Case Number: **1130875**

IN THE SUPREME COURT OF ALABAMA

THOMAS C. DONALD
Defendant / Appellant

v.

TURTLE TIME, INC.
Plaintiff / Appellee

On Appeal from the Circuit Court of
DeKalb County, Alabama
Case Number: CV-06-316
Honorable Jeremy S. Taylor, Presiding

BRIEF OF THE APPELLANT

Respectfully Submitted by: Thomas C. Donald, Appellant
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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that the facts and the legal arguments relevant to this matter are adequately presented in this brief. The quality of the Circuit Clerk's version of the Record on Appeal is significantly degraded from that of the documents originally filed. The photographs in the Clerk's Record are recognizable, but are useless for the purpose of making judgments. However, the original images are available on AlaCourt, if they are needed for reference.

If the Court feels that oral argument is necessary or advisable, Appellant will be honored to appear.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered by the Circuit Court of DeKalb County, Alabama, on a motion for summary judgment by plaintiff Turtle Time, granting the following:

1. A prescriptive easement, across the land of defendant Donald, serving the land of Turtle Time,

2. Dismissal with prejudice of a counterclaim by Donald for damages from a fire caused by Turtle Time, and

3. Dismissal with prejudice of another counterclaim by Donald requesting that the trial court order Turtle Time to cease trespassing on Donald's land.

The Supreme Court of Alabama has jurisdiction over this matter pursuant to *Ala.Code* § 12-2-7. Said judgment was made final pursuant to Ala.R.Civ.P. 54(b) on April 4, 2014. (C.406) Appellant Donald timely filed his notice of appeal to the Supreme Court of Alabama on May 5, 2014. (C.445)

TABLE OF AUTHORITIES

CASES

OTHER REFERENCES

DEFINITIONS OF TERMS USED IN THIS BRIEF

Donald – Thomas C. Donald III. The appellant/defendant.

Road – The primary roadway across Donald's land.

Turtle Time – Turtle Time, Inc. The appellee/plaintiff.

Shafer – Thomas R. Shafer. The owner of Turtle Time and the only officer of Turtle Time.

E&C – Lanier Edwards and Charles Currence. One of the predecessors in title of Turtle Time.

Miller – Miller Farms Limited Partnership, LLP. One of the predecessors in title of Turtle Time.

ALT – Alabama Land & Timber Company, LLC. One of the predecessors in title of Turtle Time and the predecessor in title of Donald.

Bowater – Bowater, Inc. The predecessor in title of E&C. The nature of Bowater's use of the Road (either permissive or adverse) is a determinative issue.

Georgia Kraft – Georgia Kraft, Inc. The predecessor in title of ALT. Georgia Kraft was the owner of the Road during the period of Bowater's use of the Road.

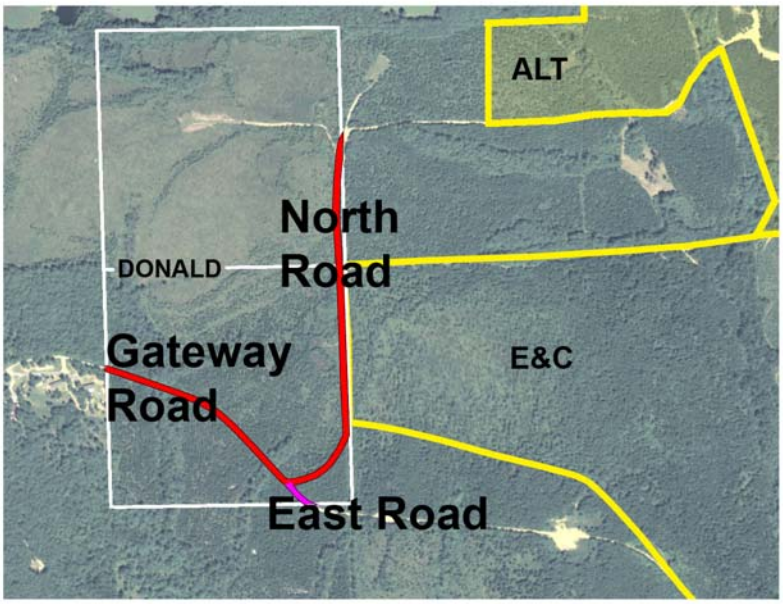
Order – The trial court's final order regarding the summary judgments on appeal, issued on April 4, 2014. (C.393-412)

STATEMENT OF THE CASE

Nature of the Case

This case relates to easements claimed by Turtle Time over a road (the Road) across land owned by Donald.

The Road is shown in the illustration here as the combination of the roads labeled as the Gateway Road and the East Road. Together with the North Road, these three roads lie on Donald's land and can be accessed from DeKalb County Road 520 from the west. Turtle Time's land, lying east of Donald's land, was acquired as a first parcel from ALT and as a second parcel from E&C. Two 40-acre parcels of Donald's land shown on the west in the illustration were acquired from ALT. An appurtenant easement over the Gateway Road and the North Road serves Turtle Time's ALT parcel.



Turtle Time's primary access route to its land is not across Donald's land, and is not shown in the illustration.

Turtle Time claims an easement by prescription over the Road to serve its E&C parcel and a parcel acquired from Miller lying further east. Donald claims that Turtle Time's repeated use of the Road since 2008 to access these parcels constitutes trespass and has requested that the trial court order Turtle Time not to use the Road.

Donald also contends that Turtle Time is responsible for a fire on land owned by Donald, stemming from Turtle Time's use of Donald's North Road to access its ALT parcel, and claims damages related to the fire.

Course of the Proceedings

Case 28-CV-2006-316 was filed by E&C and Miller on September 25, 2006, to establish an easement by prescription or necessity across Donald's land to serve land then owned by E&C and land further east then owned by Miller. Since then, Turtle Time has purchased all of E&C's and Miller's land and has been added as a plaintiff in the case. (C.003)

The trial court adjudged on August 24, 2007, (C.018) and restated as a final judgment on June 11, 2008, (C.021-022) that an easement by necessity over the Road had long served

Turtle Time's E&C and Miller parcels. Since Turtle Time had recently acquired its own, different access to its land from a public road, the trial court also ruled in the final 2008 order that the easement by necessity was extinguished (C.021-022).

On August 3, 2012, Donald filed counterclaim Count XII (C.023-025) claiming that Turtle Time had been continuously trespassing on the Road for the past four years, and requesting that Turtle Time be ordered to stop trespassing.

On June 21, 2013, Donald amended his counterclaim Count IX against Turtle Time, seeking damages for a fire on his land on October 2, 2007. (C.033-038)

On December 31, 2012, Donald filed *Motion by Defendant for Summary Judgment Regarding Claim for a Prescriptive Easement by the Alabama Plaintiffs*. (The Alabama Plaintiffs consisted of Turtle Time, E&C and Miller.) The trial court ruled in its *Order of September 26, 2013,* (C.039-048) that, "a genuine issue of material fact exists regarding the Alabama Plaintiffs' claims" to a prescriptive easement across Donald's land (C.045).

On June 20, 2013, Turtle Time amended the complaints filed by its predecessors by filing its own complaint

(C.026-032), including its individual claim (Turtle Time's Count I) to an easement by prescription over the Road to serve its E&C and Miller parcels. (C.027) The trial Court ordered a more definite statement of Turtle Time's complaint, which was filed on November 7, 2013. (C.049-072). On November 21, 2013, Donald answered Turtle Time's complaint, as supplemented. (C.073-087)

In his answers to complaints in this case and in his counterclaims, Donald has timely requested trial by jury on any and all issues triable by jury. (C.024, C.036, C.087)

On February 15, 2014, Turtle Time filed a motion for summary judgment as to an easement by prescription over the Road and challenging Donald's fire and trespass claims. (C.088-190) Donald responded to Turtle Time's motion for summary judgment on March 23, 2014. (C.191-392).

On April 4, 2014, the trial court ruled in a final order pursuant to Ala.R.Civ.P. Rule 54(b) (the *Order*) that an easement by prescription over the Road served Turtle Time's E&C and Miller parcels, and that Donald's fire claim and trespass claim were dismissed with prejudice. (C.393-412)

Donald filed motions to reconsider the *Order*, and on April 17, 2014, filed amendments of these motions, stating

that the motions were pursuant to Ala.R.Civ.P. Rules 59 and 59.1 and presenting additional evidence relevant to the *Order*. (C.413-434, C.435-437) Turtle time filed a motion to strike Donald's amended motions to reconsider on April 18, 2014. (C.438-439) Donald responded to Turtle Time's motion to strike on April 21, 2014. (C.440-443)

On April 22, 2014, the trial court denied Donald's Rule 59/59.1 motions to reconsider, without comment, and ruled that Turtle Time's motion to strike was moot. (C.444)

Disposition in the Court Below

Trial court's verbatim conclusion in the *Order* that use of an easement by necessity constitutes an adverse activity. (C.396-397)

> "Turtle Time has previously been adjudged in this case to have an easement by necessity across Donald's property to access some of Turtle Time's property. See *Order* of August 24, 2007. That easement by necessity was declared extinguished by this Court's Partial Summary Judgment issued on June 11, 2008." …
>
> "In Apley vs. Tagert, 584 So.2d 816 (Ala.1991), the Supreme Court held that an easement by prescription existed in favor of the Tagerts across land owned by the Apleys. In that case, the easement used by the Tagerts

was “the *only* means of ingress to and egress from the Tagerts' residence.” Id. at 819 (emphasis in original). Accordingly, Donald's claim that an easement by necessity, and thus permissive use, had always existed in favor of Turtle Time and its predecessors and against him and his predecessors, even if not judicially decreed, and that that fact therefore *dejure* precludes adverse use is an incorrect statement of law. It is, therefore, within this Court's purview to decide the question of prescriptive easement even given the prior declaration by this Court that Turtle Time possessed an easement by necessity.”

Trial court’s verbatim conclusion in the *Order* that travel on the Road and maintenance of the Road constitute adverse activities. (C.397-400)

“As Donald correctly points out, Alabama law states that use of a roadway across the property of another is presumed to be permissive use and the burden is on the individual claiming a prescriptive easement to prove adverse use. Cotton vs. May, 293 Ala. 212 (Ala.1974).

“The first parcel of property at issue in this segment of this Order was acquired by Turtle Time in June 2007 from Edwards and Currence, who in turn had acquired the property from Bowater, Inc. ("Bowater") on October 31, 2005. Bowater had owned the property since at least 1956. The second parcel of property at issue in this segment of this Order was acquired by Turtle Time from

Miller Farms in August 2007. Miller Farms had owned the property since at least 1973. The main road across Donald's property (what he designated as the "Gateway Road" and the "East Road" in his March 23, 2014, Response in Opposition to Turtle Time's Motion for Summary Judgment) has been used by Turtle Time and its predecessors in interest for more than twenty years to access the two parcels of property described in this paragraph. About that fact, there is no dispute." …

"The Court now hereby finds that the use described herein has been adverse to the owner of the premises, under claim of right.

"The use made of the road across Donald's property by the predecessors of Turtle Time amounts to an adverse use because Bowater's and Miller Farms' extensive use and maintenance … is much more than what would be described as mere "permissive use." Without seeking or being granted permission, those predecessors of Turtle Time engaged in what can be described as road-building activities, as well as extensive, and likely expensive, maintenance. The activity conducted, which consisted of dozer work, grader work and *the blasting of ditches with dynamite,* amounts to more than permissive use."

Trial court's verbatim conclusion in the *Order* that Donald's counterclaim regarding the fire be dismissed.

(C.403-404)

"Count 9 asserts that Turtle Time and its employees are liable for trespass upon his property and for the destruction of trees by fire upon his property on October 2, 2007.

> To grant ... a [summary-judgment] motion, the trial court must determine that the evidence does not create a genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala.R.Civ.P. When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present 'substantial evidence' creating a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So.2d 794, 797-98 (Ala.1989); § 12-21-12(d)[,] ALA.CODE 1975. Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Florida, 547 So.2d 870, 871 (Ala.1989).

McDaniel v. Harleysville Mut. Ins. Co., 84 So.3d 106, 111 (Ala.Civ.App. 2011).

"Donald has offered nothing in the way of substantial evidence supporting this Count. He has simply offered a timeline showing when Turtle Time acquired its property relative to the fire and has offered statements of Turtle Time employees and/or owner(s) that show animosity toward Donald. In an unpersuasive section of

his Response, Donald offers letters written to the editor of a newspaper in Georgia concerning the owner of Turtle Time on a tangential issue to show that he (the owner) is dishonest and therefore cannot be trusted. There is no deposition testimony showing anything other than bare allegations and conjecture regarding who is responsible for the fire on Donald's property. There certainly is nothing approaching "substantial evidence" of Turtle Time's responsibility for such.

"Accordingly, summary judgment is appropriate on this issue in favor of Turtle Time."

Trial court's verbatim conclusion in the *Order* that Donald's counterclaim regarding trespass be dismissed. (C.404)

"Donald alleged in Count 12 that Turtle Time trespassed on his property when it used what he has terms the East Road. Because the Court finds herein that Turtle Time is entitled to an easement by prescription across that portion of the roadway, Turtle Time is entitled to summary judgment on this issue."

STATEMENT OF THE ISSUES

Issues 1, 2, and 3 all relate to the trial court's award of a prescriptive easement across Donald's land, serving Turtle Time's land. Issue 4 relates to the trial court's dismissal of Donald's counterclaim Count IX regarding fire damages. There is no issue related to the trial court's dismissal of Donald's counterclaim Count XII, because that contested action stems directly from the contested award of the prescriptive easement to Turtle Time.

Issue 1 (Easement by Necessity). Did the trial court err to reversal in ruling that Bowater's use of the Road pursuant to its easement by necessity was adverse to Georgia Kraft?

Issue 2 (Finding of Fact by Trial Court). Did the trial court err to reversal in making a finding that Bowater used the Road adversely to Georgia Kraft, at summary judgment, contrary to evidence submitted by Donald, and where Donald requested a jury trial?

Issue 3 (Inconsistency by Trial Court). Did the trial court err to reversal in ruling for Turtle Time on Turtle Time's motion for summary judgment, after ruling on exactly the same issue that summary judgment was precluded by genuine issues of material fact, in a prior motion by Donald?

Issue 4 (Speculation by Shafer). Did the trial court err to reversal in ruling, regarding Donald's counterclaim for damages for a fire for which Turtle Time was responsible, that a denial by Shafer, which could not possibly have been based on Shafer's personal knowledge, entitled Turtle Time to summary judgment as a matter of law?

STATEMENT OF THE FACTS

Fact 1. The trial court found, at summary judgment, that it was within its "purview to decide the question of prescriptive easement, even given the prior declaration by this Court that Turtle Time possessed an easement by necessity". (C.397)

Fact 2. Bowater and Miller used the Road for more than twenty years, perhaps approaching sixty years, openly, obviously, continuously, uninterruptedly, and not dependent on anyone else's right. (C.399) (The remaining fact to be determined in this case is whether Bowater's and Miller's use was permissive or adverse.)

Fact 3. Bowater and Miller used the Road only for travel, maintenance and roadway improvement. See the trial court's conclusion regarding the "agreed upon facts" (C.398-399).

Fact 4. Bowater and Miller used the Road pursuant to a judicially recognized easement by necessity. (C.021, C.396)

Fact 5. Use of the Road by Bowater did not interfere with the owner of the Road, Georgia Kraft. See the deposition testimony by Bowater former employee Ball (C.308-309).

Fact 6. The owner of the Road, Georgia Kraft, never objected to Bowater's use of the Road. See the deposition testimony by Bowater former employee Ball (C.309).

Fact 7. The rights of the owner of the Road, Georgia Kraft, were never challenged by Bowater. See the deposition testimony by Bowater former employee Ball (C.310).

Fact 8. Bowater's use of the Road was not detrimental to the owner of the Road, Georgia Kraft. See the deposition testimony by Bowater former employee Ball (C.310).

Fact 9. Hostile intent was never exhibited by Bowater toward the Road owner, Georgia Kraft. See the deposition testimony by Bowater former employee Ball (C.311).

Fact 10. It is a fact that the trial court found as a fact, at summary judgment, that Bowater's use of the Road was adverse to the owner of the Road, Georgia Kraft, because it "consisted of dozer work, grader work and *the blasting of ditches with dynamite,* amounting to more than permissive use". (C.399-400)

Fact 11. The *"blasting of ditches with dynamite"*, on which the trial court focused, was not adverse the owner of the

Road, Georgia Kraft. See the deposition testimony by Bowater former employee Ball (C.417).

Fact 12. Photographs of the part of the Road on Donald's land show no indications that "blasting of ditches with dynamite" ever occurred on this land once owned by Georgia Kraft. See Donald's statements in paragraphs 3 through 8 in his affidavit (C.422-423).

Fact 13. Photographs of the Road running east of Donald's land (not on Donald's land) indicate that "blasting of ditches with dynamite" occurred on that land once owned by Bowater. See Donald's statements in paragraphs 9 through 12 in his affidavit (C.423).

Fact 14. Three days before the fire on Donald's land on October 2, 2007, a person associated with Turtle Time, Kirby, threatened Donald that, "we're going to have problems". See Donald's statement in paragraph 8 in his affidavit (C.331).

Fact 15: Three days before the fire on Donald's land on October 2, 2007, Turtle Time owner Shafer threatened Donald that, "I'm not recognizing the gate. I know you have a warrant out for my arrest. I hope they come and pick me up right up the street. … If we have to come back here,

we'll take – use the blow torch if we have to. This is a road that I have access to. Okay? I just want you to know that." Donald was not aware of a warrant for Shafer's arrest, or of any mention of such. See Donald's statement in paragraph 9 in his affidavit (C.331).

Fact 16. Aerial photographs show that Donald lost at least 17,440 plantation pine trees as a result of a fire on his land on October 2, 2007. See Donald's statement in paragraph 12 in his affidavit (C.331).

Fact 17. An incident report filed by a deputy sheriff on the day after the fire on October 2, 2007, showed that a witness observed Kirby on Donald's land on the morning of the fire while Kirby contended that he was not in the vicinity at that time. (C.345-347)

Fact 18. Personnel associated with Turtle Time exhibited a demeanor consistent with the burning of Donald's trees on October 2, 2007. (C.242)

Fact 19. Personnel associated with Turtle Time had an opportunity to burn Donald's trees on October 2, 2007. (C.242)

Fact 20. Personnel associated with Turtle Time were encouraged by Shafer to hate Donald, and they behaved as if they did so in the time-frame of the fire. (C.242)

Fact 21. Shafer's general demeanor in the time-frame of the fire on October 2, 2007, was consistent with Turtle Time having been responsible for the fire on Donald's land. (C.240-241)

Fact 22. Shafer stated in an affidavit that, "Turtle Time, Inc., was not involved in any damage, fire or destruction of trees on the property of Donald as alleged in his counterclaims." (C.189)

Fact 23. It is a *prima facie* fact that Shafer could not have had personal knowledge of whether or not any personnel associated with Turtle Time were involved in any damage, fire or destruction of trees on Donald's property.

Fact 24. Letters and an editorial in Mentone-area news papers have denounced Shafer's integrity and characterized his statements as a "Big Lie", and this casts doubt on the veracity of Shafer's denial of Turtle Time's involvement with the fire. (C.243)

STATEMENT OF THE STANDARD OF REVIEW

"To grant a motion for a summary judgment, the trial court must determine that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala.R.Civ.P. When the movant makes a prima facie showing that those two conditions are satisfied, the burden then shifts to the nonmovant to present "substantial evidence" creating a genuine issue of material fact. *Ex parte CSX Transp., Inc.,* 938 So.2d 959, 961 (Ala.2006); *see Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794, 797–98 (Ala.1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870, 871 (Ala.1989); § 12–21–12(d), Ala.Code 1975.

"In our review of a summary judgment, we apply the same standard as does the trial court on factual issues. *Ex parte Lumpkin,* 702 So.2d 462, 465 (Ala.1997). Our review is subject to the caveat that we must review the record in the light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. *Ex parte CSX Transp.,* 938 So.2d at 962; *Hanners v. Balfour Guthrie, Inc.,* 564 So.2d 412, 413 (Ala.1990). The trial court's ruling on questions of law carries no

> presumption of correctness, and this Court reviews de novo the trial court's conclusion as to the appropriate legal standard to be applied. *Ex parte Graham,* 702 So.2d 1215, 1221 (Ala.1997)."

Laster ex rel. Laster v. Norfolk Southern Ry. Co., Inc., 13 So.3d 992, 994 (Ala.2009).

SUMMARY OF THE ARGUMENT

Issue 1 (Easement by Necessity). Bowater's use of its easement by necessity is considered, under Alabama law, to have been permissive (and not adverse) with respect to servient tenement owner Georgia Kraft.

> "The basis of a way by prescription is adverse possession and use and the basis of a way by necessity is the implication of permissive use. *Waubun Beach Ass'n. v. Wilson*, 274 Mich. 598, 265 N.W. 474, 478 (1936)."

Oyler v. Gilliland, 351 So.2d 886, 887 (Ala.1977).

Accordingly, the trial court erred in granting Turtle Time an easement by prescription across Donald's land under summary judgment.

Issue 2 (Finding of Fact by Trial Court). The trial court's finding that Bowater's use of the Road was adverse to Georgia Kraft is precluded under *Ala.R.Civ.P.* Rule 56. The Committee Comments on the 1973 Adoption of Rule 56 state:

> "The summary judgment procedure is not a substitute for the trial of disputed issues of fact. On a motion for summary judgment, the court cannot try issues of fact.

> It … cannot be used to deprive a litigant of a proper trial of genuine issues of fact. 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1231 (1958).”

Accordingly, the trial court erred in granting Turtle Time an easement by prescription across Donald’s land under summary judgment.

Issue 3 (Inconsistency by Trial Court). Prior to its *Order*, the trial court ruled during 2013 that genuine issues of material fact existed as to claims regarding a prescriptive easement over the Road. (C.045) This prior 2013 order, in the same case on the same issue by the same judge, is in conflict with the *Order* and precludes summary judgment against Donald under the doctrines of *res judicata* and law of the case.

Accordingly, the trial court erred in granting Turtle Time an easement by prescription across Donald’s land under summary judgment.

Issue 4 (Speculation by Shafer). The only information presented by Turtle Time in its motion for summary judgment was a statement in an affidavit by Shafer merely denying Turtle Time’s involvement. (C.114, C.189) It is

impossible for Shafer to have had personal knowledge that none of the personnel associated with Turtle Time started the fire, and:

> "[M]ere general denial of liability, without more, does not entitle a movant to summary judgment as matter of law."

Swendsen v. Gross, 530 So.2d 764, 767 (Ala.1988).

> "[W]here the evidentiary matter in support of a motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Couch, Inc. v. Dothan-Houston County Airport Auth., Inc., 435 So.2d 14, 16 (Ala.1983) (quoting *Harold Brown Builders, Inc. v. Jordan,* 401 So.2d 36, 37 Ala.1981), quoting in turn *First Nat'l Bank of Birmingham v. Culberson,* 342 So.2d 347, 351 (Ala.1977)).

Accordingly, the trial court erred in dismissing Donald's counterclaim Count IX via summary judgment in favor of Turtle Time, even if Donald's opposing evidence was not considered by the trial court to have been substantial.

ARGUMENT

Issue 1 (Easement by Necessity).

Use of an easement by necessity is implied to be with the permission of the owner of its servient tenement.

> "The basis of a way by prescription is adverse possession and use and the basis of a way by necessity is the implication of permissive use. *Waubun Beach Ass'n. v. Wilson*, 274 Mich. 598, 265 N.W. 474, 478 (1936)."

Oyler v. Gilliland, 351 So.2d 886, 887 (Ala.1977).

Under *Oyler*, the prior adjudication by the trial court of an easement by necessity across Donald's land (C.021) precludes Turtle Time's claim to an easement by prescription, because an easement by prescription is based on adverse use, not on the permissive use implicit in an easement by necessity. The trial court is wrong in its conclusion (C.396-397) that *Apley v. Tagert*, 584 So.2d 816 (Ala.1991), contravenes *Oyler, supra*. Unlike in the instant case, there was no easement by necessity serving the Tagerts' land in *Apley*, and the circumstances in *Apley* did not justify such an easement by necessity, as Donald explained in his motion for the trial court to reconsider

its *Order* (C.414). This is because the Tagerts' property was apparently not landlocked, even though the only route they used for ingress was the roadway at issue. The Apleys did not even own the northern part of the width of the roadway over which the Tagerts claimed an easement by prescription. See *Apley, supra*, Appendix A at page 820.

Use of an easement by necessity in service of its dominant tenement is considered to be permissive. *Oyler, supra*. An easement by prescription cannot be acquired through permissive use because it requires adverse use.

> "An easement by *prescription* is acquired by use of 'the premises over which the easement is claimed for a period of twenty years or more, adversely to the owner of the premises, under claim of right, exclusive, continuous, and uninterrupted, with actual or presumptive knowledge of the owner.'"

Weeks v. Herlong, 951 So.2d 670, 679 (Ala.2006).

It is rational that a landowner who permits or concedes the use of his land by a neighbor, pursuant to an easement by necessity serving that neighbor's land, should not be subject to a claim for a prescriptive easement stemming from the very activity which the landowner was obligated to permit under Alabama law. This tenet is implicit in *Oyler,*

supra, but it is not stated as clearly in Alabama law as it could be, and the absence of such a clearer statement by this Court could be the basis of the trial court's erroneous holding.

The trial court's erroneous holding, if not reversed, would create a functional conflict in real property law which jeopardizes the property rights of all owners of a tenement servient to an easement by necessity. If an easement by necessity can be adjudged to be converted into an easement by prescription on the basis of a subjective assessment of the extent of the use of the easement, then land owners across the state are subject to losing property rights where they had no choice but to allow a land-locked neighbor to use a roadway necessary for access to his land.

This matter has been addressed in forums other than this Court by more thoroughly defining the concept of adverse use, so that erroneous conclusions about the concept are less likely to be reached. See especially *O'Dell v. Stegall*, 703 SE.2d 561 (WVa.2010), for an extensive treatise on the common law of adverse use and prescriptive easements which includes the following citations.

> "An "adverse" use is a use made without the consent of the landowner, or holder of the property interest used, and without other authorization. Adverse uses create causes of action in tort for interference with property rights. The causes of action are usually actions for trespass, nuisance, or waste."

Restatement (Third) of Property (Servitudes), § 2.16, cmt. b. The *Restatement* goes on to say:

> "To be adverse a use must create a cause of action for interference with an interest in property like trespass, nuisance, or interference with a servitude benefit. To be adverse, the use must be made without authority and without permission of the property owner. Thus, uses made pursuant to licenses are not adverse, nor are uses made pursuant to servitudes created expressly, by implication, or by **necessity**."

Id., cmt. f. (Emphasis supplied.)

> "Adversity does not imply animosity or personal hostility, but simply requires that the use of another's land be wrongful and without regard to the rights of the owner.
>
> "A use is adverse if it gives rise to a cause of action. No prescriptive easement may be created unless the landowner is able to prevent the wrongful use by resort to law."

Bruce & Ely, The Law of Easements and Licenses in Land, § 5:8. (Emphasis supplied.)

The trial court's ruling that use of an easement by necessity can be adverse to the owner of its servient tenement is in conflict with the positions of the above-cited authorities. If permitted to stand, this ruling will constitute a serious conflict in Alabama real property law and lead to further confusing litigation across the state. The trial court erred in its ruling and this Court should reverse the trial court's decision against Donald.

A clear and simple statement of the law would be that, "Uses made pursuant to licenses are not adverse, nor are uses made pursuant to servitudes created expressly, by implication, or by necessity." See *Restatement, supra*. Adoption of this concise rule by this Court will resolve not only one of the issues in this appeal, but also other issues in the underlying case where easements by prescription are also claimed over express easements and over a claimed easement by implication.

Issue 2 (Finding of Fact by Trial Court).

In its summary judgment *Order*, the trial court found (C.399-400) that, "The activity conducted, which consisted

of dozer work, grader work and *the blasting of ditches with dynamite,* amounts to more than permissive use."

If this Court contemplates that Turtle Time merits an easement by prescription based on this finding by the trial court, then a distinction should be made between clearly permissive activities such as travel to and from Turtle Time's land, and the activities identified in the trial court's *Order* as being adverse, specifically maintenance and improvement of the roadway. In this context, Turtle Time should only have a prescriptive easement to conduct maintenance and improvement of the roadway. This said, there are compelling reasons why summary judgment should have been totally denied by the trial court in the first place.

Use of the easement by Turtle Time's predecessor in title was found by the trial court to have been adverse to Donald's predecessor in title. In making such a finding, the trial court overstepped its bounds and ruled on an issue reserved for a jury.

> "The committee comments following Rule 56, A.R.C.P., quote with approval the following textbook authority: 'The summary judgment procedure is not a substitute for the trial of disputed issues of fact. On a motion for

> summary judgment, the court cannot try issues of fact. It can only determine whether there are issues to be tried. …' *3 Barron & Holtzoff, Federal Practice and Procedure*, s 1231 (1958).
>
> "The committee added that 'if there is a Scintilla of evidence supporting the position of the party against whom the motion is made, so that at a trial he would be entitled to go to the jury, summary judgment cannot be granted.' Id. (Emphasis supplied.)"

Wilson v. Liberty Nat. Life Ins. Co., 331 So.2d 617, 619 (Ala.1976). (Emphasis supplied.)

The scintilla rule was abolished by Ala.Code § 12-21-12, but Donald's response to Turtle Time's motion for summary judgment (C.207-212), discussed further below, showed far more than a scintilla of evidence that use of the easement was permissive, in compliance with Ala.Code § 12-21-12(d).

> "In order to rebut such a prima facie showing, the nonmovant must show 'substantial evidence' that creates a genuine issue of material fact. Substantial evidence is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' *West v. Founders Life Assurance of Florida,* 547 So.2d 870, 871 (Ala.1989)."

Richardson v. Terry, 893 So.2d 277, 281 (Ala.2004) quoting *Lucas v. Alfa Mut. Ins. Co.*, 622 So.2d 907 (Ala.1993).

An easement by prescription requires adverse use. See *Weeks, supra*. The law regarding what constitutes adverse use has long been established by this Court.

> "If the user be not exclusive, and not inconsistent with the rights of the owner of the land to its use and enjoyment, the presumption is that such user is permissive, rather than adverse. An easement by prescription is created only by an adverse use of the privilege, with the knowledge of the person against whom it is claimed, or by use so open, notorious, visible, and uninterrupted that knowledge will be presumed, and exercised under a claim of right adverse to the owner and acquiesced in by him; and such adverse use must exist for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession. *Jones on Easements*, § 164. No easement can be acquired when the use is by express or implied permission. Id. §§ 179, 180. The user or enjoyment of the right claimed, in order to become an easement by prescription, must have been adverse to the owner of the estate over which the easement is claimed, under a claim of right, exclusive, continuous, and uninterrupted, and with the knowledge and acquiescence of the same. *Steele v. Sullivan*, 70 Ala. 589; 2 Wait's Act. & Def. 693. One circumstance always considered is whether the user is against the interest of the party

> suffering it, or injurious to him. There must be an invasion of the party's right, for, unless one loses something, the other gains nothing. *2 Wait's Act. & Def*. 694; *Roundtree v. Brantley*, 34 Ala. 544, 552[[[73 am.dec. 470]; A*rnold v. Stevens*, 24 pick. [mass.] 106 [35 am.dec. 305]. The presumption of a grant can never arise where all the circumstances are perfectly consistent with the nonexistence of a grant. *Arnold v. Stevens*, supra; *Ricard v. Williams*, 7 Wheat. 109 [5 L.Ed. 398]."

Hill v. Wing, 69 So. 445, 447 (Ala.1915).

The presumption is that all uses are permitted by the owner. A claimant has the burden of proving that a use was adverse to the owner in order to be eligible for an easement by prescription. See *Hill, supra,* and *Bull v. Salsman,* 435 So.2d 27, 29 (Ala.1983). Turtle Time did not make a prima facie showing that Bowater's use of Georgia Kraft's segment of the Road was adverse to Georgia Kraft. The trial court might have "found" that Bowater's use was adverse, but such a finding is not permitted under *Wilson*, *supra*, citing *3 Barron & Holtzoff.* On the other hand, Donald showed substantial evidence that Bowater's use was not adverse.

Neither Bowater's use of the easement across Georgia Kraft's land, nor anyone else's use of the easement, ever interfered with Georgia Kraft's operations. See Bowater former employee Ball's deposition testimony (C.308:22-23, C.309:1-6). This shows permissive use, because a use by a claimant which is not inconsistent with the rights of an owner to use and enjoy his land is presumed to be permitted by the owner and to not be adverse to the owner. See *Hill, supra,* where *Jones on Easements* § 164 is cited.

Georgia Kraft never objected to or interfered with Bowater's use of the easement. See Bowater former employee Ball's deposition testimony (C.309:14-21). This shows use which cannot mature into a title by prescription, because a use by a claimant which is tolerated or permitted by an owner is not adverse to the owner.

> "The real point of distinction is between a tolerated, or permissive *user,* and one which is adverse, or as of right. The former does not mature into a title by prescription."

Polly v. McCall, 37 Ala. 20, 24 (Ala.1860).

Bowater had no other way to access its land other than by use of the easement. See Bowater former employee Ball's deposition testimony (C.309:22-23, 310:1-7). This rules

out a prescriptive easement, because such cannot be acquired when use is by express or implied permission of the owner (Georgia Kraft) which would have existed when there was no other way for Bowater to access its land. See *Hill, supra,* where *Jones on Easements* § 164 is cited.

Bowater never challenged Georgia Kraft's right to stop Bowater from using the easement. See Bowater former employee Ball's deposition testimony (C.310:8-11). This rules out an easement by prescription because:

> "[A] permissive occupant cannot change his possession into adverse title no matter how long possession may be continued, in the absence of a clear, positive and continuous disclaimer and disavowal of the title of the true owner brought home to the latter's knowledge; there must be either actual notice of the hostile claim or acts or declarations of hostility so manifest and notorious that actual notice will be presumed in order to change a permissive or otherwise non-hostile possession into one that is hostile."

Stewart v. Childress, 111 So.2d 8, 13 (Ala.1959), citing *White v. Williams,* 69 So.2d 847, 851 (1954).

Bowater former employee Ball's deposition testimony, (C.310:12-23), shows that any blasting of ditches with dynamite and/or extensive maintenance which might have

occurred on Donald’s land was not considered to be an adverse activity.

> Q. Was Bowater's use of the easement generally of no consequence or even beneficial to Georgia Kraft?
> A. I would feel it was beneficial.
> Q. But it certainly did not compromise Georgia Kraft?
> A. No.
> Q. Did Bowater ever do anything regarding the easement across Georgia Kraft's land to harm the easement of Georgia Kraft?
> A. No.

Thus, Bowater’s activities actually helped Georgia Kraft, both companies being in the timber business and both needing the same road to conduct their activities. This rules out a prescriptive easement, because such cannot be acquired unless the owner’s interests are violated by the claimant’s use, or unless the owner is injured by the claimant’s use. There must be an invasion of the owner’s rights by the claimant. See *Hill, supra,* where *2 Wait's Act. & Def*., *Roundtree v. Brantley*, and A*rnold v. Stevens* are cited. Furthermore, a prescriptive easement cannot be

acquired where all of the circumstances are perfectly consistent with there not being a prescriptive easement. See *Hill, supra,* where *Arnold v. Stevens* and *Ricard v. Williams* are cited.

Bowater former employee Ball never exhibited a hostile intent to any Georgia Kraft personnel, nor did he observe anyone else exhibit a hostile intent, nor did he hear any stories of anyone exhibiting hostility toward Georgia Kraft. See Bowater former employee Ball's deposition testimony (C.311:1-14). This rules out an easement by prescription, because it is necessary for such that there be: (a) adverse use for twenty years with the knowledge of the person against whom it is claimed, and exercised under a claim of right adverse to the owner and acquiesced in by him, or (b) adverse use for twenty years so open, notorious, visible, and uninterrupted that knowledge will be presumed, and exercised under a claim of right adverse to the owner and acquiesced in by him. See *Hill, supra,* where *Jones on Easements* § 164 is cited.

Bowater's not having asked permission and having exercised acts of ownership, etc., mentioned in the *Narrative Summary of Undisputed Material Facts* (C.089,

C.092, C.094) in Turtle Time's motion for summary judgment, does not conflict with the presumption of permissive use.

> "Ordinary acts of ownership, consistent with permissive possession, are not sufficient to constitute an adverse holding capable of ever ripening into a title."

Harkins & Co. v. Lewis, 535 So.2d 104, 117 (Ala.1988).

In this context, it should be noted that there are commonalities between the concepts of dominant/servient tenements and the concepts of tenancy in common. Accordingly, in the former relationship, as in the latter, exercise of an act of ownership by one party does not compromise the title of the other party.

> "Each tenant in common has an equal right to occupy the common freehold, and the exercise of ordinary acts of ownership by one, is not, without more, an adverse holding which can ever ripen into a title. … Actual occupancy, actual exercise of acts of ownership, actual improvements of the property, may all co-exist, and yet the holding not become adverse."

Johns v. Johns, 9 So. 419 (Ala.1890).

Similarly,

> "In general, the rejection of any broad legal presumption of adverseness rests upon a revolt against

> the ancient platitude of the common law. It denies that under modern conditions the repeated use by one owner of the adjacent land of another, for some harmless convenience in the enjoyment of his own land, is such an appropriation of it as to imply a claim of title on his own part or a recognition of such a title on the other's part. In the absence of anything to indicate such a claim, the use is said to be more consistent with a neighborly accommodation than with an adversative position on the part of either."

Cotton v. May, 301 So.2d 168, 169 (Ala.1974) citing Annotation 170 ALR 793.

All of the above facts constitute substantial evidence that Bowater's use of the Road was not adverse to Georgia Kraft, and they show that there are clearly genuine issues as to material facts which preclude awarding Turtle Time a prescriptive easement across Donald's land.

> "A motion for summary judgment may be granted only when there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law. *Fountain v. Phillips,* 404 So.2d 614, 618 (Ala.1981). The moving party is required to establish the absence of a genuine issue as to any material fact. *Gray v. WALA-TV,* 384 So.2d 1062, 1066 (Ala.1980), and all reasonable inferences from the facts are to be viewed most favorably to the non-moving party. *Chiniche v. Smith,* 374 So.2d 872, 873 (Ala.1979)."

Allen By and Through Allen v. Whitehead, 423 So.2d 835, 837 (Ala.1982).

The trial court's decision should be reversed, and whether Bowater's use was permissive or adverse should be left for a jury to decide.

Issue 3 (Inconsistency by Trial Court).

Prior to issuing its *Order* (on April 4, 2014), the trial court's *Order of September 26, 2013*, stated that genuine issues of material fact existed as to claims regarding a prescriptive easement over the Road. (C.045) This prior order, in the same case, on the same issue, and under the same judge, is in conflict with the *Order* and precludes summary judgment against Donald regarding the prescriptive easement claimed by Turtle Time, under the doctrine of *res judicata* or claim preclusion.

> "The elements of *res judicata,* or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *Hughes v. Allenstein,* 514 So.2d 858, 860 (Ala.1987). If those four elements are present, any claim that was or could have been

> adjudicated in the prior action is barred from further litigation."

Dairyland v Jackson, 566 So.2d 723, 725 (Ala.1990).

These criteria are satisfied by the circumstances of the trial court's ruling on September 26, 2013, that genuine issues of material fact existed regarding a prescriptive easement for Turtle Time. Thus, any claim that otherwise could have been adjudicated is barred from further litigation. This bar precludes the arguments made by Turtle Time in its motion for summary judgment regarding an easement by prescription.

This prior ruling also constitutes the law of the case.

> "[U]nder the "law of the case" doctrine, "whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case." *Lary v. Flasch Bus. Consulting,* 909 So.2d 194, 198 [(Ala.Civ.App.2005)] (quoting *Blumberg v. Touche Ross & Co.,* 514 So.2d 922, 924 (Ala.1987))." *Miller & Miller Constr. Co. v. Madewell,* 920 So.2d 571, 572–73 (Ala.Civ.App.2005).
>
> "The law-of-the-case doctrine provides that when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the same case, thereby hastening an end to litigation

> by foreclosing the possibility of repeatedly litigating an issue already decided.
> *"Martin v. Cash Express, Inc.,* 60 So.3d 236, 249 (Ala.2010) (quoting *Belcher v. Queen,* 39 So.3d 1023 (Ala.2009))."

Walden v. ES Capital, 89 So.3d 90, 107 (Ala.2011).

The trial court did not state that its prior ruling was in error. It did not even comment, in its more recent *Order*, on its prior ruling which was in conflict with the *Order*. In the absence of a resolution of the conflict between its orders, the doctrines of *res judicata* and law of the case preclude the trial court's ruling granting a prescriptive easement to Turtle Time on summary judgment. See *Dairyland, supra,* and *Walden, supra*.

The trial court's decision should be reversed, and whether Bowater's use was permissive or adverse should be left for a jury to decide.

Issue 4 (Speculation by Shafer).

Donald's *Amendment of Counterclaim Count IX* (C.033-038) contends:

> "Said forest fire resulted from the negligence of an employee of plaintiff Turtle Time and the doctrine of *res ipsa loquitur* is applicable, or, in the alternative,

said forest fire resulted from the wanton or willful action of an employee of plaintiff Turtle Time.

"Turtle Time is responsible under the doctrine of *respondeat superior* for the destruction of the trees on Defendant's Property on October 2, 2007."

Shafer's affidavit (C.188-189) included as paragraph 13 the statement that, "Turtle Time, Inc., was not involved in any damage, fire or destruction of trees on the property of Donald as alleged in his counterclaims." Shafer might have been testifying regarding his personal beliefs, but Shafer, who lives in Atlanta, cannot possibly have had personal knowledge regarding the involvement of anyone, other than himself, described in Donald's Count IX, unless he was actually present at the location of the fire in Mentone when the fire was set on Tuesday, October 2, 2007.

Under Alabama law, Shafer's denial should have been ignored by the trial court.

"Affidavits to be considered on a motion for summary judgment must be made on personal knowledge and must show affirmatively that the affiant is competent to testify as to the matters stated, and they may only set forth such facts as would be admissible in evidence. Ala.R.Civ.P. Rule 56(e). Thus the trial court is not to consider statements in affidavits based on hearsay, or otherwise, inadmissible. E.g., *Dyer v. MacDougall*, 201

F.2d 265 (2d Cir.1952); *Jameson v. Jameson*, 176 F.2d 58 (D.C.Cir.1949); *United States v. Britten*, 161 F.2d 921 (3rd Cir.1947); 6 Moore's *Federal Practice*, ¶ 56.22 (2d ed. 1953)." (Emphasis supplied.)

Committee Comments on 1973 Adoption of Ala.R.Civ.P. 56.

> "[M]ere general denial of liability, without more, does not entitle a movant to summary judgment as matter of law."

Swendsen v. Gross, 530 So.2d 764, 767 (Ala.1988).

> "Affidavits must contain statements based upon the personal knowledge of the affiant, and mere speculation and statements of subjective beliefs are not the equivalent of personal knowledge. *Black v. Reynolds,* 528 So.2d 848 (Ala.1988). Affidavits making vague, general assertions do not fulfill the requirements of Rule 56(e). *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794 (Ala.1989)."

Sooudi v. Century Plaza Co., 622 So.2d 1275, 1278 (Ala.1993).

> "Rule 56(e) "plainly requires (the word 'shall' being mandatory) that an affidavit state matters personally *known* to the affiant." *Jameson v. Jameson,* 176 F.2d 58, 60 (D.C.Cir.1949). See, also, Wright, Miller, and Kane, *Federal Practice & Procedure: Civil 2d* § 2738, p. 467 (1983)."

Ex parte Head, 572 So.2d 1276, 1279 (Ala.1990).

Shafer's statements are a mere denial of Donald’s claims and are not based on personal knowledge. The trial court should not have considered Shafer’s affidavit in its ruling. Donald, however, presented substantial evidence supporting his claims. Facts 14 through 24, listed in the *Statement of the Facts* above and discussed in Section 5.9 of Donald’s *Response in Opposition to Turtle Time’s Motion for Summary Judgment* (C.239-243), constitute “substantial” evidence of “such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.” See *Richardson, supra*. Included among these is Donald’s affidavit which, in its paragraph 11 (C.331), shows with aerial photographs the damage from the fire. Also included is the Incident Report (C.345-347) by the DeKalb County Sheriff’s Office constituting evidence that a Turtle Time employee was present in the vicinity of the fire in the time frame of the fire, and showing the employee’s conflicting denial of his having been there.

Even if Donald’s evidence did not satisfy the trial court, the trial court’s ruling against Donald was in error because Turtle Time’s statement should not have been

accepted by the trial court as evidence and, therefore, Turtle Time's motion for summary judgment did not establish the absence of a genuine issue.

> "[W]here the evidentiary matter in support of a motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Couch, Inc. v. Dothan-Houston County Airport Auth., Inc., 435 So.2d 14, 16 (Ala.1983) (quoting *Harold Brown Builders, Inc. v. Jordan,* 401 So.2d 36, 37 Ala.1981), quoting in turn *First Nat'l Bank of Birmingham v. Culberson,* 342 So.2d 347, 351 (Ala.1977)).

Accordingly, Donald's counterclaim Count IX should not have been dismissed by the trial court.

CONCLUSION

The trial court's *Order* is due to be reversed for the following reasons.

First. The trial court erred in ruling that Bowater's use of the Road, pursuant to its easement by necessity, was not permissive.

Second. The trial court erred in making a finding that Bowater used the Road adversely to Georgia Kraft, contrary to evidence submitted by Donald, at summary judgment, where Donald requested a jury trial.

Third. The trial court erred in finding for Turtle Time in its motion for summary judgment after ruling on exactly the same issue in Donald's prior motion for summary judgment that genuine issues of material fact existed as to claims regarding a prescriptive easement over the Road.

Fourth. The trial court erred in finding, regarding Donald's claim for damages for the fire on his land, where Donald requested a jury trial, that Shafer's mere, speculative denial of Turtle Time's responsibility justified summary judgment against Donald.

WHEREFORE, Donald prays that this Honorable Court will find that reversal of the trial court's *Order* is consistent with substantial justice, and that this Honorable Court will reverse the trial court's *Order* so that:

1. Turtle Time's motion for summary judgment on its claim to a prescriptive easement across Donald's land is DENIED.

2. Donald's Counterclaim Count IX for damages against Turtle Time for the fire on Donald's land is NOT DISMISSED.

3. Donald's Counterclaim Count XII regarding trespass by Turtle Time on Donald's land is NOT DISMISSED.

Respectfully submitted on this the 17th day of July, 2014.

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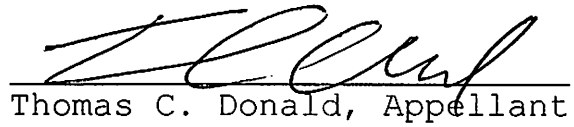
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Appellant's Brief* upon Wm. Eric Colley, attorney for the appellee, Turtle Time, Inc., by placing the same in the United States Mail, postage prepaid and addressed to P. O. Box 681045, Fort Payne, AL 35968, on this the 17th day of July, 2014.

Pursuant to Ala.R.App.P. Rule 34(a): I do not request oral argument.



Thomas C. Donald, Appellant