Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Americar Rental System, Inc.—Damage to Rental Cars

File: B-261274

Date: January 16, 1996

DIGEST

A rental car company appeals settlements denying claims for reimbursement for damage to two vehicles rented by government employees on official business. Under terms of an agreement with the Military Traffic Management Command (applicable to most federal agencies), in renting cars to government employees, the rental company assumes all liability for the vehicles unless one of several specified exceptions apply, two of which the rental company seeks to apply in this case. In one claim, the issue is whether the driver committed willful or wanton negligence when he left the keys in the ignition and the engine running in an unattended vehicle that was stolen. In the other, the issue is whether the employee was under the influence of alcohol when he drove off the side of the road. In each case, the standard is controlled by the law of the state in which the conduct occurred. Both settlements are affirmed on the basis that there is insufficient evidence in the record to support the claims under either exception.

DECISION

Americar Rental System, Inc., of Madison, Alabama, appeals two settlements by our Claims Group denying claims for damage to vehicles Americar rented to federal government employees who were authorized by their agencies to rent the vehicles incident to their temporary duty assignment.[1] The settlements are affirmed.

BACKGROUND

In the first case, the vehicle was stolen after the employee, Junior D. Kerns, a civilian employee of the Department of Defense, left the keys in the ignition and the

[1]The two settlements are Z-2869367-01, Jan. 27, 1995, which involved a vehicle driven by Junior D. Kerns, and Z-2869367, April 4, 1995, which involved a vehicle driven by James G. Powers. Ms. Anna P. Weeks, the owner of Americar Rental Systems, Inc., submitted the appeals on behalf of the company.

engine running when he went inside a convenience store in Huntsville, Alabama, to pay for gasoline. The vehicle eventually was recovered in damaged condition. Americar's $2,662.42 claim consists of $1,840.17 for repairs and $822.25 for lost rental revenue at $14.95 a day for the 55 days the car was missing or being repaired.

In the second case, James G. Powers, then an employee of the National Aeronautics and Space Administration, ran off the side of a road returning to his motel after dinner at a friend's home near Huntsville, Alabama. The vehicle was a total loss. Mr. Powers asserts that the accident, which occurred at about 10:30 p.m., resulted from darkness and his temporary blindness caused by an approaching car's failure to dim its lights, and his unfamiliarity with the road, which he states went from four lanes to two lanes abruptly and without sufficient warning. Mr. Powers acknowledged having two beers between 5 p.m. and 6 p.m., prior to dinner, but asserts he was not under the influence of alcohol when the accident occurred. Mr. Powers's statement is supported by a statement from the friend at whose home he had spent the evening.

Mr. Powers also states that he passed several field sobriety tests administered by the police at the accident scene, although the fact that these tests were administered is not noted on the police report. The police report includes a notation of alcohol, but gives no further explanation. Mr. Powers states that the notation was made because he told the policeman that he had consumed two beers earlier in the evening. According to the report, the investigating officer did not cite Mr. Powers for driving under the influence of alcohol.

Americar's claim for this loss is $10,538.84, which includes the value of the vehicle (less salvage value), towing, and loss of use for 28 days.

Both rentals are covered by the basic U.S. Government Car Rental Agreement, promulgated by the Military Traffic Management Command. Americar on August 28, 1992, accepted the terms of this agreement as covering its rental of cars to federal employees authorized to rent vehicles at government expense.[2]

Paragraph 9a of the agreement provides in pertinent part as follows:

> "b. Loss of or Damage to Vehicle. Notwithstanding the provisions of any Company vehicle rental agreement executed by the Government renter, the Company hereby assumes and shall bear the entire risk of

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[2]Americar is one of several rental companies that entered into the agreement to make special rates and privileges available to government employees, including maintaining full comprehensive and collision insurance, the cost of which is built into the rental rates charged.

loss of or damage to the rented vehicles (including costs of towing, administrative costs, loss of use, and replacements), from any and every cause whatsoever, including without limitation, casualty, collision, fire, upset, malicious mischief, vandalism, falling objects, overhead damage, glass breakage, strike, civil commotion, theft and mysterious disappearance, except where the loss or damage is caused by one or more of the following:

"(1) Willful or wanton misconduct on the part of a driver.

. . . . .

"(3) Operation of the vehicle by a driver who is under the influence of alcohol or any prohibited drugs;"

Paragraph 9c provides that claims for damage to a vehicle "will not include amounts for loss of use."

The two agencies involved and our Claims Group denied Americar's claims on the basis that liability is precluded by the terms of the agreement. Americar disagrees, arguing that the exception for willful or wanton misconduct on the part of the driver applies to Mr. Kerns's leaving the keys in the ignition and the engine running, and the exception for operation of the vehicle by a driver who is under the influence of alcohol applies to Mr. Powers.

OPINION

As a preliminary matter, we note that as the Claims Group stated, the amounts claimed for loss of use of the vehicles in both cases would not be payable because of the specific exclusion of claims for loss of use stated in paragraph 9c, quoted above, whether or not the cases are covered by an exception in paragraph 9a.

As to the two exceptions to which Americar refers, the meanings of the terms "wanton or willful misconduct" and "under the influence of alcohol," used in paragraph 9a of the agreement, are not defined in the agreement. Therefore, it is appropriate to look to the law of the state in which the conduct occurred in construing those terms. Thus the issues here are whether, under Alabama law, Mr. Kerns's act of leaving the keys in the unattended car with the motor running while paying for gasoline amounts to willful or wanton misconduct, and whether Mr. Powers was under the influence of alcohol, thus causing his accident.

The Kerns case

In Lynn Strickland Sales v. Aero-Lane Fab., 510 So. 2d 142 at 145 (Ala. S. Ct. 1987), the Alabama Supreme Court, in distinguishing between negligence and wanton or willful conduct, stated that "Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury." Wanton or willful misconduct is distinguished from negligence not by the level of misconduct, but rather by the actor's state of mind. Valley Building & Supply, Inc. v. Lombus, 590 So. 2d 142 (Ala. S. Ct. 1991). The actor must possess some degree of consciousness "that injury is likely to result from his act or omission." Id. at 144. The test for wanton misconduct also has been expressed as whether the "act or failure to act is in reckless disregard of the consequences." Hamme v. CSX Transportation, Inc., 621 So. 2d 281 (Ala. S. Ct. 1993).

In this case, there is no evidence that Mr. Kerns believed that, in the brief time it would take him to pay for the gasoline, the car was likely to be stolen or that he had no regard whether or not the car was stolen. As the Claims Group noted, the theft of the car clearly was contrary to Mr. Kerns's interests. Therefore, while Mr. Kerns may have been negligent, we do not believe his conduct rose to the level of willful or wanton.[3]

The Powers case

The Alabama Code provides that "[a] person shall not drive or be in actual physical control of any vehicle while: . . . (2) Under the influence of alcohol . . . ." Ala. Code 1975 § 32-5A-191(a)(2). This statute does not define "under the influence." However, the Alabama Supreme Court has interpreted this phrase to require evidence that the driver had consumed alcohol "to the extent that it affected his ability to operate his vehicle in a safe manner." Ex Parte Buckner, 549 So. 2d 451, 453 (Ala. S. Ct. 1989). This may be established with eyewitness testimony regarding how the person had been driving, his physical appearance and his inability to perform certain coordination tests. Frazier v. City of Montgomery, 565 So. 2d 1255, 1258 (Ala. Ct. App. 1990).

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[3]The Alabama Supreme Court, in a case in which it held that the operator of a vehicle was not liable for damages caused to a third party by someone who stole the vehicle, even though the operator left the vehicle unattended with the keys in the ignition, recognized that leaving the keys in the ignition may constitute negligence, but made no mention of wanton or willful conduct. Linner Vines, etc., et al. v. Plantation Motor Lodge et al., 336 So. 2d 1338 (S. Ct. 1976).

There is no evidence that the two beers Mr. Powers admits to drinking prior to his dinner, and some 5 hours before the accident, affected his ability to drive in a safe manner. None of the types of evidence cited in Frazier, supra, is present in the record here. Moreover, the investigating officer's failure to cite Mr. Powers for driving under the influence, or even to note administration of a breath test, suggests that he did not consider that Mr. Powers had been driving under the influence of alcohol.

Therefore, we do not believe Americar has provided sufficient evidence to establish its claims under the cited exceptions to the agreement in either of the two cases. Accordingly, the Claims Group settlements are affirmed.

/s/Seymour Efros
for Robert P. Murphy
General Counsel