[Cite as *In re Fix*, 2004-Ohio-5086.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: RICHARD J. FIX	:	Case No. V2004-60369
RICHARD J. FIX	:	ORDER OF A THREE-COMMISSIONER PANEL
Applicant	:	

: : : : :

{¶ 1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to a June 22, 2002 motor vehicle incident. The applicant sustained severe injuries while riding on a motorcycle driven by his intoxicated cousin, William Snyder. On April 25, 2003, the Attorney General denied the applicant's claim for an award of reparations pursuant to R.C. 2743.60(B) contending that the applicant knew or should have known that his cousin was intoxicated and therefore the applicant should have declined to ride with Mr. Snyder in light of his impaired condition. On May 19, 2003, the applicant filed a request for reconsideration asserting that he saw the offender consume only one beer prior to the accident. On March 17, 2004, the Attorney General denied the applicant's claim once again pursuant to R.C. 2743.60(B). On April 12, 2004, the applicant filed a notice of appeal to the Attorney General's March 17, 2004 Final Decision. On May 17, 2004, the applicant filed a Brief asserting that he held no knowledge of the offender's impaired state since: 1) he was recently released from prison, after serving a 20 year sentence, 2) he does not drink alcohol himself, 3) he saw Mr. Snyder consume only one beer, 4) he never noticed a change in his cousin's behavior, and 5) he only had the opportunity to observe Mr. Snyder for approximately one hour. On May 20, 2004,

the Attorney General filed a Brief recommending the Final Decision be affirmed since the applicant knew or should have known that Mr. Snyder was intoxicated because: 1) the applicant witnessed the offender consume alcohol; 2) the offender's blood alcohol content was .138; and 3) the police report revealed that the offender had a strong odor of alcohol emanating from his person. Hence, this matter came to be heard before this panel of three commissioners on July 8, 2004 at 10:35 A.M.

{¶ 2} The applicant, applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony and oral argument for this panel's consideration. Janet Fix, the applicant's sister, briefly testified, via telephone, that on June 22, 2002 she held a graduation party for her daughter and that the applicant and William Snyder attended the celebration. Ms. Fix indicated that she had the opportunity to observe Mr. Snyder arrive on his motorcycle and play several skillful rounds of horseshoes. Ms. Fix noted that she only saw Mr. Snyder consume 1-2 beers, however she stated that he never appeared inebriated to her.

{¶ 3} Patrick Hardy, the applicant's brother-in-law, testified, via telephone, that he also attended the graduation party and observed the activities of William Snyder. Mr. Hardy stated that he and Mr. Snyder played horseshoes together and that he never noticed any unusual behavior from Mr. Snyder.

{¶ 4} Carol Fix, the applicant's sister, also testified, via telephone, that she, Mr. Snyder, Patrick Hardy, and the applicant primarily played horseshoes while at the party. Ms. Fix asserted that she saw Mr. Snyder consume 1-2 beers before he and the applicant departed the party together on Mr. Snyder's motorcycle. Ms. Fix testified that Mr. Snyder failed to exhibit any

sodden behavior while in her presence. Ms. Fix noted for the panel that Mr. Snyder played horseshoes exceptionally well that day.

{¶ 5} Richard Fix testified that he arrived at the party approximately one hour after Mr. Snyder arrived. The applicant stated that he and William Snyder had not seen each other in over 20 years and that they primarily played horseshoes together until Mr. Snyder asked if he would like to accompany him to obtain cigarettes from a nearby store. The applicant testified that he saw Mr. Snyder consume only one beer in his presence and that he never noticed any type of impaired behavior from his cousin except on their return from the store, which is when the accident occurred. Mr. Fix stated that Mr. Snyder refused to slow down, even after repeated requests. The applicant explained that the terrain was curvy, narrow, and steep and that they were traveling at a rate of approximately 80 mph in a 35 mph speed zone. Lastly, Mr. Fix briefly testified concerning the nature and extent of the injuries that he sustained as a result of Mr. Snyder's reckless behavior.

{¶ 6} Applicant's counsel stated that the claim should be allowed since there was no reason for the applicant to have known or suspect that Mr. Snyder was intoxicated when he accepted a ride from him, based on the testimony presented. Counsel argued that the witnesses testified that they observed no impaired behavior from Mr. Snyder and, in fact, stated that Mr. Snyder exhibited great skill while playing horseshoes. Counsel asserted, based on Mr. Snyder's conduct, that there was no reason for anyone in attendance of the party to believe that Mr. Snyder was intoxicated. Counsel further contended that there is insufficient evidence to find that merely because the applicant observed Mr. Snyder partake of *one* alcoholic beverage, that the applicant knew or should have known that Mr. Snyder was intoxicated. Counsel also argued that

the police officer's detection of alcohol from the offender is also insufficient evidence to find that the applicant knew or should have known that Mr. Snyder was inebriated, since the applicant already knew that his cousin had previously drank one beer and hence would naturally smell of alcohol. Lastly, counsel requested that the applicant be granted the maximum award allowed by the fund, in light of the severe injuries he sustained as a result of the incident.

{¶ 7} The Assistant Attorney General maintained that the claim must be denied since the applicant knew or should have known pursuant to R.C. 2743.60(B) that Mr. Snyder was impaired prior to accepting the ride. The Assistant Attorney General stated that the applicant had the opportunity to watch Mr. Snyder consume an alcoholic beverage prior to their departure. The Assistant Attorney General also contended that the applicant should have known Mr. Snyder was inebriated since his blood alcohol content was .138, which is well over the legal limit and therefore Mr. Snyder should have demonstrated signs of an impaired condition. The Assistant Attorney General further indicated that the police officer, at the scene, noted in his report that he noticed the strong odor of alcohol emanating from Mr. Snyder.

{¶ 8} R.C. 2743.60(B) states:

> (B)(1) The attorney general, a panel of commissioners, or a judge of the court of claims shall not make or order an award of reparations to a claimant if any of the following apply:
>
> (a) The claimant is the offender or an accomplice of the offender who committed the criminally injurious conduct, or the award would unjustly benefit the offender or accomplice.
>
> (b) Except as provided in division (B)(2) of this section, both of the following apply:
>
> (i) The victim was a passenger in a motor vehicle and knew or reasonably should have known that the driver was under the influence of alcohol, a drug of abuse, or both.

(ii) The claimant is seeking compensation for injuries proximately caused by the driver described in division (B)(1)(b)(i) of this section being under the influence of alcohol, a drug of abuse, or both.

(c) Both of the following apply:

(i) The victim was under the influence of alcohol, a drug of abuse, or both and was a passenger in a motor vehicle and, if sober, should have reasonably known that the driver was under the influence of alcohol, a drug of abuse, or both.

(ii) The claimant is seeking compensation for injuries proximately caused by the driver described in division (B)(1)(b)(i) of this section being under the influence of alcohol, a drug of abuse, or both.

(2) Division (B)(1)(b) of this section does not apply if on the date of the occurrence of the criminally injurious conduct, the victim was under sixteen years of age or was at least sixteen years of age but less than eighteen years of age and was riding with a parent, guardian, or care-provider.

{¶ 9} 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 find that the applicant qualifies as a victim of criminally injurious conduct, since Mr. Fix was injured as a result of Mr. Snyder driving while intoxicated, which is clearly evidenced by the offender's arrest for DUI and the positive toxicology report indicating the offender's blood alcohol level was .138.

{¶ 10} Second, we find that the Attorney General has failed to prove, by a preponderance of the evidence, that the applicant knew or should have known that the offender was intoxicated in order to deny this claim pursuant to R.C. 2743.60(B). Based on the facts and circumstances surrounding this case, we find no reason why the applicant would have known or should have known that Mr. Snyder was inebriated, since the applicant only saw the offender partake of one

beer and neither the applicant nor others who attended the party (that testified) observed any obvious signs of intoxication from Mr. Snyder. The Assistant Attorney General's argument that the applicant should have known that Mr. Snyder was drunk simply because a police officer noticed the strong odor of alcohol emanating from the offender's person is not well-taken. The applicant, as well as others, testified that they saw Mr. Snyder consume at least one alcoholic beverage, therefore it would have been only natural for the offender to have smelled of alcohol. In addition, we note that police officers are trained to discern whether an individual is under the influence of drugs and alcohol, thus the officer's notation of such in the police report. R.C. 2743.60(B) is an objective test that is based upon what a reasonable prudent person knew or should have known about an individual's behavior. We believe that a reasonable prudent person would have also concluded that Mr. Snyder was not sullen. According to Mr. Fix's testimony, it was only after he and his cousin left the store to return to the party did he notice the offender's unusual and reckless behavior. The applicant testified that he repeatedly requested Mr. Snyder to slow down, however to no avail. Based on the testimony presented and the totality of the circumstances, we find that the March 17, 2004 decision of the Attorney General shall be reversed and this claim shall be remanded to the Attorney General for economic loss calculations and decision.

IT IS THEREFORE ORDERED THAT

1) The March 17, 2004 decision of the Attorney General is REVERSED to render judgment in favor of the applicant;

2) This claim is remanded to the Attorney General for economic loss calculations and decision;

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

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

JAMES H. HEWITT III
Commissioner

CLARK B. WEAVER, SR.
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

ID #\3-dld-tad-072304

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

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To S.C. Reporter 9-23-2004