

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.*

FILED

July 14, 2005

Starcher, J., concurring:

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I agree with the outcome reached by the majority in allowing this case to go forward for determination on the merits for two reasons. First, the lower court's *res judicata* ruling was inappropriate because it is clear from the record that neither Rebecca Black nor the Human Rights Commission was a party to the earlier restrictive covenant case brought by The Esquire Group against Mr. and Mrs. Black. Secondly, summary judgment was unsuitable because the issue of reasonable accommodation in this case involved numerous factual determinations which provided a genuine trial issue. I write separately to elaborate on the second reason.

The dissent attacks the basis on which the majority opinion reaches its conclusion regarding the reasonable accommodation issue, and asserts that this opinion “proclaims that summary judgment cannot be based on alternative grounds.” I feel no such proclamation was made, nor was it intended to be made, in this *per curiam* opinion. As we declared in Syllabus Point 2 of *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001), “[t]his Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.”

The dissent takes exception to the majority's characterization of the lower court's alternative ruling. In reality, the lower court did dismiss the case on the basis of *res judicata* and then proceeded to rule as a matter of law on issues which involved undetermined material facts. The legal issues raised by the discrimination claim simply could not be resolved without inquiry into the facts and "[a] motion for summary judgment should be granted *only* when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 7, *Mountain Lodge Assn. v. Crum & Forster Indem. Co.*, 210 W.Va. 536, 558 S.E.2d 336 (2001) (emphasis added). As the lower court did not sufficiently respect the interplay between the facts and the law in this case, its ruling on the alternative ground was irrelevant.

Determining whether an accommodation is reasonable involves a highly fact-based analysis. It follows that summary judgment would only be appropriate in cases involving reasonable accommodation where there has been adequate development of the relevant facts. In this case, we had an inadequate record and lack of any meaningful factual inquiry by the trial court which could support resolving the issue of reasonable accommodation. It is obvious that the "reasonableness" of an accommodation depends upon the circumstances. Relevant circumstances and facts in this case that are undeveloped include when The Esquire Group became aware of Rebecca Black's disability and whether

other home owners were permitted to maintain fences on their property, and if so, for what purposes. During the oral argument of this case, it was more than obvious after pointed questioning by members of this Court that the circumstances involving the fences permitted within the subdivision were far from settled. Such critical factual issues require thorough development in order to give meaning to the protections provided by the Fair Housing Act. It is more than clear from the record of this case that the facts need further development in order to determine the reasonableness of the accommodation The Esquire Group proposed.

Both because Rebecca Black and the Human Rights Commission were not parties to the separate restrictive covenant suit, and because further inquiry regarding the facts is needed to clarify the application of the law, I concur with the majority conclusion that the lower court's summary judgment determination be reversed and the case be reinstated on the trial docket.