

[Cite as *In re Sammons*, 2006-Ohio-6321.]

**IN THE COURT OF CLAIMS OF OHIO
VICTIMS OF CRIME DIVISION**

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IN RE: BUFFIE R. SAMMONS	:	Case No. V2006-20429
SHARON POGASH	:	<u>ORDER OF A THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>
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{¶ 1} Sharon Pogash (“applicant”) filed a reparations application seeking reimbursement of expenses incurred with respect to the June 29, 2004 murder of her daughter, Buffie Sammons (“victim” or “decedent”). On November 2, 2004, the Attorney General denied the claim pursuant to R.C. 2743.60(F) contending that the victim had been engaging in substantial contributory misconduct, prostitution, when the criminally injurious conduct occurred. On November 30, 2004, the applicant filed a request for reconsideration. On April 26, 2006, the Attorney General determined that the previous decision warranted no modification and hence denied the claim once again. On May 22, 2006, the applicant filed a notice of appeal to the Attorney General’s April 26, 2006 Final Decision. Hence, this matter was heard before this panel of three commissioners on August 10, 2006 at 10:20 A.M.

{¶ 2} The applicant, the applicant’s attorney, and an Assistant Attorney General attended the hearing and presented exhibits, testimony, and oral argument for the panel’s consideration. Detective William Gillette, a police officer with the Columbus

Police Department, testified that he was one of the police officers who investigated the decedent's death. Detective Gillette's testimony was consistent with information that had previously been submitted to the court.

{¶ 3} The applicant's attorney stated that the claim should be allowed based on the facts of this particular case. The applicant's attorney suggested that the claim be reduced and not denied, since there is insufficient evidence that the victim's illegal conduct rose to the level of substantial contributory misconduct to warrant denial of the claim. However, the Assistant Attorney General maintained that the claim should be denied pursuant to R.C. 2743.60(F) based on the testimony presented and the materials in the claim file. The Assistant Attorney General stated that the victim was a prostitute who was attempting to engage in such activity when she was murdered. The Assistant Attorney General cited various R.C. 2743.60(F) cases and argued that precedent requires that this claim be denied, based on the victim's illegal conduct of prostitution at the time of the criminally injurious conduct.

{¶ 4} From review of the file and with full and careful consideration given to all the information presented at the hearing, we make the following determination. We find by a preponderance of the evidence that the decedent had been engaging in substantial contributory misconduct at the time of her demise.

{¶ 5} Revised Code 2743.51(M) states:

“(M) ‘Contributory misconduct’ means any conduct of the claimant or of the victim through whom the claimant claims an award of reparations that is unlawful or intentionally tortious and that, without regard to the conduct's

proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.”

{¶ 6} Revised Code 2743.60(F) states in pertinent part:

“(F) In determining whether to make an award of reparations pursuant to this section, the attorney general or panel of commissioners shall consider whether there was contributory misconduct by the victim or the claimant. The attorney general, a panel of commissioners, or a judge of the court of claims shall reduce an award of reparations or deny a claim for an award of reparations to the extent it is determined to be reasonable because of the contributory misconduct of the claimant or the victim.”

{¶ 7} With respect to the exclusionary criteria of R.C. 2743.60, the Attorney General bears the burden of proof by a preponderance of the evidence. *In re Williams*, V77-0739jud (3-26-79); and *In re Brown*, V78-3638jud (12-13-79). According to the definition of contributory misconduct there are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) conduct by the victim/applicant; (2) conduct that is unlawful or intentionally tortious; and (3) that conduct must have a causal relationship to the criminally injurious conduct. In this case, there is ample evidence indicating that the decedent was a prostitute who was killed while attempting to engage in an illegal act of prostitution.

{¶ 8} Moreover, in order for an award of reparations to be denied pursuant to R.C. 2743.60(F), the Attorney General must prove by a preponderance of the evidence that the victim's contributory misconduct was substantial in nature. See *In re Spaulding* (1991), 63 Ohio Misc. 2d 39. Essentially, the Attorney General urged this panel to

follow the panel's holding in *In re Terry*, V91-96073tc (9-30-94), which held that any contributory misconduct that approaches 50 percent is substantial in nature and is a complete bar to an award of reparations. However, this panel also recognizes the judicial holdings of *In re McKendry*, V91-26415jud (1-26-94) and *In re Simpson*, V93-36752jud (2-14-96), which provide exceptions to the *Terry* decision. The court upheld reductions of more than 50 percent to awards of reparations based upon contributory misconduct.¹

{¶ 9} Moreover, we note that the court in *In re McKendry* and *In re Simpson* also stated, in pertinent part, that:

“While impossible to specifically define ‘substantial’ this court evaluates all applications for reparations on the basis of case-by-case analysis and has consistently held that R.C. 2315.19 (Effect of contributory negligence or implied assumption of risk) is not the applicable standard to apply to victim of crime cases. The single commissioner or panel of commissioners has the authority to deny or reduce an award due to contributory misconduct on behalf of the victim or claimant and their decision will be supported by the court unless unreasonable in a manner that approaches arbitrariness.” (Emphasis added.)

{¶ 10} In light of the above, we find that neither prostitution nor any other illegal or intentionally tortious conduct to be substantial contributory misconduct *per se* that warrants an automatic bar to an award of reparations. Every allegation of contributory misconduct shall be examined on a case-by-case basis. Therefore, based

¹This panel notes that *In re Terry* held that a victim who acted as a vigilante engaged in substantial contributory misconduct, whereas *In re McKendry* and *In re Simpson* held that the victims' “participation in a fight” was contributory misconduct.

upon the present facts and circumstances of this particular case, we find that the victim's illegal conduct of prostitution at the time of the criminally injurious conduct was substantial in nature.

{¶ 11} The victim died after having been shot five times by a potential "John", Ronald Smith ("offender"). The victim and her longtime boyfriend, Kevin Ezell, had been patrons at an Extended Stay America hotel in Columbus, Ohio for three weeks. The decedent had been a prostitute who advertised in the Columbus Dispatch, a local newspaper. On June 29, 2004, the victim received telephone calls from the offender inquiring about her services. The victim and offender met in the victim's hotel room and, approximately five minutes later, five gunshots were fired, which struck and killed the victim. The offender pled guilty to two counts of involuntary manslaughter (the victim was six months pregnant when she was killed). Based upon the above, we find the April 26, 2006 decision of the Attorney General shall be affirmed.

{¶ 12} In addition, the panel would like to note that the three-commissioners panel component of the Victims' Program provides an applicant with the first platform for independent judicial review of the claim. An applicant has a right to full due process before this panel and that right shall not be violated regardless of an Assistant Attorney General's belief that a particular issue is well-settled within the bounds of the law. Pursuant to R.C. 2743.53(A), the panel of commissioners is charged with the duty to hear and determine all matters relating to appeals from decisions of the Attorney General. We believe not doing such would be a violation of the law and public policy, since the Attorney General is charged with the duties of both protecting the fund and initially determining eligibility for the program.

IT IS THEREFORE ORDERED THAT

1) The April 26, 2006 decision of the Attorney General is AFFIRMED;

2) This claim is DENIED and judgment is rendered for the state of Ohio;

3) Costs are assumed by the court of claims victims of crime fund.

LLOYD PIERRE-LOUIS
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

ID #A3-dld-tad-081506

A copy of the foregoing was personally served upon the Attorney General and sent by regular mail to Franklin County Prosecuting Attorney and to:

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To S.C. Reporter 11-29-2006

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ORDER