[Cite as *In re Plant*, 2006-Ohio-6843.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION
www.cco.state.oh.us

IN RE: LOUISE PLANT	:	Case No. V2006-20135
LOUISE PLANT	:	OPINION OF TWO-COMMISSIONER PANEL
Applicant	:	

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{¶1} Louise Plant ("Ms. Plant" or "applicant") filed a reparations application seeking reimbursement of expenses incurred regarding an April 24, 2003 motor vehicle accident caused by Gloria Womack ("Ms. Womack" or "offender"). On July 26, 2005, the Attorney General denied the claim under R.C. 2743.52(A) contending that the applicant failed to prove by a preponderance of the evidence that she qualifies as a victim of criminally injurious conduct under any of the motor vehicle exceptions listed in R.C. 2743.51(C). On August 3, 2005, the applicant filed a request for reconsideration. On October 3, 2005, the Attorney General denied the claim once again. On February 17, 2006, the applicant filed a notice of appeal to the Attorney General's October 3, 2005 Final Decision. Hence, this matter was heard by this panel on July 26, 2006 at 11:15 A.M.

{¶2} The applicant, the applicant's attorney, and an Assistant Attorney General attended the hearing and presented testimony and oral argument. Ms. Plant (now age 55) testified that she sustained serious injury as a result of the April 24, 2003 motor

vehicle accident. The applicant stated that she was hospitalized for three weeks as a result of injuries to her face, head, eye, collarbone, chin, and ribs. The applicant also stated that the motor vehicle accident adversely impacted her speech and hearing. Ms. Plant explained that prior to the accident she had been employed with the Dayton Board of Education and Central State University. However, now she is unable to work as a result of the injuries she sustained in the accident. The applicant explained that in January 2006 the Social Security Administration determined that she was disabled. The applicant testified that she utilizes a mobility service for her transportation needs. Ms. Plant also stated that she was granted a civil judgment in the amount of 2.5 million dollars, but has received no monies to date.

{¶3} The applicant's attorney stated that based on the testimony presented and the witness statements contained in the claim file, the applicant's claim should be allowed. Counsel asserted that the applicant has proven by a preponderance of the evidence that she qualifies as a victim of criminally injurious conduct. Counsel argued that Ms. Womack engaged in reckless conduct when she, without a valid operator's license, sped through an intersection where the light had been red for at least ten seconds. Counsel noted that the offender's vehicle (a Chevrolet Cavalier) struck the applicant's vehicle (an SUV) with such force as to topple the SUV and cause extremely serious injuries to the applicant. Counsel urged the panel to find that Ms. Womack operated the motor vehicle with heedless indifference, which is evidenced by the offender's repeated disregard for the law by driving without a valid operator's license since 1995, and speeding through a red light at an intersection. Counsel argued that

the offender's history of continually violating the law in this manner should be considered a noteworthy factor by the panel. Counsel asserted that Ms. Womack's true *mens rea* was reflected at the time of the accident, as evidenced by her repeated illegal conduct. Lastly, counsel urged this panel to reverse the Attorney General's decision based on *In re Littler*, V04-60172tc (7-1-04), 2004-Ohio-4612 and *In re Balish*, V05-80428tc (3-7-06), 2006-Ohio-2162.

{¶4} The Assistant Attorney General continued to maintain that Ms. Plant does not qualify as a victim of criminally injurious conduct under any of the motor vehicle exceptions listed in R.C. 2743.51(C). The Assistant Attorney General contended that there is no evidence that Ms. Womack: 1) attempted to intentionally harm the applicant; 2) was a fleeing felon; 3) was driving the vehicle under the influence of drugs and/or alcohol; or 4) had operated the vehicle in a manner that would constitute vehicular assault or aggravated vehicular assault as defined in R.C. 2903.08. The Assistant Attorney General argued that the facts in *In re Littler* and *In re Balish* are distinguishable from the facts in the present case, that speed alone is not recklessness per se and that Ms. Womack's driving history should not be used to prove that she acted recklessly on April 24, 2003.

{¶5} From review of the file and with full and careful consideration given to all the evidence presented at the hearing, a majority of the panel commissioners makes the following determination. We find that Ms. Plant has proven by a preponderance of the evidence that she qualifies as a victim of criminally injurious conduct.

{¶6} Revised Code 2743.51(C) states:

"(C) 'Criminally injurious conduct' means one of the following:

(1) For the purposes of any person described in division (A)(1) of this section, any conduct that occurs or is attempted in this state; poses a substantial threat of personal injury or death; and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle, except when any of the following applies:

(a) The person engaging in the conduct intended to cause personal injury or death;

(b) The person engaging in the conduct was using the vehicle to flee immediately after committing a felony or an act that would constitute a felony but for the fact that the person engaging in the conduct lacked the capacity to commit the felony under the laws of this state;

(c) The person engaging in the conduct was using the vehicle in a manner that constitutes an OVI violation;

(d) The conduct occurred on or after July 25, 1990, and the person engaging in the conduct was using the vehicle in a manner that constitutes a violation of section 2903.08 of the Revised Code."

{¶7} Revised Code section 2903.08 in pertinent part states:

"(A) No person, *while operating or participating in the operation of a motor vehicle*, motorcycle, snowmobile, locomotive, watercraft, or aircraft, *shall cause serious physical harm* to another person or another's unborn in any of the following ways:

(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

* * *

(b) *Recklessly*.

* * *

(B)(1) Whoever violates division (A)(1) of this section is guilty of aggravated vehicular assault. * * *

(C)(1) Whoever violates division (A)(2) * * * of this section is guilty of vehicular assault * * *." (Emphasis added.)

{¶8} Revised Code section 2901.22(C) contains the following definition:

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

In *In re Calhoun* (1994), 66 Ohio Misc. 2d 159, a judge of the Court of Claims ruled that:

"* * * to establish his eligibility for an award of reparations pursuant to R.C. 2743.51(C)(1)(d) and 2903.08, it is necessary for the applicant to prove, by a preponderance of the evidence, that the offender operated his vehicle with 'heedless indifference to the consequences' of his action. To establish this type of operation requires that the acts and risks of the offender must be known and disregarded. This proof must be established by factual evidence and probabilities, not by possibilities and speculation." Id. at 162.

{¶9} These types of cases warrant a fact-specific review. And in this case, the facts presented compel us to conclude that Ms. Womack acted recklessly. A review of the testimony along with witness statements contained in the claim file reveals that Ms. Womack acted in heedless indifference toward herself, other motorists, and pedestrians by her conduct on April 24, 2003. The facts demonstrate that Ms. Womack recklessly approached the intersection at an excessive rate of speed and disregarded the red light - a light that had been red for ten seconds. Moreover, according to information in the file, Ms. Womack's vehicle, a Chevrolet Cavalier, struck the applicant's SUV in the intersection with such force that it toppled the SUV. We also note that Ms. Womack lacked a valid operator's license (since 1995) at the time of the incident and continued to drive her vehicle in violation of state laws. Ergo, we find that in this case, Ms. Womack acted not only negligently, but also recklessly. We find, considering the totality of the circumstances, that Ms. Womack acted with heedless indifference to the consequences of speeding through a red light at an intersection and completely

disregarded the known risks that her conduct was likely to cause, i.e., an accident resulting in serious physical harm to another person. Therefore, the October 3, 2005 decision of the Attorney General shall be reversed and the claim shall be remanded to the Attorney General for total economic loss calculations and decision.

JAMES H. HEWITT III
Commissioner

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RANDI OSTRY LE HOTY
Commissioner

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Dissent of Commissioner Barwell,

I respectfully dissent from the majority's decision to qualify the applicant as a victim of criminally injurious conduct.

Louise Plant filed a reparations application seeking reimbursement of expenses incurred regarding an April 24, 2003 motor vehicle accident caused by Gloria Womack ("Ms. Womack" or "offender"). The Attorney General denied the claim under R.C. 2743.52(A) contending that the applicant failed to prove by a preponderance of the evidence that she qualifies as a victim of criminally injurious conduct under any of the motor vehicle exceptions listed in R.C. 2743.51(C).

Applicant's counsel stated that Ms. Womack operated the motor vehicle recklessly by driving without a valid operator's license since 1995, and speeding through a red light at an intersection. Counsel asserted that Ms. Womack's true *mens rea* was reflected at the time of the accident, as evidenced by her repeated illegal conduct. Lastly, counsel urged this panel to reverse the Attorney General's decision based on *In re Littler*, V04-60172tc (7-1-04), 2004-Ohio-4612; and *In re Balish*, V05-80428tc (3-7-06), 2006-Ohio-2162.

In order to qualify as a victim of criminally injurious conduct under any of the motor vehicle exceptions listed in R.C. 2743.51(C), Ms. Plant must prove by a preponderance

of the evidence that Ms. Womack: 1) attempted to intentionally harm the applicant; 2) was a fleeing felon; 3) was driving the vehicle under the influence of drugs and/or alcohol; or

4) had operated the vehicle in a manner that would constitute Vehicular Assault or Aggravated Vehicular Assault as defined in R.C. 2903.08.

Revised Code section 2903.08 in pertinent part states:

"(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in either of the following ways:

(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

* * *

(b) *Recklessly*.

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consequences, he perversely disregards a known risk that such circumstances are likely to exist."

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Ms. Plant was involved in a serious automobile accident on April 24, 2003. There is no evidence, however, to suggest that the driver who struck Ms. Plant was

operating the vehicle in a manner that constitutes a violation of R.C. 2903.08. Officer Mark Henley indicated that the driver who struck Ms. Plant (Ms. Womack) was driving the speed limit of 50 mph. However, even if Ms. Womack had exceeded the speed limit, speed in and of itself does not constitute recklessness as defined by Ohio law. *Morrow v. Hume* (1936), 131 Ohio St. 319; *Akers v. Stirn* (1940),136 Ohio St. 245. The court in the *Morrow* case stated that "wantonness can never be predicated upon speed alone; but when the concomitant facts show an unusually dangerous situation and a consciousness on the part of the driver that his conduct will in common probability result in injury to another of whose dangerous position he is aware, and he drives on without any care whatever, and without

slackening his speed, in utter heedlessness of the other person's jeopardy, speed plus such unusually dangerous surroundings and knowing disregard of another's safety may amount to wantonness." Id. at 324.

The facts of this case, however, do not reveal that the driver was driving in excess of the posted speed limit or that she was driving with a heedless indifference to the consequences of her actions. It is mere speculation to determine the true *mens rea* of the offender at the time of the accident. There was only one eyewitness who observed how long the light was red but he did not appear in court. The facts of this case illustrate pure negligence. Even the police officer who investigated the accident

did not find recklessness. The only facts we have left to review are that Ms. Womack ran a red light, was not wearing her seat belt and was driving with a suspended license.

Counsel argued this case is similar to both *In re Balish* (V2005-80428tc) and *In re Littler* V2004-60172tc. I disagree. Both cases are distinguishable from the facts of this case even though all three cases show evidence that the offender was operating a vehicle without a valid driver's license. The offender in *Littler* was 14 years old and in *Balish* the driver was an illegal immigrant. Both cases establish evidence that the offender did not have the proper training to drive a vehicle. The offender in this case however, once had a valid driver's license.

Counsel also argued that Ms. Womack's driving history, coupled with the length of time the light was red constitute recklessness. Upon review of Ms. Womack's driving

history, this commissioner finds that, there is no evidence that she habitually runs red lights. Ms. Womack does have a history of driving with a suspended license but no other history of reckless driving.

The evidence taken before this panel does not rise to the level of recklessness that constitutes a violation of R.C. 2903.08. This panel should affirm the decision of the Attorney General.

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Therefore, I find that there was insufficient evidence placed before this panel upon which a determination could be reasonably made that the applicant qualifies as a victim under R.C. 2743.51. While I am sympathetic to the applicant's injuries, the applicant simply did not establish by a preponderance of the evidence a case of criminally injurious conduct. Accordingly, for the reasons expressed above, I dissent.

GREGORY P. BARWELL
Commissioner

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LOUISE PLANT	:	ORDER OF TWO-COMMISSIONER PANEL
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IT IS THEREFORE ORDERED THAT

1) The October 3, 2005 decision of the Attorney General is REVERSED and judgment is entered for the applicant;

2) This claim is remanded to the Attorney General for total 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;

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

_____
JAMES H. HEWITT III
Commissioner

_____
RANDI OSTRY LE HOTY
Commissioner

ID #\2-tad-080406

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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To S.C. Reporter 12-22-2006