No. 32165 - West Virginia Human Rights Commission on its own and on behalf of Scott and Mary Ellen Black, for their daughter, Rebecca A. Black, a minor child, Scott Black and Mary Ellen Black, individually, and on behalf of Rebecca A. Black, their minor daughter v. The Esquire Group, Inc.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

In this proceeding, the majority opinion has concluded that res judicata did not apply in this case, and, therefore, the circuit court erred by granting the defendant summary judgment on that ground. The flaw in the majority opinion is that it disregarded the circuit court's alternative basis for granting summary judgment. The majority opinion did so by stating that the circuit court could not give an alternative basis for granting summary judgment. For the reasons set out below, I respectfully dissent.

1. Circuit Court Judges Have Authority to Render Summary Judgment on Alternative Grounds

In this proceeding, the circuit court found that summary judgment was appropriate because res judicata applied. Alternatively, the circuit court concluded that summary judgment was appropriate because the defendant had provided the plaintiff with an accommodation. The majority opinion concluded that res judicata did not apply. However, rather than examining the accommodation alternative, the majority opinion stated that "[o]nce the claim was determined as res judicata, no part of the claim remained before

the court for further discussion or determination."

Prior to the decision in this case, the opinions of this Court were quite clear in observing that summary judgment may be granted on alternative grounds. *See Mrotek v. Coal River Canoe Livery, Ltd.*, 214 W. Va. 490, 491, 590 S.E.2d 683, 684 (2003) ("The circuit court granted summary judgment on two alternative grounds. . . . Upon review of the briefs and record in this case, we affirm."); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 148-150, 506 S.E.2d 578, 591-593 (1998) ("In its summary judgment order, the circuit court listed alternative reasons for granting CAMC's summary judgment. . . . [T]he circuit court's alternative grounds for granting summary judgment on the tortious interference claim was correct."); *Tolliver v. Kroger Co.*, 201 W. Va. 509, 523, 498 S.E.2d 702, 716 (1997) ("We . . . affirm the circuit court's alternative ground for granting partial summary judgment on the claim of assault and battery.").

Additionally, federal courts have recognized that summary judgment may be granted on alternative grounds. *See also Exxon Corp. v. Hunt*, 475 U.S. 355, 361, 106 S. Ct. 1103, 1109, 89 L. Ed. 2d 364 (1986) ("The Tax Court entered summary judgment for New Jersey on two alternative grounds."); *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1323 (D.C. Cir. 2005) ("The District Court granted summary judgment for Odebrecht, relying on two alternative grounds."); *Church of American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 202 (2nd Cir. 2004) ("The District Court granted

plaintiffs' motion for summary judgment . . . on four independent and alternative First Amendment grounds."); *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 613 (5th Cir. 2004) ("In the present case, the district court granted the defendants' motion for summary judgment on grounds that plaintiffs had failed to raise a material fact issue with respect to any of their constitutional claims, and on the alternative ground that defendant Braud was entitled to summary judgment based on qualified immunity."); *Banks v. City of Whitehall*, 344 F.3d 550, 551-552 (6th Cir. 2003) ("The district court granted the defendants' motion for summary judgment on several alternative grounds."); *McKay v. United States Dept. of Transp*., 340 F.3d 695, 698 (8th Cir. 2003) ("The district court granted summary judgment for the DOT on two alternative grounds."); *Konop v. Hawaiian Airlines, Inc*., 302 F.3d 868, 881 (9th Cir. 2002) ("The district court dismissed the[] claims on the alternative grounds that it lacked jurisdiction over the . . . claims, and that [plaintiff] failed to support them with evidence sufficient to withstand summary judgment.").

The majority opinion now proclaims that summary judgment cannot be based on alternative grounds. Further, the majority opinion held that an alternative ground for summary judgment is mere "obiter dicta." As I will show, the majority opinion improperly reached this conclusion, because the circuit court's alternative ground properly disposed of this case.

2. Summary Judgment Was Appropriate under the Alternative Ground

Prior to the decision by the majority, our law was clear in recognizing that "Rule 56(c) gives trial courts the discretion to grant summary judgment when a moving party has shown that no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 56(c), at 932-933 (2000). In the instant case the trial court found, as an alternative basis for granting summary judgment,[1] that the defendant had established that no genuine issue of material fact was in dispute and the defendant was entitled to summary judgment. I will illustrate the correctness of this conclusion by citing the findings made by the circuit court in its well reasoned order:[2]

C. Esquire's Offer of Accommodation

> 16. Esquire also has presented evidence that it has offered to allow the Blacks to keep the fence so long as it is medically necessary as a reasonable accommodation for Ms. Blacks' medical condition and has met any requirements of the West Virginia Fair Housing Act. In support of its argument, Esquire asserts that it offered a reasonable accommodation in order to assist the Blacks.
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> 17. To establish a prima facie case under the Federal Fair Housing Act ("FFHA") or the West Virginia Fair Housing Act ("WVFHA"), plaintiff is required to show that:
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> "(1) [plaintiff] suffers from a handicap as defined in 42

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[1]I disagree with the majority opinion's conclusion that res judicata did not apply in this case. However, I need not address this issue because the alternative grounds for summary judgment left no room for "honest" differences of opinion.

[2]Ordinarily I would note quote so extensively from a trial court's order. However, because the majority opinion tossed aside the findings in this case as orbiter dicta, I feel it is important to fully set out the findings.

> U.S.C. § 3602(h); (2) defendants knew of [plaintiff's] handicap or should reasonably be expected to know of it; (3) accommodations of the handicap 'may be necessary' to afford [plaintiff] an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation."

In re Kenna Homes Coop. Corp., 557 S.E.2d 787, 794 (W. Va. 2001). The Court noted that both Acts only require an accommodation if a person suffers from a "handicap." *Id*. "Second, only accommodations that are reasonable are required." *Id*. Further, the reasonable accommodation requirement "does not entail an obligation to do everything humanly possible to accommodate a disabled person . . ." *Id*.

18. The record has demonstrated that Esquire offered to allow the fence to stay in place as long as it is required as a medical necessity. Esquire has taken no action to enforce Judge Cummings' Permanent Injunction Order and has no plans to do so as long as the fence is a medical necessity.

19. The WVHRC and the Blacks, despite the grant of the reasonable accommodation, pursued the instant action because Esquire will not grant a "permanent exemption" to the restrictive covenant at issue, regardless of handicap or disability and regardless of occupancy of the property. However, a permanent exemption, running with the land, simply is not required or even contemplated under the Fair Housing Act. Rather, a proposed accommodation must be based on "handicap", "reasonableness" and "necessity." *In re Kenna Homes Coop. Corp*., 557 S.E.2d at 794. W. Va. Code § 5-11A-5(f)(3) dictates that reasonable accommodation only be required while the handicapped person occupies the premises. It follows that if the person no longer uses the dwelling, *i.e*., resides there, the need for the accommodation has ceased. Moreover, such an accommodation only is required if the individual is handicapped. Plaintiffs have claimed to be entitled to an exemption even if Ms. Black resides in the home but no longer qualifies as handicapped under the statute. However, both FF[H]A and the WVFHA "only require[] an accommodation for *persons with handicaps* if the accommodation is (1) *reasonable* and (2) *necessary* (3) to afford handicapped persons equal opportunity to use and enjoy housing." *In re Kenna Homes*, 557 S.E.2d at 794 *citing Bryant Woods Inn v. Howard County, Maryland*, 124 F.3d 597, 603 (4th Cir. 1997) (emphasis added). If Ms. Black no longer qualifies as a handicapped person under the statute, the need for the accommodation has ceased to exist and no longer would be necessary.

20. Plaintiffs also argue that Esquire's proposed accommodation is not reasonable due in part to the fact that should Ms. Black's medical condition resolve itself, the subsequent removal of the fence under Esquire's offer of accommodation would not be cost efficient. Nevertheless, the law places the burden for expenses related to reasonable accommodation upon the party requesting it. Even assuming plaintiffs' argument that the Blacks will be faced with significant costs and liabilities should Ms. Black return to health or move from the home is true, the Court finds that this does not change the reasonableness of Esquire's accommodation.

21. The anti-discrimination statute expressly states that unlawful discrimination consists of:

> "a refusal to permit, at the expense of the handicapped person, the reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such full enjoyment of the premises . . ."

The statute expressly has stated that the costs associated with reasonable modifications must be borne by the handicapped person. The Blacks undertook their unilateral decision to construct the pool and the fence, and in doing so, assumed the responsibility for *all* costs associated with the making of such modifications - site preparation, installation, maintenance, and even possible removal. Plaintiffs seek to differentiate between costs of installation and costs of removal. No such distinction has been set forth in the statute.

22. Moreover, the expenses of modification must include the costs associated with removing an accommodation once it becomes unnecessary. To hold otherwise would allow the Blacks to enjoy a right to which none of their resident neighbors enjoy, even though no disabled individual resides in the house.

23. If Ms. Blacks' disability continues, Esquire has offered to allow the allegedly needed fence to remain. In such case, the Blacks will not be faced with the potential costs as long as Ms. Black lives in the home.

24. Moreover, this Court cannot ignore that if Ms. Black is not disabled, she is not entitled to the protections of the WVFHA. If Ms. Black is not disabled, the Blacks are landowners on equal footing with every other

> landowner in the subdivision. The Blacks cannot shift to Esquire, and the other landowners, the costs associated with bringing their property into compliance with a judicially sanctioned restrictive covenant in the event that a disabled person no longer resides in the home.
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> 25. After considering all of the respective facts and arguments, the Court has determined that while plaintiffs' position is arguable, it does not address the fact that a reasonable accommodation has been offered yet the Blacks have chosen to refuse it in order to seek a permanent exemption or some agreement as to the cost of removing.
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> *D. Conclusion*
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> . . . .
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> 28. The Court further finds that Esquire has offered plaintiffs[] a reasonable accommodation as a matter of law.

The above findings by the circuit court were deemed to be merely orbiter dicta by the majority opinion. Clearly, these findings were not orbiter dicta. The defendant moved for summary judgment on two theories: (1) res judicata and (2) that an offer had been made to provide plaintiffs with a reasonable accommodation. Under the majority opinion, the circuit court had no authority to consider both theories, it could only consider one. The majority's reasoning simply is wrong and in direct conflict with Rule 8(e)(2) of the West Virginia Rules of Civil Procedure. It has correctly been observed that:

> Rule 8(e)(2) permits alternative, inconsistent and mixed pleadings. Variance in pleadings is encouraged to simplify the statement of claims and defenses, so as to bring about a complete resolution of conflict in the trial of a single civil action.

Cleckley, Davis & Palmer, *Litigation Handbook* § 8(e)(20), at 201-202.

Rule 8(e)(2) allows parties to plead alternative liability theories and defenses. Under the majority's ruling in this case, a circuit court may consider only one theory in making a ruling on a dispositive motion. With such reasoning, I strongly disagree.[3]

Based upon the foregoing, I dissent.

[3]The other problem with this case is that it is being remanded for a trial on two issues that are not supported by the law. Insofar as the defendant has agreed to allow the plaintiffs' to retain the wall so long as the child is handicapped, the jury must decide (1) whether federal and state law require a housing accommodation to remain after a handicapped person no longer resides in the home, or (2) whether federal and state law requires a landlord to compensate a handicapped person for the removal of an accommodation when the handicap ceases. I have been unable to find any law to support sustaining a favorable jury verdict for the plaintiffs on either issue. Consequently, the circuit court was correct as a matter of law in not allowing those two issues to go to a jury.