

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Robin Stilwell, Circuit Court Judge

Case No. 2017-CP-23-3754

Appellate Case No. 2017-002618

**RECEIVED**  
NOV 07 2018  
SC Court of Appeals

Harold Estes Blackwell, Jr.

Appellant,

v.

Miracle Hill Ministries, Inc.,  
Anita Jane Miller (aka Anita M. Blackwell),  
And William Fisk,

Respondents.

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INITIAL BRIEF OF WILLIAM FISK

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### **STATEMENT OF THE ISSUES ON APPEAL**

- I. DID THE LOWER COURT CORRECTLY DETERMINE THAT THE COMPLAINT FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE ANY CAUSE OF ACTION AGAINST RESPONDENT WILLIAM FISK?
- II. DID THE LOWER COURT ABUSE ITS DISCRETION BY DISMISSING THE COMPLAINT WITH PREJUDICE AND BY DECLINING TO GRANT APPELLANT'S REQUEST FOR A CONTINUANCE?
- III. ARE THERE ARE ADDITIONAL SUSTAINING GROUNDS TO AFFIRM THE ORDER OF THE LOWER COURT GRANTING RESPONDENT WILLIAM FISK'S MOTION TO DISMISS?

### **STATEMENT OF THE CASE**

On June 8, 2017, Appellant Harold Estes Blackwell, Jr. ("Blackwell") filed his summons and complaint against Respondents Anita Jane Miller ("Miller"), Miracle Hill Ministries, Inc. ("Miracle Hill"), and William Fisk ("Fisk") in the Court of Common Pleas for Greenville County, see Complaint. The complaint alleges the following nine causes of action against three defendants: (i) intentional infliction of emotional distress, (ii) gross negligence, (iii) civil conspiracy, (iv) breach of fiduciary duty, (v) aiding and abetting breach of fiduciary duty, (vi) defamation, (vii) fraudulent concealment, (viii) failure to control patient, and (ix) fraud. See *id.*, pp. 43-68.

Respondent Fisk is a member of the same church where Appellant and his former wife attended and is a family friend. Respondent Miller is the former wife of appellant, and they were divorced in Greenville County by order of the Greenville County Family Court dated October 1, 2016 in Case No. 2015-DR-23-4000. Respondent Miller is also a former client of respondent Miracle Hill Ministries, Inc., having sought treatment there for alcohol addiction. Respondent Fisk filed a motion to dismiss the complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6) on August 21, 2017. The other respondents filed similar motions. These motions were heard by the Honorable Robin B. Stilwell in Greenville on October 4, 2017. Judge Stilwell granted

the motions by separate order relating to each respondent. His order dismissing the complaint as to Respondent Fisk was dated November 8, 2017.

Appellant claims he filed the Notice of Appeal on December 13, 2017, but the Certificate of Service is dated December 20, 2017 and notes he placed the Notice of Appeal in the mail on December 14, 2017. Respondent Fisk received a Notice of Appeal dated December 20, 2017.

While Judge Stilwell's order in this matter dismissed all six causes of action brought by appellant against respondent Miller, appellant assigns as error on this appeal the dismissal of only two of those causes of action, intentional infliction of emotional distress and breach of a fiduciary duty.

### ARGUMENT

I. THE LOWER COURT CORRECTLY DETERMINED THAT THE COMPLAINT FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE ANY CAUSE OF ACTION AGAINST RESPONDENT WILLIAM FISK.

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the lower court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the lower court must base its ruling solely on allegations set forth in the complaint. *Id.*

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In deciding whether the lower court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Id.*

A. The Lower Court Correctly Determined that the Complaint Fails to Allege Extreme and Outrageous Conduct by Respondent William Fisk Sufficient to State a Claim for Intentional Infliction of Emotional Distress

In reviewing a motion to dismiss a cause of action for intentional infliction of emotional distress or outrage under SCRCP 12(b)(6), the trial court must base its ruling upon the allegations contained on the face of the complaint, resolving any doubts in favor of appellant. The trial court must initially determine whether the allegations concerning respondent Fisk's conduct would, if true, be extreme and outrageous enough to permit a recovery for emotional distress. If no circumstances exist where the conduct as alleged could be considered by reasonable persons as extreme and outrageous, the court should grant the motion as a matter of law. See *Fleming v. Rose*, 338 S.C. 524, 537, 526 S.E.2d 732, 739 (Ct. App. 2000), reversed on other grounds, 350 S.C. 488, 567 S.E.2d 857 (2002).

Here, appellant specifically listed the conduct in his complaint which he believed was so extreme and outrageous as to allow him to recover for emotional distress. Paragraph 215 of appellant's complaint alleges several "acts" of Fisk which he claims are "outrageous as a matter of law." [Complaint at pp. 44-46] The list includes Fisk interfering with Appellant's relationship with Respondent Miller by encouraging her to maintain her silence, ignoring Appellant's warnings about Respondent Miller being an "expert deceiver," and believing the program at Renewal was based upon the book *Alcoholics Anonymous*.

The trial court considered and found that these "acts" alleged against Fisk in paragraph 215, even if true, would not constitute, as a matter of law, "conduct so extreme and outrageous as to exceed all possible bounds of decency, [which] ... must be regarded as atrocious and utterly intolerable in a civilized society," *Ford v. Hutson*, 276 S.C. 157,162,276 S.E.2d 776, 778 (1981). [Order at p. 3)

Cases finding outrageous conduct in South Carolina generally require "hostile or abusive encounters" or "coercive or oppressive conduct." Fleming, 338 S.C. at 538, 526 S.E.2d at 739. In Ford, the defendant subjected the plaintiff to public browbeating, obscenities and threats, even entering her home and verbally attacking her in front of her guests. Ford, 276 S.C. at 157, 276 S.E.2d at 776. In McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991), the plaintiff was forced to perform exercises in front of other employees that exposed her incontinence problem.

None of that type of conduct is alleged in paragraph 215. In fact, none of the "acts" alleged have ever been cited in a reported case in South Carolina as the kind of act(s) which would meet the standard set out in the Ford case. In Fleming, 338 S.C at 538, 526 S.E.2d at 739, the tort of libel was not sufficiently outrageous conduct to support a claim for outrage. See also Sabb v. SC State University, 350 S.C. 416,567 S.E.2d 231 (2002), Shipman v. Glenn, 314 S.C. 327,443 S.E.2d 921 (Ct. App. 1994) and Wright v. Sparrow, 298 S.C. 469,381 S.E.2d 503 (Ct. App. 1989).

Even though the acts alleged may have frustrated or hurt the appellant, that alone is not sufficient to meet the legal standard for outrage. They must also be extreme and outrageous. The tort of outrage is not a "panacea for wounded feelings." Todd v. Farm Bur. Mut. Ins. Co., 283 S.C. 155,171,321 S.E.2d 602,611 (Ct. App. 1984), rev'd on other grounds, 287 S.C. 190,336 S.E.2d 472 (1985).

**B. The Lower Court Correctly Determined that the Complaint Fails to Allege Any Legal Duty Owed by Respondent William Fisk to Appellant Sufficient to State a Claim for Breach of Fiduciary Duty/Aiding and Abetting A Breach of Fiduciary Duty**

The Complaint fails to allege facts sufficient to constitute either a claim for breach of fiduciary duty or aiding and abetting a breach of fiduciary duty against William Fisk. Typically, South Carolina law has reserved the imposition of a fiduciary duty "to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate

directors, and corporate promoters." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458-59, 578 S.E.2d 711, 715 (2003). Relevant to both claims, the complaint fails to identify any fiduciary duty owed by Fisk to Blackwell as there is no legal or business relationship between the appellant and Fisk or any respondent. Furthermore, Fisk owes no duty to Blackwell because he and Fisk were nothing more than church members and Respondent Fisk was simply engaging in communications with the parties to facilitate marriage counseling. Blackwell cannot unilaterally impose a fiduciary duty upon another where such a duty would not otherwise exist. See *Brown v. Pearson*, 326 S.C. 409, 422- 23, 483 S.E.2d 477,484 (Ct. App. 1997) ("[A] fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him."). As to Blackwell's claim for aiding and abetting a breach of fiduciary duty, this claim fails because, as discussed above, the complaint describes no fiduciary duty owed to Blackwell by any individual and the complaint fails to allege that Fisk knew of such a duty and assisted a third party in breaching that duty. See *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) ("The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach.").

C. The Lower Court Correctly Determined that the Complaint Fails to Allege  
Any Legal Duty Owed by Respondent William Fisk to Appellant Sufficient to  
State a Claim Fraudulent Concealment

The Complaint asserted a claim for Fraudulent Concealment based upon Fisk's failure to speak candidly with Appellant regarding his knowledge of Miller. Appellant was requesting Fisk communicate with Miller and then "report back" to Appellant regarding the conversation and to ensure Appellant knew that Fisk didn't believe he was telling the truth. To establish a duty to disclose there are three distinct classes: 1) where it arises from a preexisting definite fiduciary relation between the parties; 2) where one party expressly reposes a trust and confidence in the

other with reference to the particular transaction in question, or else from the circumstances of the case, that nature of their dealings, or their position towards each other, such a trust or confidence in the particular case is necessarily implied; 3) where the very contact or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. *Ardis v. Cox*, 314 S.C. 512,431 S.E.2d 267 (Ct. App. 1993).

In the case at hand, Appellant and Fisk were members at the same church and family friends. Fisk owed no fiduciary duty to Appellant. Furthermore, Fisk and Appellant were not involved in any type of business relationship or one where a contract or transaction was involved. The only "relationship" that existed was one where Fisk was a mentor in his church and was attempting to help navigate a marriage. Thus, since no legal duty existed between the parties, the cause of action as to fraudulent concealment can not survive.

Assuming, however, some duty existed the Appellant then must allege some fraud existed. The complaint fails to allege a claim of fraud against William Fisk. To establish fraud, the following elements must be shown: (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) knowledge of its falsity, or reckless disregard for its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis v. Cox*, 314 S.C. 512,431 S.E.2d 267 (Ct. App. 1993). "Failure to allege all elements is fatal to a claim of fraud." *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505,511,450 S.E.2d 624, 628 (Ct. App. 1994). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Rule 9(b), SCRC.P.

Specifically, the complaint fails to allege that William Fisk in any way acted fraudulently and concealed any such representation to which Fisk had a duty to reveal.

D. The Lower Court Correctly Concluded That the Complaint Failed to State Facts Sufficient to Constitute a Claim for Relief Despite Appellant's Status as a Pro Se Litigant

The appellant mistakenly argues that the lower court should have denied the dismissal of the complaint due to Blackwell's status as a pro se litigant. Blackwell failed to raise this appeal. See Patterson, 318 S.C. at 185,456. S.E.2d at 437. Notwithstanding Blackwell's failure to preserve his argument, his argument fails on the merits.

Although it has stated that courts must liberally construe prose pleadings, the United States Supreme Court has made clear that a plaintiff must do more than make conclusory statements to state a claim. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 1943 (2009); *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964 (2007). The mandated liberal construction afforded to prose pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a lower court may not rewrite a complaint to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128 (10th Cir. 1999), construct the plaintiff's legal arguments for him, *Small v. Endicott*, 998 F.2d 411 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). Rather, the pleading must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face, and the reviewing court need only accept as true the pleading's factual allegations, not its legal conclusions. *Ashcroft*, 556 U.S. at 678-79, 129 S.Ct. at 1944. Further, allegations that are no more than conclusions are not entitled to the assumption of truth. *Id.* at 681, 129 S.Ct. at 1951.

In the instant case, the lower court correctly concluded that the complaint fails under any construction to allege facts sufficient to state a claim against William Fisk. Blackwell is trying to sue William Fisk because he disagrees with the type of counseling that Fisk, a church member, gave to another church member. Even the most liberal construction will not yield a single colorable claim against William Fisk. The lower court is not required to act as Blackwell's legal counsel to transform the disjointed allegations of the complaint into actionable claims against William Fisk. Blackwell has been afforded ample opportunity to identify a set of facts that would entitle him to relief against William Fisk, however he has been unable to do so either at the hearing, in his Rule 60 motion, or on appeal. Therefore, the lower court correctly dismissed the complaint with prejudice.

II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE COMPLAINT WITH PREJUDICE AND BY DECLINING TO GRANT APPELLANT'S REQUEST FOR A CONTINUANCE

In addition to his arguments concerning the sufficiency of the complaint, Blackwell argues two issues involving the lower court's exercise of discretion: (i) whether the lower court abused its discretion by dismissing the complaint with prejudice and without allowing amended pleadings, and (ii) whether the lower court abused its discretion in denying his request for a continuance. As argued below, the lower court was well within its authority to exercise its discretion in dismissing the complaint with prejudice and refusing Blackwell's request for a continuance.

A. The Lower Court Did Not Abuse Its Discretion by Dismissing the Complaint with Prejudice

On appeal, the plaintiff argues for the first time that the lower court erred when it dismissed the complaint with prejudice and without allowing him to file an amended complaint. Because this issue has never been presented to the lower court, Blackwell cannot now present this issue for the

first time on appeal. See *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Therefore, Blackwell's failure to preserve this issue forecloses its consideration on appeal. Regardless of Blackwell's failure to preserve, the trial correctly dismissed Blackwell's claims with prejudice. While Rule 15(a), SCRCP, provides that leave to amend shall be freely given when justice so requires, a lower court is properly within its discretion to decline an amended pleading. Regardless of Blackwell's failure to preserve, the trial correctly dismissed Blackwell's claims with prejudice. While Rule 15(a), SCRCP, provides that leave to amend shall be freely given when justice so requires, a lower court is properly within its discretion to decline an amended pleading that would be futile. See *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' this court has held that it may be denied where the proposed amendment would be futile."), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012). A reasonable period of time in which to amend the complaint may be allowed "when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881-82 (2006).

In the case at bar, Blackwell has failed to any present any factual allegations or different theory of recovery upon which relief may be based against William Fisk. Blackwell has had ample opportunity to identify an alternative set of facts or cause of action that would entitle him to relief had this information originally been included in the complaint. Considering that Blackwell failed to assert a single colorable theory of relief across 69 pages and 285 paragraphs in his complaint, it is difficult to imagine what other facts could be asserted in an amended complaint that would

overcome his deficiencies. In light of this futility, the lower court properly dismissed Blackwell's complaint with prejudice.

B. The Lower Court Did Not Abuse Its Discretion by Denying Blackwell's Request for a Continuance

Without any citation to authority, Blackwell argues for the first time that the lower court erred when it opted to hear multiple motions involving two lawsuits both of which were filed by Blackwell involving virtually the same timeline of events. As an initial matter, Blackwell failed to preserve this issue as it was omitted from his Rule 60 motion and was thus not ruled upon. See *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion). Regardless, Blackwell's argument is without merit.

The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown. *Gurley v. Mills Mill*, 225 S.C. 46, 80 S.E.2d 745 (1954); see also *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) ("It has long been the rule in this State that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant."). Although Blackwell did not specifically request a continuance at the time of his objection, his arguments on appeal effectively argue that the lower court should have continued the hearing on Woodard's motion to dismiss so that Blackwell would have time to prepare.

After the lower court heard arguments from the attorneys representing Miracle Hill, Miller, and Fisk, the lower court then heard arguments from counsel for Woodard in another lawsuit captioned, "*Harold E. Blackwell, Jr. v. Toby Woodard*, C.A. No. 2016-CP-23-065467." See Tr. of Oct. 4, 2017 Hearing, p. 29. When the motion was called, Blackwell stated to the lower court, "I

object to that, your Honor. I'm not ready." *Id.*, lines 11-12. Counsel for Woodard affirmed to the lower court that the motion had been previously scheduled to immediately follow the motions filed by the parties to the instant lawsuit. *Id.*, lines 15-16. Notably, Blackwell did not argue that he had not been notified of the hearing, rather he complained that he was not ready. Since all the motions had been previously scheduled by the lower court to be heard in that order, Blackwell suffered no unfair surprise.

Since both lawsuits were filed by Blackwell and involve virtually the same events and timeline, the lower court did not abuse its discretion in hearing the motions the same day. See *Id.*, lines 19-21 ("I think it actually dovetails nicely with what the Court has just heard."). For example, Woodard worked at Miracle Hill's Renewal program with Miller, *id.*, p. 30, lines 1-5, and the basis of Blackwell's original defamation claims against Woodard relate to Woodard's allegedly false accusation that Blackwell had been subject to a restraining order filed by Miller. *Id.*, lines 6-19. Considering the close interconnection of events and causes of action asserted by Blackwell in both suits and his lack of surprise, the lower court properly exercised its discretion in denying Blackwell's objection and request for a continuance. Moreover, the interest of judicial economy is best served by allowing the parties to argue multiple motions at the same hearing as a single hearing minimizes multiple recitations of the same facts and the need for multiple hearings for the same parties.

Finally, Blackwell's argument that an experienced attorney could have understood what motions were being heard is without merit. As the transcript reveals, each motion heard by the trial court had been scheduled in advance, and Blackwell has never argued that he did not receive notice of the hearings. *Id.*, p. 4, lines 5-8; p. 29, lines 15-16.

### III. THERE ARE ADDITIONAL SUSTAINING GROUNDS TO AFFIRM THE ORDER OF THE LOWER COURT GRANTING RESPONDENT WILLIAM FISK'S MOTION TO DISMISS

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been present to or ruled on by the lower court." *l'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced, it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id* at 420, 526 S.E.2d at 723, see also Rule 220(c), SCACR ("The appellate court may affirm a ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.").

#### A. Appellant Has Abandoned Any Arguments Relating to The Lower Court's Dismissal of His Remaining Causes of Action

Blackwell has failed to raise on appeal the lower court's dismissal of his claims for (i) civil conspiracy, (ii) gross negligence, (iii) aiding and abetting breach of fiduciary duty, and (iv) defamation. None of these issues were identified in Blackwell's statement of issues on appeal and none were specifically identified or argued elsewhere in his brief. See App. Init. Br., p. 5. See Rule 208(b)(1)(D), SCACR ("The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."). Because Blackwell has failed to identify or argue these issues on appeal, any arguments he may have had are abandoned and may not be considered on appeal. See *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). In the event this Court finds that Blackwell

has not abandoned these arguments, the lower court correctly concluded Blackwell's claims are without merit.

**CONCLUSION**

For the reasons stated above, this Court should affirm the order of the lower court issued November 8, 2017 granting William Fisk's motions to dismiss.

Respectfully submitted.

November 5, 2018



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PROOF OF SERVICE

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I hereby certify that I did serve a copy of the forgoing Respondent Fisk's Initial Brief and Designation of Matter to be Included in the Record on Appeal upon the Appellant, pro se and counsel for other Respondents this day of October, 2018 by United States mail, postage prepaid, properly addressed to their last known address as follows:

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November 5, 2018

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**  
NOV 07 2018  
SC Court of Appeals

Re: Harold Estes Blackwell Jr vs. Anita J. Miller, Miracle Hill Ministries  
2017-002618

Dear The Honorable Kitchings:

Enclosed please find the original and one copy of respondent William Fisk, initial brief and designation of matter to be included in the record on appeal in the above referenced case, along with a proof of service for the same. We would appreciate your filing the original and returning a clocked copy to us in the envelope provided.

Thank you for your time and attention to this matter.

With kindest regards,

WALKER ALLEN GRICE AMMONS & FOY LLP

*s/Carrie Hailman O'Brien*

Carrie Hailman O'Brien

CHO/acw

Cc: Harold Blackwell/ Adam Bach/ Lee Daniels

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