

[Cite as *In re Troutwine*, 2007-Ohio-4513.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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IN RE: PHILLIP D. TROUTWINE	:	Case No. V2006-20879
PATRICIA TROUTWINE	:	Commissioners:
THAD C. TROUTWINE	:	Tim McCormack, Presiding
part	:	Thomas H. Bainbridge
Applicants	:	Karl C. Kerschner, concurring in
	:	and dissenting in part
	:	<u>OPINION OF A THREE-</u>
	:	<u>COMMISSIONER PANEL</u>
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{¶1} The applicants filed a reparations application seeking reimbursement of expenses incurred with respect to the September 1, 2004 murder of Phillip Troutwine (“decedent” or “victim”). On June 12, 2006, the Attorney General denied the claim pursuant to R.C. 2743.60(F) contending that the victim engaged in substantial contributory misconduct, solicitation of prostitution, in connection with his murder. On July 10, 2006, the applicants filed a request for reconsideration. On September 8, 2006, the Attorney General denied the claim once again. On September 22, 2006, the applicants filed a notice of appeal to the Attorney General’s September 8, 2006 Final Decision. On February 7, 2007 at 11:00 A.M., this matter was heard before this panel of three commissioners.

{¶2} The applicants' attorney and an Assistant Attorney General attended the hearing and presented testimony and oral argument for the panel's consideration. Detective Michael Galbraith ("Detective Galbraith") of the Dayton Police Department briefly testified that he was the lead detective on the case investigating the victim's death.¹

{¶3} The evidence presented establishes that Candace Hargrove ("Ms. Hargrove") resided with her boyfriend, James Russell ("Mr. Russell") in an apartment located in Montgomery County. Ms. Hargrove identified herself as a prostitute to the police and reported soliciting clients via a dateline service in the Dayton Daily Newspaper. Ms. Hargrove asserted that Mr. Troutwine contacted her on September 1, 2004 via the dateline service to confirm their previously arranged meeting. Ms. Hargrove later informed her boyfriend that she did not want to perform that day. Subsequently, Ms. Hargrove and Mr. Russell planned to rob the victim, as they had done in the past to prior customers. When Mr. Troutwine arrived at the apartment, Mr. Russell demanded money from him. A struggle ensued and Mr. Troutwine was shot and killed. Ms. Hargrove assisted Mr. Russell in cleaning up the apartment, disposing of the victim's body, and fleeing. The victim's body remained undiscovered for 3 ½ weeks. Ms. Hargrove pled guilty to aggravated robbery, tampering with evidence, and gross abuse of a corpse. She was sentenced to ten years in prison and ordered to pay

¹Detective Galbraith's testimony essentially mirrored the information that is contained within the police report.

restitution. Mr. Russell was convicted of aggravated robbery, murder, theft, gross abuse of a corpse, and having a weapon under disability. He was sentenced to 15 years to life imprisonment.

{¶4} The purpose of this program is remedial in nature. The compensation fund is designed to return victims/applicants to their status prior to the occurrence of the criminally injurious conduct. The Ohio General Assembly created the Victims of Crime Act to compensate victims. The right to participate in the reparations fund is controlled via compliance with set criteria and prudent restrictions contained within the statute. After full and careful review of this case, we hold the applicants have met that criteria to participate in the fund.

{¶5} We note after careful consideration of the evidence presented that this specific appeal meets the criteria, to qualify for an award. The fact pattern of this case highlights one of the most important and challenging statutory duties imposed on the Ohio Court of Claims Victims of Crime Division. Our statutory mandate is to render just and balanced decisions when determining whether a victim of crime - has conduct, in small or large measure, contributed to the subsequent occurrence of violent crime. A significant number of appeals heard by this panel involve violent felonies committed against victims. The victims in contributory misconduct cases are men and women who through either minor or major misconduct on their part contributed to the criminally injurious conduct. Our statutory duty is to weigh and balance all of the evidence on a case-by-case basis to reach a just resolution. The panel must determine whether an

award should be reduced due to the misdemeanor nature of the contributory misconduct, or whether the contributory misconduct is so substantial that it is either clearly felonious in its elements or so egregious in its relation to the criminally injurious conduct as to preclude any award to a claimant.

{¶6} 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.

{¶7} Revised Code 2743.60(F) states:

(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.

{¶8} 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 R.C. 2743.51(M) and relevant case law, there are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) specific, unlawful

or intentionally tortious conduct by the victim or applicant;² 2) a causal relationship between that conduct and the criminally injurious conduct; and 3) foreseeability of the likelihood of the criminally injurious conduct occurring if the victim or applicant engaged in such conduct.³ Furthermore, in order to deny an award under R.C. 2743.60(F), the Attorney General must prove that the victim's or applicant's contributory misconduct was substantial.⁴

{19} Since the panel's decision in *In re Terry*, V91-96073tc (9-30-94), which held that any contributory misconduct that approaches the fifty percent mark is substantial and is a complete bar to recovery, most claims with a substantial contributory misconduct finding (usually involving drug deals, prostitution, solicitation, etc.) have been completely denied. However, we note the holdings in *In re McKendry*, V91-26415jud (1-26-94) and *In re Simpson*, V93-36752jud (2-14-96). In *Simpson*, a judge upheld the panel's 60 percent reduction in an award despite finding that the applicant engaged in substantial contributory misconduct. In *Simpson*, the judge stated that the panel of commissioners has the authority to deny or reduce an award pursuant to R.C. 2743.60(F) and that the panel's decision will be supported by the court unless the decision is determined to be unreasonable or arbitrary. The court in *Simpson* referencing *McKendry* further stated that it recognized the difficulty of these particular

² See *In McGary II*, V91-83761jud (11-16-94).

³ See *In re Ewing* (1987), 33 Ohio Misc.2d 48.

⁴ See *In re Spaulding* (1991), 63 Ohio Misc.2d 39.

cases and stated that it is impossible to specifically define "substantial." In *Simpson*, the court further related that it will evaluate these claims on a case-by-case basis and specifically stated that R.C. 2315.19 (contributory negligence or implied assumption of the risk) is not the applicable standard to apply to victims of crime cases. We believe the holding in *Simpson* essentially overturned the holding in *Terry*, because the court allowed the 60 percent reduction in an award even though the victim 's misconduct was found to have surpassed the 50 percent mark. Pursuant to *Simpson*, a substantial contributory misconduct finding (regardless of the type of misconduct) does not warrant an automatic denial of an award.

{¶10} In light of the above, we find that neither prostitution nor any other illegal or intentionally tortious conduct shall be considered substantial contributory misconduct *per se* that warrants an automatic bar to an award of reparations. Contributory misconduct cases cannot, should not, and will not be denied carte blanche. Every allegation of contributory misconduct shall be examined on a case-by-case basis. In evaluating the existence and level of contributory misconduct under R.C. 2743.60(F) for this case, this panel considered the following nonexclusive list of considerations:⁵

- {¶11} 1. Age and corresponding mental capacity of the victim/applicant;
- {¶12} 2. The victim/applicant's familiarity/relationship with the offender;
- {¶13} 3. The victim/applicant's mens rea;

⁵We note that review of the above listed considerations is not required for every R.C. 2743.60(F) case. The list is merely a guide when reviewing contributory misconduct issues.

{¶14} 4. Whether the victim/applicant suffered from diminished capacity due to intoxication or other mitigating factor;

{¶15} 5. Whether the victim/applicant suffered a disproportionate level of harm compared to the victim/applicant's level of contributory misconduct;

{¶16} 6. Whether the victim/applicant's degree of misconduct was a relatively minor or substantial violation of the law; and

{¶17} 7. Whether granting a reparations award violates the public policy of the Victims of Crime Act. *In re Kempton*, V06-20640 (4-2-07), 2007-Ohio-2929.

{¶18} Mr. Troutwine was 57 years old at the time of the incident. There is no evidence that suggests he suffered from any long-term or permanent mental impairment. According to information in the file, it is unclear whether the victim and Ms. Hargrove had an on going relationship with one another or whether September 1, 2004 was the parties' first encounter.

{¶19} The file contains information that Ellen Dillard ("Ms. Dillard"), a neighbor of Ms. Hargrove, informed the police that "white men would come over in the morning hours and that they would go up to the apartment * * * James would go out on the balcony or come out on the front steps and hang out." Ms. Dillard stated that she had seen Mr. Troutwine "on a couple different dates and times, usually in the morning hours, going up to upstairs apartment." Ms. Dillard stated that "sometime in the morning hours of the day he came to the apartment that she had heard what sounded like a gunshot coming from that apartment area." She also observed a tent, that appeared to have a

body wrapped up inside of it, being pushed down the steps. The tent was "loaded into the trunk of the purple car and then driven out into the alley and away by James Russell and Candace." She stated that "later on during the day, she smelled the odor of bleach and observed Candace bleaching the floor and other items in and around the apartment." Ms. Dillard was shown a photograph of Mr. Troutwine and she positively identified him along with his purple or plum colored vehicle. Based on the above, it appears Mr. Troutwine knew that his September 1, 2004 arrangement with Ms. Hargrove was to be a sex for money encounter. However, definitive evidence of such (since Mr. Troutwine is unable to provide his version) is unavailable.

{¶20} Nevertheless, we find that the offenders' excessive use of force ultimately caused Mr. Troutwine to suffer a disproportionate level of harm, an untimely death. The victim's degree of misconduct would have been considered a misdemeanor violation while the offenders' conduct was significant and felonious in nature. Moreover, we believe a decision to grant a significantly reduced award to the applicants does not contradict the program's public policy. By significantly reducing the award, we acknowledge the victim's contributory misconduct.

{¶21} When the victim arranged to meet Ms. Hargrove to procure her services as a prostitute, he engaged in specific unlawful conduct. The victim's specific unlawful conduct was a contributing cause of his death, although not the direct and proximate cause. Mr. Troutwine should have known that engaging in illegal solicitation of prostitution could have resulted in some degree of harm.

{¶22} Despite Mr. Troutwine's illegal and imprudent conduct, we nevertheless find that such conduct does not warrant death. We in no way condone Mr. Troutwine's conduct, but believe that by finding substantial contributory misconduct on Mr. Troutwine's part, we, in effect, assign more fault to Mr. Troutwine for his death than to the perpetrators. Hence, we find that Mr. Troutwine did not engage in substantial contributory misconduct because his misconduct ranks secondary to the offenders' misconduct; the offenders escalated the incident from a robbery to murder.

{¶23} Based on the above factors and analysis and the panel's discretion under *Simpson* to reduce this claim, we find that any award shall be reduced by 40 percent pursuant to R.C. 2743.60(F). Therefore, the September 8, 2006 decision of the Attorney General shall be reversed and the claim shall be remanded to the Attorney General for economic loss calculations.

TIM MC CORMACK
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

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Commissioner Karl C. Kerschner concurring, in part, and dissenting, in part:

Consistent with the majority determination in this matter, I agree that Mr. Troutwine, the victim in this matter, engaged in contributory misconduct pursuant to the dictates of R.C. 2743.51(M). Applicants' claim should be denied in its entirety, however, because the victim's contributory misconduct was substantial.

As set forth above, a *prima facie* case of contributory misconduct is present if the Attorney General establishes the following three elements by a preponderance of the evidence: (1) specific, unlawful, or intentionally tortious conduct by the victim or applicant; (2) a causal relationship between the conduct and the criminally injurious conduct; and (3) foreseeability of the likelihood of the criminally injurious conduct occurring if the victim or applicant engaged in such conduct. R.C. 2743.51(M). Moreover, if the Attorney General establishes by a preponderance of the evidence the victim's or applicant's contributory misconduct was substantial, then the claim shall be denied. See *In re Spaulding* (1991), 63 Ohio Misc. 2d 39.

While contributory misconduct determinations depend upon the particular facts and circumstances of each case, this area of the Victims of Crime Act is well-established and substantial precedent exists. In particular, numerous decisions have been issued with respect to cases in which the victim of criminally injurious conduct engaged in illegal prostitution/solicitation of prostitution. See, e.g., *In re Suarez*, V84-30976jud (4-11-85) (holding illegal solicitation of prostitution is inherently dangerous activity and victim who was robbed and slashed with razor in connection with solicitation

engaged in substantial contributory misconduct); *In re Eisenbach* V87-80630jud, (7-26-89) (holding victim's illegal solicitation of prostitution constituted substantial contributory misconduct thus completely barring recovery); *In re Stroud*, V91-21669tc (1-31-95) (holding victim who was killed in connection with illegal prostitution solicitation and drug activity engaged in substantial contributory misconduct thus completely barring recovery); and *In re Sammons*, V2006-20429tc (10-2-06), 2006-Ohio-6321 (holding victim engaged in illegal prostitution, her death resulted from the unlawful conduct, and the victim's substantial contributory misconduct completely barred claim).

Well-established precedent over the past two decades demonstrates that in circumstances where a victim engages in prostitution/illegal solicitation of prostitution, the victim's contributory misconduct is substantial and the claim must therefore be barred. The claim presently before the panel of commissioners does not compel a contrary finding in light of the facts of this claim and the foregoing well-reasoned and longstanding precedent. Here, the majority expressly determined that the victim engaged in specific, unlawful conduct—solicitation of prostitution—and observed that the victim's illegal solicitation of prostitution was not isolated (Decision, pp. 7–8). The majority further determined there was indeed a causal relationship between the victim's unlawful conduct and the criminally injurious conduct, the second element required to establish a *prima facie* case for contributory misconduct (Decision, p. 8). Tragically, the victim died from injuries sustained in connection with his illegal activity. The victim's untimely death was unnecessary and unfortunate. Notwithstanding the foregoing,

however, the victim voluntarily placed himself at risk and in harm's way by engaging in the solicitation of prostitution, an illegal and inherently dangerous activity. But for the victim's engaging in the unlawful conduct, he would have not been at risk of any personal harm. The victim's illegal solicitation of prostitution was the foreseeable and proximate cause of his robbery, assault, and resulting untimely death.

The majority correctly determined illegal solicitation of prostitution is inherently dangerous and, further, that the "victim's specific unlawful conduct was a contributing cause of his death" (Decision, p. 8). Furthermore, the majority correctly determined the victim engaged in contributory misconduct in connection with this claim and that, but for the victim's illegal conduct, he would not have been in harm's way on the evening of his murder (Decision, p. 8). Based upon the foregoing analysis and consistent with well-established precedent, the Attorney General established by a preponderance of the evidence that the victim's contributory misconduct in this matter was substantial. Indeed, it would be contrary to the public policy underlying the Victims of Crime Act to reward the victim's illegal conduct with compensation from the reparations fund. Accordingly, the applicants' claim should be barred in its entirety.

KARL C. KERSCHNER
Commissioner

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Applicants	:	
_____	:	
_____	:	<u>ORDER OF A THREE-</u>
	:	<u>COMMISSIONER PANEL</u>

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IT IS THEREFORE ORDERED THAT

- 1) The September 8, 2006 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicants;
- 2) This claim is remanded to the Attorney General for economic loss calculation and decision;
- 3) All awards shall be reduced by 40 percent;

4) This order is entered without prejudice to the applicants' right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

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

TIM MC CORMACK
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

ID #\3-dld-tad-042507

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

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