

[Cite as *In re Balish*, 2006-Ohio-2162.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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IN RE: JOANNE M. BALISH	:	Case No. V2005-80428
JOANNE M. BALISH	:	<u>OPINION OF A THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>
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{¶ 1} On August 30, 2004, the applicant, Joanne Balish filed an application for compensation as the result of an automobile accident which occurred on September 18, 2003. Applicant's husband, George Balish, was a passenger in the vehicle at the time of the incident and has also filed an application for compensation which was assigned Case No. V2005-80436. Applicant asserts she was the victim of an aggravated vehicular assault contending that the offending driver, Rosalia Mendez, was operating the vehicle without a driver's license and in a reckless manner. As the result of the incident, the applicant incurred unreimbursed allowable expense and work loss.

{¶ 2} On March 7, 2005, the Attorney General issued a Finding of Fact and Decision denying the applicant's claim asserting the accident did not meet any of the motor vehicle exceptions contained in R.C. 2743.51(C)(1)(a)(b)(c) or (d).

{¶ 3} Revised Code 2743.51(C)(1), in pertinent part, 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.

{¶ 4} On March 22, 2005, the applicant filed a request for reconsideration. On May 31, 2005, the Attorney General issued a Final Decision finding no modification of the previous decision was necessary. On June 6, 2005, the applicant filed a notice of appeal from the Attorney General's Final Decision. On June 23, 2005, the court issued a scheduling notice setting the matter for oral hearing on August 24, 2005. Subsequently, two motions for continuance of the hearing were filed. On October 28, 2005, the court rescheduled the hearing until January 11, 2006. Hence, this matter came to be heard before this panel of three commissioners on January 11, 2006 at 11:25 A.M.

{¶ 5} Due to the fact that the motor vehicular incident in question involved applicant, Joanne Balish, and her husband, George Balish and both were represented by the same attorney and it was agreed without objection that the hearing consider both cases simultaneously. Accordingly, both Joanne and George Balish, their counsel, and an Assistant Attorney General attended the hearing and presented testimony, an exhibit, and oral argument for this panel's consideration.

{¶ 6} George Balish testified that he was a passenger in the vehicle driven by his wife, Joanne Balish, on the day of the incident, September 18, 2003. It was a dry sunny summer afternoon at approximately 2:15 P.M. when the incident occurred. There were no weather or traffic conditions that contributed to the incident in Mr. Balish's opinion. Mr. Balish related they were traveling southbound on Interstate 270 in the middle lane approximately a quarter of a mile north of the Cemetery Road Exit when the offending driver in a white vehicle in the outside lane of northbound Interstate 270 suddenly and without apparent reason swerved onto the berm of the roadway, immediately overcorrected the driving error, crossed all three northbound lanes of traffic, the grass median and proceeded to strike the Balish vehicle. Under questioning from counsel, Mr. Balish testified that the driver of the white vehicle, later identified as Rosalia Mendez, made no evasive actions to avoid the collision, did not brake, sound her horn, or slow down. George Balish asserted the offender's vehicle traveled a minimum of seventy-seven feet straight across the roadway through the median and struck their vehicle. He related that while he was in the hospital, he was told by someone, a police officer he believes, that the offending driver did not have a driver's license and did not know how to drive.

{¶ 7} Mr. Balish went on to describe the seriousness of his injuries and the costs associated with his treatment and recovery. He asserted his costs far exceed the proceeds he received from his uninsured motorist coverage under his insurance policy. Not only was the offending driver unlicensed, but the vehicle in question carried no insurance coverage.

{¶ 8} Applicant's counsel presented color photographs of the accident scene for the panel members to view. The photographs graphically depict the accident scene and the lack of any skid marks left by the offending vehicle.

{¶ 9} Finally, Mr. Balish was questioned about the subsequent trial of the offending driver. He learned the driver did not speak English nor did she possess a driver's license, a social security card, or insurance. He stated the prosecutor was a temporary prosecutor and charged Rosalia Mendez with failure to control her vehicle, no driver's license, and no insurance. She was found guilty on all counts.

{¶ 10} An Assistant Attorney General cross examined Mr. Balish asking one question. Did you [Mr. Balish] bring any statements or documents with you stating that the offending driver was untrained to operate a motor vehicle? Mr. Balish answered no.

{¶ 11} Applicant, Joanne Balish, then took the stand and testified as to the events leading up to the collision. She stated she was operating the vehicle on the day in question and noticed the erratic driving of Ms. Mendez. Mrs. Balish observed the white car go onto the berm of the northbound lane of Interstate 270 and then proceed directly across all northbound lanes, the grass median and drive directly in front of their vehicle. Mrs. Balish testified she jammed on the brakes, but it was too late. She stated she saw Ms. Mendez's face prior to the collision and it was expressionless as if she was oblivious to her surroundings and the situation created by her

reckless driving. Joanne Balish proceeded to detail her injuries and the prolonged treatment and rehabilitation she sustained and continues to suffer to this day.

{¶ 12} The Assistant Attorney General had no questions for this witness. However, panel members sought answers concerning the current whereabouts of the offender, owner of the offending vehicle, and the total amount received from the Balish's insurance policy, (\$100,000 each). It was explained that this amount did not cover their respective medical expenses, work loss, or other related loss as a result of this collision.

{¶ 13} In closing argument, counsel for the applicants asserted the reckless conduct of the offending driver began the minute the vehicle was started. Ms. Mendez was aware she had no driver's license to operate a motor vehicle, the record is void of an indication she had driver training prior to the incident, and her manner of operating the vehicle is consistent with a driver who possessed no driving skills.

{¶ 14} An Assistant Attorney General argued that the only information that has been established concern the offending driver's lack of a driver's license, the vehicle was not insured, and that Ms. Mendez was found guilty of failure to control. It was unclear from the evidence whether or not the driver had ever had driver training. The Assistant Attorney General contends, based on these facts, that the offending driver's conduct does not arise to the level of reckless operation of a motor vehicle and, accordingly, the applicants were not victims of criminally injurious conduct.

{¶ 15} From review of the file and with full and careful consideration given all the information presented at the hearing, this panel makes the following determination. We find that the applicant, Joanne Balish, has proven, by a preponderance of the evidence, that she qualifies

as a victim of criminally injurious conduct under the motor vehicle exceptions contained in R.C. 2743.51(C).

{¶ 16} Revised Code 2743.51 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.

{¶ 17} Revised Code 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;

(2) Recklessly.

(B)(2) Whoever violates division (A)(2) of this section is guilty of vehicular assault. Except as otherwise provided in this division, vehicular assault is a felony of the fourth degree.

OR

(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 of the type described in division (E)(2) or (5) of section 2901.01 of the Revised Code to another person.

(B) Whoever violates this section is guilty of vehicular assault a felony of the fourth degree.

(C) As the proximate result of committing a violation of division (1)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) Recklessly.

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

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

{¶ 18} R.C. 2901.22(C) defines the culpable mental state of “recklessly” as follows:

(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.

{¶ 19} In In re Calhoun (1994), 66 Ohio Misc. 2d 159, a judge of the Court of Claims ruled that

* * * 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.

{¶ 20} According to information in the file and the testimony presented, we find Rosalia Mendez operated the vehicle on September 18, 2003 in violation of R.C. 2903.08. She operated the vehicle without a driver’s license and in such a manner that evidenced she possessed no training or experience in the safe operation of a motor vehicle. She acted in heedless indifference to herself and to other motorists being unable to control the vehicle and by doing nothing to avoid a collision with vehicles traveling in the opposite direction on an interstate highway.

{¶ 21} In *re Littler*, V2004-60172tc (7-1-04), 2004-Ohio-4612, a panel of commissioners held that an unlicensed driver of a motor vehicle who fails to yield the right of way acts in a reckless manner. While each case must be considered on its own merits, a review of the testimony along with the witness statements contained in the claim file, reveal the

offending driver had a total disregard for the safety of the other drivers on the interstate. The testimony of the witnesses coupled with the lack of evasive actions taken by the offending driver, the lack of skid marks left by the offending driver plus the compelling testimony of Joanne Balish that the offending driver was emotionless at the time of the impending collision leaves this panel to reach one conclusion; that the offending driver's heedless indifference to herself and other motorists elevated her actions to a violation of R.C. 2903.08. It should also be noted that the owner of the vehicle, Silva Raymundo Ramirez, contributed to this crime by allowing an unlicensed driver to operate his uninsured vehicle. Therefore, based upon the above findings and rationale, the May 31, 2005 decision of the Attorney General shall be reversed and this claim remanded to the Attorney General for economic loss calculations and decision.

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

LLOYD PIERRE-LOUIS
Commissioner

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IN RE: JOANNE M. BALISH	:	Case No. V2005-80428
JOANNE M. BALISH	:	<u>ORDER OF A THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>
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IT IS THEREFORE ORDERED THAT

- 1) The May 31, 2005 decision of the Attorney General is REVERSED and judgment is rendered for 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;

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ORDER

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ORDER

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

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

LLOYD PIERRE-LOUIS
Commissioner

ID #\9-drb-tad-013106

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. 4-14-2006

