

IN THE SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

CHARLESTON

SCOTT BLACK AND MARY ELLEN BLACK
as Natural Parents and Next Friends of **REBECCA A. BLACK**

Appellants,

vs.

THE ESQUIRE GROUP, INC.

Appellee.

CASE NO. 32165

BRIEF OF APPELLANTS, SCOTT BLACK AND MARY ELLEN BLACK
as Natural Parents and Next Friends of **REBECCA A. BLACK**

FILED BY:

Paul E Biser, Esquire (W. Va. Bar #7319)
FREDEKING & FREDEKING LAW OFFICES, LC
511 Eighth Street
Huntington, West Virginia 25701
(304) 525-7701

Counsel for Appellant,
SCOTT BLACK AND MARY ELLEN BLACK as
Natural Parents and Next Friends of **REBECCA A.**
BLACK

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I. The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal.

The West Virginia Human Rights Commission (Commission) charged the Esquire Group, Inc (Esquire) with violating the West Virginia Human Rights Act. Esquire elected to have the matter heard in a civil action in lieu of an administrative proceeding (See attached Exhibit "A" to Appellants' Petition for Appeal) The Commission filed the complaint on April 11, 2001. The Commission alleged Esquire was guilty of discriminatory housing practices prohibited by W. Va. Code Section 5-11A-5 by refusing to permit a reasonable modification to subdivision rules in order to allow Scott Black and Mary Ellen Black to make and Maintain a fence around their pool. (See Complaint paragraph 11)

By order entered June 26, 2001 the Circuit Court permitted Scott Black and Mary Ellen Black to intervene in the civil action individually and as the natural parents and next friends of their daughter, Rebecca A. Black (Blacks)

On May 22, 2003 the Circuit Court heard Esquire's Motion for Summary Judgment and granted the motion. The Circuit Court entered an Order granting summary judgment on September 8, 2003. Prior to entry of the order on September 8, 2003, the Blacks filed a motion to reconsider its ruling pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. The Circuit Court denied the motion by order entered April 19, 2004. It is from this order that the Blacks appeal

II. Statement of Facts.

On July 30, 1999, Esquire was notified by letter that Rebecca A. Black had been diagnosed with Leukemia. Despite this fact, Esquire, on November 24, 1999, filed an action for injunctive relief in the Circuit Court of Cabell County, West Virginia, bearing Civil Action # 99-C-888. In that

petition, Esquire asked for a preliminary and permanent injunction only against Scott Black and Mary Ellen Black, to remove a fence which Esquire contended violated a restrictive covenant. The preliminary injunction hearing was set for November 29, 1999 at which time a temporary injunction was granted. This matter was reconvened on February 25, 2000. The court ordered that a permanent injunction be issued against Scott Black and Mary Ellen Black only. At no time was Rebecca A. Black a party to this injunction litigation nor was she in privity with any of the parties to the litigation.

Following the February 25, 2000 hearing, but prior to entry of an order, on March 14, 2000, Esquire received a letter from Dr. Andrew L. Pendleton confirming Rebecca A. Black had been diagnosed with Leukemia. Dr. Pendleton further indicated that a fence around the Blacks' pool was necessary to prevent the contamination of the pool of water. Rebecca A. Black's immune system was not functioning properly due to Leukemia, which made her very susceptible to contaminants.

Accompanying Dr. Pendleton's letter was a letter from the Blacks' attorney again requesting that Esquire immediately grant a variance for the fence around the swimming pool and requested that it be granted by Friday March 17, 2000. The letter also advised Esquire that failure to do so would result in charges being filed for violation of the Fair Housing Act of 1998. Esquire refused to grant an accommodation and the Blacks, on behalf of their daughter, filed a claim with the West Virginia Human Rights Commission.

On February 15, 2001 following a thorough investigation, the Commission issued a notice indicating that it had found reasonable cause to believe that Esquire committed or was about to commit a violation of the West Virginia Fair Housing Act. Consequently, Esquire was charged with a violation of the act.

The Commission filed the lawsuit which is the subject of this appeal on behalf of Rebecca A.

Black, the first time Rebecca A. Black had ever been a party to any litigation involving Esquire Counsel for Rebecca A. Black filed a Motion to Intervene on her behalf, which was granted

Esquire filed a Motion for Summary Judgment basically stating that the matters alleged in this litigation were barred by the doctrine of Res Judicata. Esquire further argued that the allegations of this litigation should have been contained as a compulsory counter-claim under Rule 13(a) of the West Virginia Rules of Civil Procedure. This Court granted Esquire's summary judgment motion.

Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, the Blacks asked the Circuit Court to reconsider its decision regarding Esquire's motion for summary judgment. Rebecca A. Black was not a party to the previous litigation filed by Esquire nor was she in privity with any of the parties to the litigation. The lawsuit which is the subject of this appeal was filed on behalf of Rebecca A. Black, and not on behalf of Scott Black and Mary Ellen Black, who were the only parties to the initial litigation filed by Esquire. Further, since Rebecca A. Black was not a party to the previous litigation filed by Esquire, she was not required to file a compulsory counter-claim, pursuant to Rule 13(a) of the West Virginia Rules of Civil Procedures

III. Standard of Review and Summary Judgment.

In syllabus point one of *Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994), this Court explained that "[a] circuit court's entry of summary judgment is reviewed de novo." Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates "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." As this Court observed in syllabus point one of *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E. 2d 329 (1995):

"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." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

In syllabus point two of *Williams*, this Court continued:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove

In syllabus point three of *Williams*, this Court explained the burden of a party against whom summary judgment is sought, as follows:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

In *Gooch v. West Virginia Department of Public Safety*, 195 W. Va. 357, 465 S.E.2d 628 (1995), this Court explained that "to meet its burden, the nonmoving party must offer 'more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.'" *Id.* at 365, 465 S.E.2d at 636 (quoting, in part, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). A non-moving party "cannot create a genuine issue of material fact through a mere speculation or the building of one inference upon another" *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). In syllabus point four

of *Painter*, we acknowledged the necessity of a sufficient showing of an essential element of the plaintiff's burden of proof, as follows:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove *192 W. Va. at 190, 451 S.E.2d at 756, syl. pt. 4*.

IV. Assignment of Error

The Appellants make the following three (3) assignments of error, each of which will be discussed more fully below:

1. The Circuit Court Improperly Held that The Housing Discrimination Claim Raised in the Instant Action on Behalf of Rebecca A. Black is Barred under the Doctrine of Res Judicata.
 2. The Circuit Court Improperly Held that Rebecca Black's Housing Claim was a Compulsory Counter-Claim to the Injunction Proceeding.
 3. The Circuit Court Improperly Granted Summary Judgment on the Issue of Reasonable Accommodation.
- a. **The Circuit Court Improperly Held that The Housing Discrimination Claim Raised in the Instant Action on Behalf of Rebecca A. Black is Barred under the Doctrine of Res Judicata.**

The Circuit Court improperly held that Rebecca A. Black's claims were barred by the Doctrine of Res Judicata.

The basic requirements for invoking Res Judicata or claim preclusion are set forth in *Blake v. Charleston Area Medical Center*, 498 S.E. 2d 41 (1997). These requirements are,

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction over the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause

of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved had it been presented in the prior action. *Id.* at 887.

The second requirement for Res Judicata to apply is that the two actions must involve either **the same parties or persons in privity with those same parties.** Rebecca A. Black was not a party to the initial litigation filed by the Esquire Group nor is she in privity with the parties to that litigation.

The focus of the Circuit Court should have been on whether Rebecca A. Black was a party to the initial litigation or if she was in privity with any parties to the initial litigation. The answer to both of these questions is no.

There is no dispute that Rebecca A. Black was not a party to the litigation initially filed by Esquire. A review of the complaint filed in the injunction proceedings clearly shows that she was not a party. Nor was her interest protected by the parties in that litigation. As previously stated, the petition in the injunction proceedings filed by Esquire asked only for a preliminary and permanent injunction against Scott Black and Mary Ellen Black, requiring them to remove a fence around a pool which Esquire contended violated a restrictive covenant. The petition filed by Esquire in no way dealt with the right of Rebecca A. Black to a reasonable accommodation due to her handicap. In fact, her name was not mentioned in the injunction proceeding. The injunction proceeding simply dealt with the right of Scott and Mary Ellen Black to have a fence on their property, which Esquire contended violated a restrictive covenant.

Not only was Rebecca A. Black not a party to the initial litigation, she was not in privity with any of the parties in the initial litigation. This Court has dealt with the issue of privity between parent and child and concluded that privity does not typically arise from the relationship.

In *Glover v. Honorable Steven D. Narick*, 184 W Va. 381, 400 S E.2d 816 (1990), this Court

dealt with the issue of privity between parent and child. In *Glover* a mother and son were involved in an auto accident. Subsequently, the mother filed suit for her injuries and also sought to recover expenses for treatment of her son's injuries and for loss of his services and consortium. No action was brought on behalf of the son for his injuries, who was eleven (11) at the time of the accident. The Defendant filed a motion for joinder of the son as a party, which the lower court granted. This Court found that each party had a separate and distinctive claim. The argument was raised that collateral estoppel was appropriate in *Glover*, but the court disagreed. In reaching its decision, the *Glover* Court stated the long held standard that:

It is generally agreed that for collateral estoppel purposes, privity does not typically arise from the relationship of parent and child. *Soyre v. Crews*, 184 F.2d 723 (5th Cir 1950); *Gorski v. Deering*, 465 N.E. 2d 759 (Ind. App. 1984); *Arsenault v. Carrier*, 390 A.2d 1048 (Me. 1978); *Whitehead v. General Tel Co.*, 20 Ohio St. 2d 108, 49 Ohio Op. 2d 435, 254 N.E.3d 10 91969); *Smittle v. Eberle*, 353 P.2d 121 (Okla. 1960) *Richburg v. Baughman*, 290 S.C. 431, 351 S.E. 2d 164 (1986); *Commonwealth v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989).

In the case from which this appeal arises, Rebecca A. Black had a separate and distinct claim for a violation of the West Virginia Fair Housing Act as a result of the action by Esquire against Scott and Mary Ellen Black. As such, given the facts of this case, there is no privity between Rebecca A. Black and her parents.

In reaching its decision, the *Glover* court reviewed its holding in *Conley v. Spiller*, 301 S.E. 2d 216 (1983). In *Conley*, the court held that:

The mere fact that the plaintiffs had appeared in the prior litigation as representatives of the interest of the minor child did not preclude them from proceeding upon their own claims against the same defendants:

"Cases as well as the Restatement demonstrate that the privity doctrine does not apply when a person sues in a representative capacity, and then brings his own individual cause of action even though it arises from the same transaction. This is summarized

in Paragraph 2 of Section 36 of the Restatement (Second) of Judgments (1982)

“A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity”

In the injunction proceeding filed by Esquire, Scott and Mary Ellen Black were sued in their individual capacity. In the instant litigation, Scott and Mary Ellen Black intervened in their capacity as next friends of Rebecca A. Black in order to advance a claim for Esquire's violation of the West Virginia Fair Housing Act. As such, neither the privity doctrine nor the doctrine of res judicata apply. Scott and Mary Ellen Black were party defendants in the initial action filed by Esquire. However, in this litigation, they are involved as next friends of their daughter, Rebecca A. Black. As such, Scott Black and Mary Ellen Black are parties to the two (2) subject actions in two (2) separate and distinct capacities. Therefore, the doctrine of Res Judicata does not apply in this case.

This Court has also dealt with the issue of privity between parent and child in the domestic context, which holdings should be utilized in reviewing the facts of this case. In *State of West Virginia ex rel, Cline v. Pentasuglia*, 193 W. Va. 621, 457 S.E. 2d 644 (1995), the mother filed for divorce from her husband in Virginia. The final order entered in Virginia found the husband to be the father of the minor child.

Later, a petition was filed attempting to find that a different man was the father of the minor child. The new purported father filed a motion for summary judgment arguing that the petition was barred by the doctrine of res judicata because the Virginia court had already determined that some one else was the minor child's father.

This Court in *Cline* found that the doctrine of res judicata could not be used to preclude the suit. This Court reached the following decision:

We think that analysis in *Benjamin* applies with equal force to the instant case. Like *Benjamin*, there is no sufficient indication of privity between the mother and Travis in the prior proceeding. Further, it does not appear that anyone even acted to protect Travis' interest in that proceeding. Accordingly, we conclude that the Respondent's *res judicata* argument lacks merit.

As stated, this Court relied upon the holdings in *State ex rel. Division of Human Resources v. Benjamin P.B.*, 183 W Va. 220, 395 S E. 2d 220 (1990) in reaching this decision. This Court in *Benjamin* stated:

The dismissal with prejudice of a paternity action initiated by a mother against a putative father of a child does not preclude the child, under the principle of *res judicata*, from bringing a second action to determine paternity when the evidence does not show privity between the mother and the child in the original action nor does the evidence indicate that the child was either a party to the original action or represented by counsel or guardian ad litem in that action.

This Court in *Benjamin* and *Cline* referenced the Virginia decision of *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989). The Court in *Johnson* found that:

While the mother and child's rights may relate to the same subject matter, and may be coextensive to some extent, they are distinct.

This Court in *Cline* also relied upon *Cleo A.E. v. Rickie Gene E.*, 190 W Va. 543, 546, 438 S.E.2d 886, 889 (1993), in rendering its opinion. The *Cleo A. E.* case stated:

Although historically courts have addressed issues affecting children primarily in the context of competing adults' rights, the present trend in courts throughout the county is to give greater recognition to the rights of children, including their right to independent representation in proceedings affecting substantial rights.

In the case of *Betty L.W. v. William E.W.*, 212 W Va. 1, 569 S E 2d 77 (2002), this Court summarized its decisions regarding *res judicata* and the rights of children. The Court held:

The rights of the child and the absence of *res judicata* preclusion of challenges initiated by or on behalf of the child were addressed by this Court in *State ex rel. Dep't of Health and Human Resources v. Pentasuglia*, 193 W. Va. 621, 457 S.E.2d 644 (1995). In *Pentasuglia*, this Court found that because the child had not been a

party to the initial divorce action, principles of *res judicata* would not operate to preclude a support action filed by the child against another putative father. *Id.* at 622, 457 S.E.2d at 645. This ruling was also consistent with syllabus point five of *State ex rel. Div. of Human Servs. v. Benjamin P.B.*, 183 W. Va. 220, 395 S.E.2d 220 (1990) ("The dismissal with prejudice of a paternity action initiated by a mother against a putative father of a child does not preclude the child, under the principle of *res judicata*, from bringing a second action to determine paternity when the evidence does not show privity between the mother and the child in the original action nor does the evidence indicate that the child was either a party to the original action or represented by counsel or guardian ad litem in that action.") Elaborating upon this assertion from *Benjamin P.B.*, the *Pentasuglia* Court observed that "the child also has a fundamental right, not shared by the mother, to establish the father-child relationship, and in exercising that right there clearly is potential for conflict between the mother's interest and the child's interest." 193 W. Va. at 624, 457 S.E.2d at 647, quoting *Commonwealth, Dep't of Social Serv. v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787, 791 (Va. App. 1989). *Id.* @ 83

Even though the above line of cases dealt primarily with domestic issues, their rationale only further enhances the Blacks' argument that the doctrine of *res judicata* does not apply to the instant litigation. Rebecca A. Black was not a party to the injunction litigation filed by Esquire nor was she in privity with the parties to this litigation even though the parties were her parents. Rebecca A. Black has a distinct cause of action against Esquire for a violation of the West Virginia Fair Housing Act.

Further, as this court noted in *Benjamin* and *Cline*, not only was the child not a party, the evidence indicates that the interest of the child was not protected. As Esquire so eloquently pointed out in its Motion for Summary Judgment, Rebecca A. Black's handicap was not mentioned in the injunction proceedings. Therefore, applying the test set out in *Blake* to the present case, it is clear that the present claims are not barred by *Res Judicata* or claim preclusion. The second part of the test indicates that in order for *Res Judicata* to apply, the two actions must involve either the same parties or persons in privity with those same parties. The evidence shows that this litigation involved parties

different from the parties in the initial litigation filed by Esquire. Case law shows that just because the parties to the injunction litigation happen to be the parents of Rebecca A. Black does not create privity between the parties. In fact, Rebecca A. Black was not in privity with any of the parties to the previous litigation filed by Esquire and has her own claim independent from her parents. The Circuit Court improperly held that the claims of Rebecca Black are barred by the doctrine of Res Judicata.

b. **The Circuit Court Improperly Held that Rebecca Blacks' Housing Claim was a Compulsory Counter-Claim to the Injunction Proceeding.**

Rebecca Black, a non-party to the injunction proceeding, was not required to file a counter-claim for a violation of the West Virginia Human Rights Act.

Rule 13(a) of the West Virginia Rules of Civil Procedure states that

(a) **Compulsory Counterclaims** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 13(a) clearly states, a counterclaim can only be filed by a party to the litigation. As has previously been discussed, Rebecca A. Black was not a party to the initial litigation filed by Esquire nor was she in privity with any of the parties to that litigation. Therefore, she was not able to file a pleading or to assert her claim. Scott Black and Mary Ellen Black were sued in their individual capacity in the injunction litigation filed by Esquire, not in their capacity as the next friends of Rebecca A. Black. Therefore, in their individual capacity, the Blacks did not have a claim for violation of the West Virginia Fair Housing Act against Esquire in the injunction proceeding. Only

Rebecca A. Black had the right to bring this claim - a distinct and separate claim from any claim or defense her parents may have had against Esquire in the injunction proceedings filed by Esquire.

c. The Circuit Court Improperly Granted Summary Judgment on the Issue of Reasonable Accommodation.

It is well settled in West Virginia that, in considering a motion for summary judgment, it is not the Court's duty to weigh the evidence and make a determination as to which party it thinks will prevail, it is the Court's duty to determine only if there is a genuine issue for trial. In *Painter v. Peavy*, 451 S E 2d 755, this Court made exactly that point. The *Painter* Court held that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id* at Syl Pt 3. Nevertheless, the Circuit Court made a factual determination that accommodations offered by Esquire were reasonable.

The granting of summary judgment on the issue of reasonable accommodations prior to the completion of discovery is viewed as precipitous. See, generally, *Board of Educ. v. Van Buren & Firestone Architects, Inc.*, 267 S. E.2d 440. In the circuit court case, this judge granted summary judgment without allowing the Blacks to conduct even a small amount of discovery. There weren't even any depositions taken. This Court specifically addressed the issue of granting summary judgment prior to conducting discovery in *Drake v. Snider*, 2004 LEXIS 141 (W. Va. Nov. 12, 2004). The Court stated:

[W]e are disturbed by the fact that the circuit court failed to grant Ms. Drake's Rule 56(f) motion to specifically conduct discovery in the bad faith case. Of course, we are also mindful that, during a scheduling conference, dates were set out for discovery. However, absent entry of a scheduling order, the discovery requirements were never

formalized. Indeed, we have cautioned that "under Rule 16(b), it is mandatory that trial courts enter a scheduling order that limits the time to join parties, amend pleadings, file and hear motions, and complete discovery." *State ex rel. Pritt v. Vickers*, 214 W. Va. 221, 226, 588 S.E.2d 210, 215 (2003) (footnote added) (citing *Elliott v. Schoolcraft*, 213 W. Va. 69, 73 n.5, 576 S.E.2d 796, 800 n.5 (2002) (reversing summary judgment because circuit court failed to enter scheduling order). Because no scheduling order was entered in this case, we find that trial court abused its discretion by denying Ms. Drake's Rule 56(f) motion to conduct discovery in the bad faith case. *Id.* @ 10

The West Virginia Fair Housing Act provides that housing discrimination includes:

a refusal to make reasonable accommodations in rules, policies, practices or services when such accommodation may be necessary to afford such person **equal opportunity** to use and enjoy a dwelling. Emphasis added. West Virginia Code Section 5-11A-5(F)(3)(B)

As the statute indicates, a factor in determining whether or not an accommodation is reasonable is Esquire's past practice with regard to fences in the subdivision and if the accommodation gives the person equal opportunity to use and enjoy a dwelling. Esquire has permitted numerous fences in the subdivision for many years prior to the Blacks' request. To require the Blacks to take the fence down at some point and time in the future while allowing others to continue to have fences is not a reasonable accommodation. It does not allow the Blacks to have an equal opportunity to enjoy their dwelling. In fact, even after the Court granted Esquire's motion for summary judgment, it allowed another home owner to erect a fence that violated the restrictive covenants around the pool with absolutely no restrictions. (See affidavit of Scott Black attached as Exhibit "A" to Black's Rule 59(e) Motion) Once again, there is a question of fact as to whether or not Esquire's offer is a reasonable accommodation.

Finally, to require the Blacks to take down a fence sometime in the future and have a pool without proper safeguards in place would adversely affect the value of their real estate or would

require them to incur expenses in removing the pool. These facts, coupled with Esquire's practice of allowing others to have fences, creates a question of fact for the jury to determine whether or not these accommodations are reasonable.


Esquire maintained that W Va Code 5-11A-5(F)(3) dictated that a reasonable accommodation only be required while the handicap person occupies the premises. A review of the referenced code section shows that it makes no mention that the accommodation only be required while the handicap person occupies the premises. Despite the genuine issues of fact, the Circuit Court improperly granted summary judgment on the issues of reasonable accommodations.

CONCLUSION AND PRAYER FOR RELIEF

Appellants pray that the order granting summary judgment against her be reversed specifically finding that Res Judicata does not apply, finding that the claims asserted in this action were not a Compulsory Counter-Claim in previous litigation and find that the issue of whether Esquire made a reasonable accommodation to the Black's is a question of fact for a jury to determine.

WHEREFORE, the Appellants pray that the Appeal be granted, the lower Court's decision to grant summary judgment be reversed and remanded and for any other and further relief to which this Court deems meet and proper

SCOTT AND MARY ELLEN
BLACK, for their daughter,
REBECCA A. BLACK, a minor child,
By Counsel.



Paul E. Biser

W.V. Bar # 7319

FREDEKING & FREDEKING LAW OFFICES, LC

511 Eighth Street

Huntington, WV 25701

(304) 525-7701

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THE ESQUIRE GROUP, INC.

Appellee.

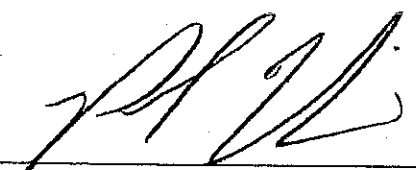
CASE NO. 32165

CERTIFICATE OF SERVICE

I, Paul E. Biser, attorney for George Scott Black and Mary Ellen Black, on behalf of their daughter, Ellen Black in the foregoing matter, do hereby certify that I served the foregoing "Brief of George Scott Black and Mary Ellen Black, on behalf of their daughter, Ellen Black" upon the following by placing the same in the regular course of the United States mail, postage pre-paid, this the 15th day of December, 2004.

Barry M. Taylor, Esq.
JENKINS FENSTERMAKER, PLLC.
P. O. Box 2688
Huntington, West Virginia 25726-2688

Paul R. Sheridan, Esq.
Robert D. Goldberg, Esq.
OFFICE OF ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
P.O. Box 1789
Charleston, WV 25326-1789



Paul E. Biser
WV Bar # 7319