

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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|--------------------------|-----------|---------------------------|
| IN RE: KEVIN FONTES, JR. | :         | Case No. V2003-40291      |
| JACQUELINE KIRKLAND      | :         | <u>ORDER OF A THREE-</u>  |
| Applicant                | :         | <u>COMMISSIONER PANEL</u> |
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|                          | : : : : : |                           |

{¶1} On August 13, 2002, the applicant filed a reparations application seeking dependent's economic loss on behalf of her minor son, Kevin Fontes, Jr. However, the applicant listed Kevin Fontes, Jr. as the victim instead of Kevin Fontes, Sr. On December 13, 2002, the Attorney General issued a Finding of Fact and Decision denying the applicant's claim pursuant to R.C. 2743.60(E) since Kevin Fontes, Sr. and the applicant both have felony convictions within ten years of the criminally injurious conduct. The criminally injurious conduct, the murder of Kevin Fontes, Sr., occurred on March 6, 1994. On January 13, 2003, the applicant filed a request to reconsider. On March 14, 2003, the Attorney General issued a Final Decision denying the claim again pursuant to R.C. 2743.60(E). On April 14, 2003, the applicant appealed the Attorney General's Final Decision. Hence, this appeal came to be heard before this panel of commissioners on July 10, 2003 at 11:45 A.M.

{¶2} Applicant's counsel and an Assistant Attorney General attended the hearing and presented oral argument for this panel's consideration. Applicant's counsel argued that the real

victim in this case is Kevin Fontes, Jr. Counsel asserted that even though Kevin Fontes, Sr. and the applicant have felony convictions, Kevin Fontes, Jr. should not be disqualified from receiving an award for dependent's economic loss since he did not engage in any felonious activity. Hence, counsel requested the claim be opened in order for Kevin Fontes, Jr. to recover an award of dependent's economic loss.

{¶3} The Assistant Attorney General maintained that this claim must be denied since both Kevin Fontes, Sr. and the applicant have felony convictions. Furthermore, the Assistant Attorney General asserted that Kevin Fontes, Jr. fails to qualify as a victim in his own right. The Assistant Attorney General contended that the police report failed to disclose any information indicating that Kevin Fontes, Jr. was present at the incident or that he arrived at the scene shortly thereafter. The Assistant Attorney General also noted that an award for dependent's economic loss can only be recovered under Kevin Fontes, Sr.'s claim.

{¶4} From review of the file and with full and careful consideration given to all the information presented at the hearing, this panel makes the following determination. First, we must clarify that the only issue before us under this claim is whether Kevin Fontes, Jr., the listed victim on this application for reparations (V03-40291), qualifies as a victim in his own right with respect to the March 6, 1994 murder of his father. All claims and issues regarding future loss of support (dependent's economic loss and dependent's replacement services loss) in relation to the March 6, 1994 incident must be sought, filed and resolved under Kevin Fontes, Sr.'s claim (V94-46361). Therefore, the applicant, Kevin Fontes, Jr. (upon reaching the age of majority), or any other individual may file a claim under V94-46361.

{¶5} This court recognized in cases In re Clapacs (1989), 58 Ohio Misc. 2d 1, 567 N.E. 2d 1351 and In re Fife (1989), 59 Ohio Misc. 2d 1, 569 N.E. 2d 1078, that emotional distress due to a direct awareness of a criminal incident can be classified as personal injury. As such, persons other than the victim per se may qualify as victims in their own right. However, the court must analyze the nature of the alleged injury and its relationship to the criminal incident. Based on the Supreme Court holdings in Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 451 N.E. 2d 83 and Burris v. Grange Mut. Cos. (1989), 46 Ohio St. 3d 84, 545 N.E. 2d 83, the Court of Claims has espoused certain qualitative factors to examine when determining who may qualify as a victim. In re Anderson (1991), 62 Ohio Misc. 2d 268.

\* \* \* To receive compensation an applicant is required to prove relationship of an injury to the criminal event by a preponderance of the evidence. It is contemplated that “personal injury” as compensated herein shall require a showing of more than mere sorrow, concern, or mental distress. Psychological injury must be of such a debilitating nature so as to impede or prohibit the resumption or enjoyment of day-to-day activities. In re Fife, supra.

{¶6} Also generally, in order for someone to qualify as a victim in their own right, they must have had a contemporaneous sensory perception of the criminally injurious conduct or have arrived at the scene immediately after the occurrence of the incident. In re Anderson, supra. The police report clearly indicates that Kevin Fontes, Jr. was not present during the murder of his father nor did he arrive on the scene shortly thereafter. Accordingly, the applicant has failed to prove by a preponderance of the evidence that Kevin Fontes, Jr. qualifies as a victim in his own right. Therefore, the March 14, 2003 decision of the Attorney General shall be affirmed denying the applicant’s claim, albeit pursuant to former R.C. 2743.52.

{¶7} IT IS THEREFORE ORDERED THAT

{¶8} 1) The March 14, 2003 decision of the Attorney General is AFFIRMED,  
albeit pursuant to former R.C. 2743.52;

{¶9} 2) This claim is DENIED and judgment is entered for the state of Ohio;

{¶10} 3) Costs are assumed by the court of claims victims of crime fund.

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DALE A. THOMPSON  
Commissioner

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CLARK B. WEAVER, SR.  
Commissioner

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ASHER W. SWEENEY  
Commissioner