

Case Number: 1130875

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IN THE SUPREME COURT OF ALABAMA

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THOMAS C. DONALD  
Defendant / Appellant

v.

TURTLE TIME, INC.  
Plaintiff / Appellee

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On Appeal from the Circuit Court of  
DeKalb County, Alabama  
Case Number: CV-2006-316  
Honorable Jeremy S. Taylor, Presiding

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APPLICATION FOR REHEARING  
WITH STATEMENT OF FACTS  
AND BRIEF

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Respectfully Submitted by: Thomas C. Donald, Appellant  
P. O. Box 43507  
Birmingham, AL 35243  
205-967-9504, tcd@bellsouth.net

## APPLICATION FOR REHEARING

Comes now appellant Thomas C. Donald ("Donald"), and respectfully makes application for a rehearing in case 1130875 in the Supreme Court of Alabama, pursuant to Rule 40 of the Alabama Rules of Appellate Procedure. A statement of facts and a brief in support of this application are attached.

This Court did not express an opinion in its decision affirming summary judgment against Donald, rendered on January 16, 2015, that use of an easement by necessity constituted adverse use in a prescriptive easement action. **This Court's decision is notable in that it implies that use of an easement by necessity can be considered to be adverse in Alabama** and, thus, that the following American Law Institute rule does not apply in Alabama:

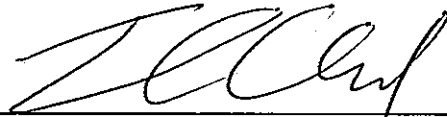
"Uses made pursuant to licenses are not adverse, nor are uses made pursuant to servitudes created expressly, by implication, or by necessity."

However, this ALI rule is consistent with prior decisions by the Supreme Court of Alabama, and this rule is consistent with clearly established law in other states, and this rule is consistent with the general interests of

land owners and the orderly conduct of their affairs in Alabama, and this rule is consistent with common sense.

If it is the intended conclusion of this Court that this rule does not apply in Alabama, then an opinion so stating is merited because of the extraordinary nature of such a conclusion. In the alternative, if it is the conclusion of this Court that this rule applies in Alabama, then vacation and setting aside of this Court's decision rendered in this matter on January 16, 2015, affirming summary judgment against Donald, is merited.

Respectfully submitted on this the 30<sup>th</sup> day of January, 2015.



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Thomas C. Donald, Appellant  
P. O. Box 43507  
Birmingham, AL 35243  
205-967-9504, tcd@bellsouth.net

**STATEMENT OF FACTS IN SUPPORT OF**  
**APPLICATION FOR REHEARING**

**Fact 1.** The trial court opined that it found, at summary judgment, that it was within its "purview to decide the question of prescriptive easement, even given the prior declaration by the trial 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) (Whether the use was permissive or adverse was disputed and still is disputed.)

**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.** The trial court opined that it found, 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 to 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 or was needed 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)

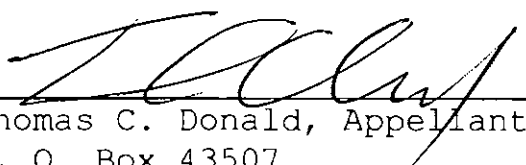


**BRIEF IN SUPPORT OF**  
**APPLICATION FOR REHEARING**

**STATEMENT REGARDING ORAL ARGUMENT**

Appellant believes that the facts and the legal arguments relevant to this matter are adequately presented in this brief.

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

  
Thomas C. Donald, Appellant  
P. O. Box 43507  
Birmingham, AL 35243  
205-967-9504, tcd@bellsouth.net

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## STATEMENT OF JURISDICTION

This is a request for rehearing of an appeal from a judgment entered by the Circuit Court of DeKalb County, Alabama, on a motion for summary judgment by plaintiff Turtle Time, said judgment 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 in the trial court 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 this Court on May 5, 2014. (C.445) This Court affirmed the judgment against Donald on January 16, 2015, and Donald timely filed a request for rehearing on January 30, 2015, pursuant to *Ala.R.App.P.* 40.

**TABLE OF AUTHORITIES**

**CASES**

*Apley v. Tagert*, 584 So.2d 816 (Ala.1991) . . . . . 7

*City of Montgomery v. Water Works & Sanitary Sewer Bd.*,  
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*Couch, Inc. v. Dothan-Houston County Airport Auth., Inc.*,  
435 So.2d 14 (Ala.1983) . . . . . 13

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*Ex parte Parker*, 740 So.2d 432 (Ala.1999) . . . . . 4, 5

*O'Dell v. Stegall*, 703 SE.2d 561 (WVa.2010) . . . . . 9, 15

*Oyler v. Gilliland*,  
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*Smitherman v. Marshall County Comm'n*,  
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*Swendsen v. Gross*, 530 So.2d 764 (Ala.1988) . . . . . 13

*Weeks v. Herlong*, 951 So.2d 670 (Ala.2006) . . . . . 8

**OTHER REFERENCES**

*Ala.Code* § 12-2-7 . . . . . xi

*Ala.R.App.P.* Rule 40 . . . . . ii, xi

*Ala.R.Civ.P.* Rule 54(b) . . . . . xi

*Ala.R.Civ.P.* Rule 56 . . . . . 6, 11

*Bruce & Ely, The Law of Easements and Licenses in Land*,  
§5:8 . . . . . 10

*Restatement (Third) of Property (Servitudes)*,  
§2.16 . . . . . 9, 15

**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**

Turtle Time claims an easement by prescription over a road (the Road) on land owned by Donald to serve its land.

### **Course of the Proceedings**

On September 25, 2006, case 28-CV-2006-316 was filed by E&C and Miller 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)

On August 24, 2007, the trial court adjudged (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 order of 2008 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 filed a complaint (C.026-032) claiming an easement by prescription over the Road to serve its E&C and Miller parcels.

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 its claimed easement by prescription over the Road and challenging Donald's fire and trespass

claims. (C.088-190) On March 23, 2014, Donald responded to Turtle Time's motion for summary judgment. (C.191-392).

On March 27, 2014, a hearing (R.1-116 at C.501-616) was held on Turtle Time's motion for summary judgment, and on April 4, 2014, the trial court ruled in a final order (the *Order*) that an easement by prescription over the Road served Turtle Time's land, and that Donald's fire claim and trespass claim were dismissed with prejudice. (C.393-412)

On May 5, 2014, Donald timely filed a notice of appeal to the Supreme Court of Alabama. On January 16, 2015, the Supreme Court of Alabama affirmed, in its case 1130875, with no opinion, the judgment of the trial court against Donald.

#### **Disposition in the Court Below**

See *Appellant's Brief* filed on July 17, 2014.

#### **STATEMENT OF THE ISSUES**

**Issue 1.** Does the ruling by the Supreme Court of Alabama create a conflict in Alabama property law by affirming a decision by a trial court that use of an easement by necessity was adverse?



**Issue 2.** Is the ruling by the Supreme Court of Alabama inconsistent with the standard of review in *Appellant's Brief* filed on July 17, 2014, which states that summary judgment against Donald shall not be granted where there are genuine issues of material fact and that the record shall be reviewed in the light most favorable to Donald?

**STATEMENT OF THE STANDARD OF REVIEW**

See *Appellant's Brief* filed on July 17, 2014, for the standard of review applicable to the issues in the appeal from the trial court's decision.

This Court's affirmation with no opinion of January 16, 2015, results in serious conflicts in Alabama real estate law. Rehearing is an appropriate method by which this Court can issue an opinion to help resolve these conflicts, even if the affirmation by this Court is not changed.

This Court has previously used an application for rehearing to clarify or explain a ruling. For example, in *Ex parte Formby*, 750 So.2d 587, 589 (Ala.1999) this Court said, "We accept the State's invitation to clarify Parker...", referring to *Ex parte Parker*, 740 So.2d 432 (Ala.1999). This Court then explained and clarified the

ruling in *Formby* relative to *Parker* although formally denying rehearing.

Likewise in *Smitherman v. Marshall County Comm'n*, 746 So.2d 1001, 1002 (Ala.1999) this Court said, "... we conclude that the application for rehearing is due to be overruled, but we issue this substituted opinion to clarify our holding." Similarly, in *City of Montgomery v. Water Works & Sanitary Sewer Bd.*, 660 So.2d 588, 590 (Ala.1995), the Supreme Court of Alabama modified its original ruling for purposes of clarification and overruled the application for rehearing.

#### SUMMARY OF THE ARGUMENT

See *Appellant's Brief* filed on July 17, 2014, for the summary of the argument applicable to the issues in the appeal from the trial court's decision.

**Issue 1.** Use of an easement by necessity is considered, under Alabama law, to be permissive and not adverse.

Accordingly, affirmation of the trial court's decision that Bowater's use of an easement by necessity was adverse to Georgia Kraft will create a serious conflict in Alabama property law, and should be vacated and set aside.

**Issue 2.** The affirmation of the trial court's decision against Donald on a motion for summary judgment was inconsistent with Ala.R.Civ.P Rule 56(c)(3) and did not consider the record in a light most favorable to Donald, contrary to the standard of review in the *Appellant's Brief*. The affirmation should be vacated and set aside.

### ARGUMENT

**Issue 1.** The trial court issued a final judgment on June 11, 2008, that the easement across Donald's land used by Turtle Time and its predecessors in title was an easement by necessity. Under Alabama law, this judgment should have precluded the claim for a prescriptive easement argued by Turtle Time in its motion for summary judgment filed on February 15, 2014. Nevertheless, the trial court granted Turtle Time's motion, apparently on the premise that use of an easement by necessity could be adverse. This is an extraordinary conclusion and its affirmation by the Supreme Court of Alabama merits an opinion to clarify the law regarding prescriptive easements in Alabama. Otherwise, the affirmation should be vacated and set aside.

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*. See *Appellant's Brief* at page 22.

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 Alabama real property law which would jeopardize 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 aspects 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.

It appears that the issues on appeal might be issues of first impression in Alabama. The Supreme Court of West Virginia in *O'Dell v. Stegall*, 703 SE.2d 561 (WVa.2010), examined similar issues regarding prescriptive easements and easements by necessity, and issued a comprehensive opinion which included 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 was adverse to the owner of its servient tenement is in clear conflict with the positions of the above-cited authorities. The trial court erred in its ruling, and this Court should vacate and set aside its affirmation of that ruling. In the alternative, the trial court's ruling should, at least, be explained and qualified in a comprehensive opinion, so that the ruling will not constitute a serious conflict in Alabama real property law and lead to further confusing litigation across the state.**

**Issue 2.** To grant a motion for a summary judgment, the trial court is required to determine "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."

*Ala.R.Civ.P.* Rule 56(c)(3). Donald brought to the trial court's attention genuine issues of material fact in this case, including, but not limited to, the following. 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 11: The "*blasting of ditches with dynamite*", on which the trial court focused, was not adverse to 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 or was needed on this land once owned by Georgia Kraft. See Donald's statements in paragraphs 3 through 8 in his affidavit (C.422-423).

The standard of review in *Appellant's Brief* required due consideration of these genuine issues as to material facts. Rehearing is merited because this Court's affirmation with no opinion did not comply with this standard of review.

The standard of review in *Appellant's Brief* also required that the record be reviewed in a light most favorable to Donald. The only contention presented by Turtle Time in its motion for summary judgment, regarding destruction of Donald's trees, was a statement in an affidavit by Shafer merely denying Turtle Time's involvement. (C.114, C.189) But this is insufficient for judgment against Donald.

"[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). (Emphasis supplied.)

Thus, affirmation of the trial court's judgment against Donald is inconsistent with the standard of review in *Appellant's Brief* filed on July 17, 2014, and so the affirmation should be vacated and set aside.

### CONCLUSION

Rehearing is merited because the decision of this Court creates a conflict in Alabama property law, and the decision is inconsistent with the standard of review specified in *Appellant's Brief* filed on July 17, 2014.

This Court's affirmation of the trial court's *Order* should be vacated and set aside, and the trial court's *Order* should 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, at summary judgment, where genuine issues of material fact existed and 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 a prior motion for summary judgment by Donald 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 in a rehearing of this case that reversal of the trial court's *Order* is consistent with substantial justice, and that this Honorable Court will vacate and set aside its affirmation and reverse the trial court's *Order* so that:

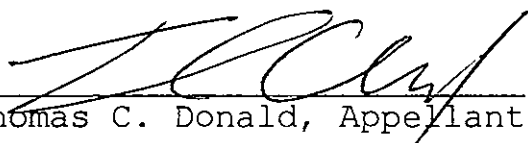
1. Turtle Time's motion for summary judgment on its claim to a prescriptive easement across Donald's land is DENIED.

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.

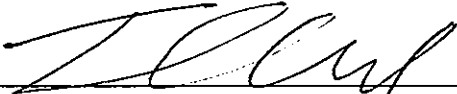
In the alternative, if this Court denies a rehearing or re-affirms the trial court's *Order* regarding Turtle Time's claim to a prescriptive easement, Donald prays that this Court will clearly state in an opinion the extent of the application in Alabama of the rule in the *Restatement (Third) of Property* adopted by the Supreme Court of West Virginia. See *O'Dell, supra* and *Restatement, supra*.

Respectfully submitted on the 30<sup>th</sup> day of January, 2015.

  
Thomas C. Donald, Appellant  
P. O. Box 43507  
Birmingham, AL 35243  
205-967-9504, tcd@bellsouth.net

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing *Application for Rehearing with Statement of Facts and 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 30<sup>th</sup> day of January, 2015.

  
\_\_\_\_\_  
Thomas C. Donald, Appellant