BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION

CITY OF FAIRBANKS FIRE DEPARTMENT,	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
	)	
DIVISION OF FORESTRY,	)	
	)	
Contracting Agency.	)	OAH No. 05-0057-CON
	)	Contract AK-DF-A-04-FS-0026

PROPOSED DECISION

I. Introduction

The City of Fairbanks Fire Department filed a claim with the Division of Forestry for damages to a pumper/tender incurred while it was rented to the division. The division denied the claim. The fire department filed an appeal, which was denied by Marlys Hagen, the procurement officer for the Department of Natural Resources. The fire department filed a further appeal with the Department of Administration under AS 36.30. The commissioner referred the matter to the Office of Administrative Hearings and the chief administrative law judge appointed administrative law judge Andrew M. Hemenway as the hearing officer.

The hearing officer conducted a telephonic hearing on February 28, 2004. Warren Cummings, chief of the Fairbanks Fire Department, testified and represented the fire department. Ms. Hagen testified and represented the division. Both parties agreed to submit the matter for decision on the record and the testimony at the hearing.

I recommend that the claim be denied.

II. Facts

Under AS 41.15.010, the State of Alaska is responsible for fire protection of natural resources on land owned privately, by a municipality or by the State of Alaska.

To implement AS 41.15.010, the Department of Natural Resources, Division of Forestry, executes cooperative agreements with other entities with fire protection responsibilities, including the City of Fairbanks. The cooperative agreements are supplemented by annual operating plans.

The 2004 operating plan between the division and the Fairbanks fire department describes notification procedures, response procedures, communications and command systems, dispatch priority, investigation responsibilities, and other matters, including fiscal considerations.

Having made these prior general arrangements, the division rented from the fire department a 1974 Kenworth pumper/tender. The equipment rental contract included the following condition of hire:

> 12. Apparatus Loss, Damage or Destruction – [The division] will reimburse the Cooperator for the costs of loss, physical damage or destruction to apparatus, other than normal wear and tear, arising from the fault of [the division]. [The division's] liability is limited to the lesser of the actual repair costs or market value. [The division] is not responsible for indirect damages such as loss of use or lost profits.

On July 19, 2004, while under rental to the division, the pumper/tender was being operated by a fire department employee who had not been hired by the division.[1] At about 8:30 p.m., while the operator was driving with reasonable care, the treads on the left front tire separated and the tire blew. As a result of the tire failure, the truck left the roadway, went airborne, and was totaled. The cause of the tire's failure was normal wear and tear to, or an inherent defect in, the left front tire.

The fire department had purchased the vehicle new in 1973. The purchase price was $48,786. The fire department submitted a claim in the amount of $46,311, which is 10% of the purchase price of a replacement vehicle.

III. Discussion

In this case, the relevant facts were undisputed. The only question for resolution is whether the contract placed the risk of loss for the physical damage on the fire department or on the division.

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[1] The rental agreement provided that the division had discretion to hire the operator (a fire department employee) as a temporary employee.

In support of its claim, the fire department relies on paragraph 12 of the terms of conditions, quoted above. In the fire department's view, paragraph 12 places the risk of loss for physical damage to the rented property (other than normal wear and tear) on the division, or at least is misleading.

Paragraph 12 expressly addresses only damage "arising from the fault of [the division]." Because it is undisputed that the division was not at fault in this case, Paragraph 12 cannot reasonably be read to place liability on the division.[2] Furthermore, the fire department's argument that Paragraph 12 is misleading rests not so much on the language of that provision as on the observation that because damage was not caused by an act of the fire department, and the vehicle was under rental to the division, the division "should, by definition, assume the liability." Whether as a policy matter the division should accept liability is a question the affected parties may wish to consider in the future, as they review their cooperative agreements and annual operating plans. But whether as a contractual matter the division actually has accepted that liability depends on what the contract says, not on what the division "should" do.

On the question of liability for physical damage not caused by the fault of the division, the contract is silent: Paragraph 12 expressly accepts liability for damages (other than normal wear and tear) that are the fault of the division, but it does not expressly limit the division's liability for other damages.[3] As a result, the express language of the

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[2] The fire department's argument appears to be that any physical damage that occurs while the vehicle is in rental status is the "fault" of the division, in the sense that but for the rental agreement, the equipment would not have been engaged in the activity in question. In the fire department's reading, "fault" is not a pejorative term; it connotes causality and not negligence. I do not find that reading reasonable. *Cf.* AS 45.12.103(a)(6) (in commercial lease context, "'fault' means wrongful act, omission, breach, or default"). It might just as well be said, under the fire department's reading, that the damage was its own "fault": it was the fire department that offered to rent the vehicle with a worn tire in the first place.

Nor does the fact that the division inspected the vehicle mean that the division is at fault, at least not to the point of superceding the fire department's express undertaking to provide a safe, non-defective vehicle. Assuming that the tire that blew had an observable defect (*e.g.*, worn treads), the pre-inspection clause in the rental agreement authorized the division to reject the vehicle but did not otherwise affect the division's rights or remedies. *See* AS 45.12.516 (acceptance "does not of itself impair another remedy provided by this chapter or the lease agreement for nonconformity."); AS 45.12.519(c) (after acceptance lessee may recover its losses, including incidental and consequential damages); *cf.* AS 45.12.214(c)(2) (after inspection by buyer, "there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed."); AS 45.12.215 (express and implied warranties are cumulative).

[3] In a prior case raising similar issues, the clause governing physical damage included language limiting liability, as well as language accepting liability. *See*, Smith v. Division of Forestry, OAH No. 05-0001-CON (February 10, 2005). The clause in that case stated:

contract does not foreclose interpreting the contract to impose liability on the division for physical damage that was not its fault.[4]

Because the contract is silent on liability for physical damage that is not the fault of the division, a reasonable implied term should be read into the contract.[5] A contract is interpreted as a whole to give effect to the reasonable expectations of the parties.[6] The parties' reasonable expectations is determined in light of the written documents and the extrinsic evidence.[7]

In this case, because the contract states that the division "will reimburse" the fire department for physical damage that is the "fault" of the division, it is reasonable to infer that the division will not reimburse the fire department for physical damage that is not fault of the division.[8] In addition, it would be inconsistent with general legal principles to impose liability for such damages on the division. In the context of a personal property lease, the lessor retains the risk of loss, regardless of fault, unless a provision in the lease imposes liability on the lessee.[9] Similarly, in the bailment context, the bailor is liable for damage to the bailed goods, except insofar as the bailee fails to exercise ordinary care.[10]

Because it is reasonable to read the contract as imposing liability for the damages on the fire department, and because a contrary reading would be inconsistent with

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> The State will only reimburse the Contractor for the costs of loss, physical damage or destruction arising directly from the negligence of the State's employees. The State's liability is limited to the lessor [sic] of the actual repair costs or prevailing market value. The State is not responsible for indirect damages such as loss of use or lost profits. No compensation will be paid for normal wear and tear.

4 Paragraph 17 of the terms and conditions of rental provides that the rental rates are based on actual operating costs, including routine maintenance and normal wear and tear. In light of this provision, even if the contract could be read to require the division to pay for "physical damage" that was not the division's fault, it would be unreasonable to interpret the contract as obligating the division to pay for normal wear and tear: normal wear and tear is to be covered in the rental rate. For this reason, the division is not liable for the cost of the tires, even if they failed as a result of normal wear and tear.

5 RESTATEMENT OF CONTRACTS (2D) §204 (1981); Disotell v. Stiltner, 100 P.3rd 890, 895 (Alaska 2004).

6 Southwest Marine v. State, 941 P.2d 166, 173 (Alaska 1997).

7 *See, e.g.*, Leisnoi, Inc. v. Stratman, 956 P.2d 452, 454 (Alaska 1998). The parties' testimony regarding the course of dealings and surrounding circumstances is relevant. However, the parties' testimony regarding their unexpressed subjective intent or understanding at the time the contract was executed need not be considered. *See* Sprucewood Investment Corp. v. Alaska Housing Finance Corp., 33 P.3rd 1156, 1162 (Alaska 2001); Peterson v. Wirum, 625 P.2d 866, 870 (Alaska 1981).

8 *See, e.g.*, Trapp v. State, Office of Public Advocacy, ___ P.3rd ___ at n. 16 (Alaska, May 13, 2005) (expression of one thing implies exclusion of others).

9 AS 45.12.219(a).

10 *See, e.g.*, Alaska Continental v. Trickey, 933 P.2d 528, 536 (Alaska 1997).

generally applicable principles of personal property law, I conclude that the division is not liable under the contract for the physical damage to the pumper/tender that was not caused by its own negligent act or omission.

IV. Conclusion.

The division is not liable under its contract for the physical damage to the pumper/tender under the circumstances of this case. This claim should be denied in its entirety.

DATED June 16, 2005.

Andrew M. Hemenway
Administrative Law Judge

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

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June 22, 2005

Chief Warren Cummings
Fairbanks Fire Department
656 7th Avenue
Fairbanks, Alaska 99801

Re: Contract Claim Appeal, Contract No. AK-DF-A-04-FS-0026
CERTIFIED MAIL NO. 7001 1940 0001 5861 9493

Dear Chief Cummings:

I have reviewed the record and the proposed decision of the administrative law judge in this matter and I have determined to adopt the proposed decision as my own. A copy of the decision is enclosed.

This is the final administrative decision regarding this contract claim. If you are dissatisfied with my decision, you may appeal to the superior court. An appeal must be filed within 30 days of the date this letter was mailed to you, in accordance with the applicable rules of court and AS 36.30.685. For further information on the appeal process, please contact the clerk of court.

Sincerely,

Ray Matiashowski
Commissioner

Enclosures (1)

cc: Marlys Hagen
Procurement Officer
Dept. of Natural Resources

Terry Thurbon
Chief Administrative Law Judge
Office of Administrative Hearings