Ill. App. 3d at 1036, 663 N.E.2d at 1099 (quoting *Berryhill v. Moore*, 180 Ariz. 77, 86, 881 P.2d 1182, 1191 (Ariz. Ct. App. 1994)).

¶ 34 According to plaintiff's August 2017 deposition, the fence along southern boundary of the disputed tract remained fully intact until 1980. The fence did erode over time, but remnants still remained. Thus, the fence provided evidence of exercise and control. Moreover, the pathways established by plaintiff for the timber harvest and the timber harvest itself were also evidence of plaintiff's exercise and control of the disputed tract. Thus, we find plaintiff also presented evidence showing actual possession of the disputed tract to survive defendants' motion for summary judgment.

¶ 35 c. Open, Notorious, and Exclusive

¶ 36 This court has stated "[t]he adverse claimant's possession of the land at issue must be of such open and visible character as to apprise the world, that the property has been appropriated, and is occupied." (Internal quotation marks omitted.) *Brandhorst*, 2014 IL App (4th) 130923, ¶ 56 (quoting *Estate of Welliver*, 278 Ill. App. 3d at 1038, 663 N.E.2d at 1100). Like the previous elements, the maintenance and later mere existence of a fence on defendants' property and the timber harvesting is visible use of the disputed tract by plaintiff. The existence of the timber pathways is open and obvious use of the property. Additionally, plaintiff's use was exclusive as he posted no trespassing signs, removed deer stands, and attempted to keep others out of the disputed tract. We note the 20-year period plaintiff seeks to establish ended before defendants began using the disputed tract. Accordingly, plaintiff also presented evidence showing his open, notorious, and exclusive use of the disputed tract to overcome defendants' motion for summary judgment.

¶ 37 d. Claim of Title Inconsistent with That of the True Owner

¶ 38 Moreover, this court has held " '[u]sing and controlling property as owner is the ordinary mode of asserting a claim of title inconsistent with that of the true owner.' " *Brandhorst*, 2014 IL App (4th) 130923, ¶ 60 (quoting *Peters v. Greenmount Cemetery Ass'n*, 259 Ill. App. 3d 566, 570, 632 N.E.2d 187, 190 (1994)). We noted this element is similar to the elements requiring the possession to be actual and adverse/hostile. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 60. Plaintiff's deposition testimony established he treated the disputed tract as his own property as evidenced by his timber management and attempts to keep others off the disputed tract. Thus, we again find plaintiff has presented enough evidence establishing this element to withstand defendants' motion for summary judgment.

¶ 39 e. Continuous

¶ 40 Plaintiff contends his possession was continuous based on his clearing a path for the timber harvest using a bulldozer and maintaining the path himself and by having others mow it. It is undisputed the bulldozing of a path on the disputed tract is open, obvious, and visible evidence of plaintiff's exercise of dominion. Accordingly, plaintiff has presented sufficient evidence to prevent summary judgment in favor of defendants. However, the preparations for the timber harvests took place around 30 years apart. When defendants purchased their property, Jeffrey stated he did not observe a "discernable manmade trail" or cut tree stumps. Thus, a question of fact exists as to how long plaintiff's timber management was open, obvious, and visible evidence of plaintiff's exercise of dominion. Since multiple questions of fact exist as to plaintiff's possession of the property, plaintiff was not entitled to summary judgment in his favor. We note our decision just highlights some of the questions of fact that remain in this case.

¶ 41 2. *Tacking*

¶ 42 Plaintiff recognizes he only possessed the land himself for 19 years before defendants started using the disputed tract. Thus, it is undisputed defendant must utilize the doctrine of tacking to establish the 20 years necessary to obtain title by adverse possession. Specifically, defendant must tack on his possession to Nannette's possession of the disputed tract and show her possession of the disputed tract also meets the five elements necessary to establish adverse possession. Defendants acknowledge the doctrine of tacking exists in Illinois but contend plaintiff's use of the land did not constitute adverse possession. Therefore, they assert the doctrine does not assist plaintiff in establishing adverse possession and need not be addressed. However, we have found so far plaintiff has presented enough facts showing adverse possession to survive defendants' cross-motion for summary judgment. Accordingly, the issue of tacking is before us.

¶ 43 Illinois law authorizes tacking of possessions when privity exists between the possessors. *Rich v. Naffziger*, 255 Ill. 98, 104, 99 N.E. 341, 343 (1912). The privity required is "there must be a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene." *Rich*, 255 Ill. at 106, 99 N.E. at 343-44. Here, defendants do not challenge plaintiff's privity with Nannette.

¶ 44 During Nannette's possession of the disputed tract, the fence separating the disputed tract from defendant's property was still maintained and kept intact and the Pecks' cattle grazed on the disputed tract for most of the period plaintiff could recall, which was 1955 to 1976. Unless the grazing was permissive, the fence served as open, obvious, and visible evidence of plaintiff's exercise of dominion of the disputed tract in a manner that was incompatible with that of the true owner. Plaintiff also notes Nannette's timber agreement. Plaintiff's deposition testimony indicates pathways were built on the disputed tract to assist with the timber harvest under

Nannette's and later plaintiff's timber contracts. Thus, the existence of Nannette's timber contract suggests visible timber pathways existed on the disputed tract during Nannette's possession of it.

¶ 45 At this point in the proceedings, plaintiff has presented sufficient supporting materials to avoid summary judgment in favor of defendants but has not presented enough evidence to obtain summary judgment in his favor. A question of fact clearly remains about how long the obvious nature of the timber harvest lasted on the disputed tract to give notice of his control and dominion over the disputed tract. Moreover, even if Jeffrey's testimony about Ruth Van Horn's statement her family camped on the disputed tract is admissible, it only creates a question of fact and does not establish summary judgment in favor of defendants. As with plaintiff's adverse possession of the disputed tract, a question of fact remains regarding the continuous nature of the Pecks' adverse possession, if any, of the disputed tract. Our resolution of the competing motions for summary judgment is not a statement on the ultimate resolution of this case.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we reverse the Macon County circuit court's judgments granting defendants summary judgment on all three counts of plaintiff's complaint, affirm the court's denial of plaintiff's motions for summary judgment, and remand for further proceedings.

¶ 48 Reversed and remanded.