

Nelson & Dahle, P.C.

Billings office : 2619 St. Johns Avenue, Suite E : Billings, Montana 59102 : phone 406.867.7000
Bozeman office : 105 West Main Street, Unit MC : Bozeman, Montana 59715 : phone 406.867.7000

Mountain West Farm Bureau v. Fitte and DeTienne (decision)

FEDERAL COURT

INSURANCE: "Conduct of business" in "Business Squire" policy triggers coverage of wildfire that resulted from felling dead tree in yard of home-based business to protect business equipment and personal property from falling tree and then burning the branches for personal aesthetic reasons ("dual-purpose" conduct)... Strong.

Robert Fitte operates a home remodeling and siding business as sole proprietor in Helena. He uses a room of his home as an office, maintains a separate business phone, and deducts part of his business insurance and utility expenses from his taxes. He lists his home address in his Yellow Pages ad. He keeps work equipment and vehicles at his home and has no other business address. In 2012 he decided to remove a dead 70' tree from his yard, primarily to prevent it from falling on work equipment and to protect non-business personal property. He felled it 6/21/12, then stripped the branches and burned them in his yard. On 6/23, after he thought the fire had gone out, it ignited an adjacent wooded area. The flames spread to neighboring properties, allegedly causing damage that prompted claims against him including a State Court action by Kevin DeTienne. He had a \$300,000 personal lines policy and a \$1 million business policy from Mountain West. Mountain West has defended under the personal policy and committed to paying its limit. It is defending under the business policy subject to reservation of rights, but denies any obligation to provide coverage. The business policy states that Fitte is an insured "only with respect to the conduct of a business." It limits coverage to his operations, listed as "siding installation" and "contractors-subcont work in connect w/BLDG const."

Mountain West argues that the definition of "insured" limits coverage to damages arising only from business activity, and that "business conduct" must have been part of "a continuous or regular activity for the purpose of earning a profit or making a living." Lambert (WV 1995). It also cites Eyler (Ky. 1992) and Miller (Mo. App. 1994) (business conduct involves a "continuity of activity with a profit motive." It acknowledges that Fitte felled the tree "arguably" for both business and personal reasons, but argues that the claims arise from the separate act of burning the branches, which served an exclusively personal purpose – improving aesthetics of his property. It argues that even if the claims are attributed to the more general act of hazard removal they are still not covered because the conduct was only partly for business purposes. It argues that the phrase "only with respect to the conduct of a business" necessarily excludes conduct that serves both business and personal benefits. Heinz (Ida. 2001).

DeTienne and Fitte argue that the claims arise from Fitte's tree removal operation, of which disposing of the branches was a part, and that he removed the tree at least in part to protect business equipment and therefore burning the tree was covered business conduct. DeTienne cites cases for his contention that the "conduct of business" includes activity that does not directly garner profit: Carpenter (Alaska 2003) (felling tree for firewood in home from which insured ran floor covering business was covered); United Pacific (ED NY 2006) (removal of ice from sidewalk at construction site construed as business activity); Lineham (Wis.2000) (keeping dog at bar as guard & mascot is business activity). Fitte and DeTienne contend that the conduct should be covered even if Fitte acted for personal as well as business benefit – that "dual-purpose conduct" should be covered by both policies. They cite Cope (ND Indiana 1991) (vacation covered if sufficiently related to business purposes even if also partly recreational).

Carpenter is instructive as to whether the fire arose from business conduct: "Businesses necessarily engage in much conduct that is incidental to and supportive of revenue-earning operations. Businesses must, for example, acquire supplies, equipment and fuel, pay bills, bank, repair what they use, and send their employees on countless errands in support of operations." Business operations also include keeping equipment safe, including disposal of a large dead tree that threatens assets. Disposal only began with felling the tree. Fitte continued disposal when he burned the branches. The fire resulted from the tree disposal that he undertook in part for business purposes. This is not a "cosmic, zen-like argument that all things are connected from the beginning of time" as Mountain West asserts. The connection between felling and disposal by burning is clear & concrete. Burning the tree was in part the "conduct of business" which, for a sole proprietor like Fitte, includes many tasks in support of the work for which he is actually paid. At the very least, "conduct of business" is ambiguous and must be construed in favor of the insured.

The business policy covers damages arising out of conduct of business, even if the conduct is also motivated by non-business interests. Mountain West's argument that it limits coverage to conduct that is only for business relies on a strained interpretation of "only with respect to the conduct of a business." A more reasonable reading is that it limits coverage to only conduct that served a business purpose – conduct must be business related, not purely personal. This would include business conduct that might also serve some personal benefit. If Mountain West intended to say that only conduct exclusively for business purposes was covered it certainly could have. Its interpretation would make coverage illusory or nearly so, allowing it to deny coverage even for conduct 99% motivated by business interests. Cope held that the identical "only with respect to the conduct of business" was ambiguous because "reasonable persons might well differ on the question of whether they exclude coverage for activities furthering dual purposes of recreation and profit." It denied summary judgment, holding that coverage existed if the insured could prove at trial that the trip was sufficiently related to business. Mountain West contends that Cope turned on the "highly nebulous matter of whether a trip was for business or pleasure." It is unclear why it believes the distinction between a trip and other activity is significant, but in any event, nothing in this case is highly nebulous. It is undisputed that Fitte was removing the tree for both business and personal benefits. Mountain West urges the Court to follow Heinz, which held that either a personal policy or a business policy, but not both, could apply. The policy in Heinz completely excluded business conduct, so the parties agreed that only one policy or the other would apply. Those critical circumstances do not exist here. In light of the plain language of the contract and the case law, Fitte's "conduct of business" triggers coverage under the policy, notwithstanding the personal benefit he also derived from the conduct. Claims arising out of the fire must be covered by the business policy. Summary judgment for Fitte and DeTienne.

Mountain West Farm Bureau Mutual Ins. v. Fitte and DeTienne, 40 MFR 516, 8/19/13.

Randall Nelson (Nelson & Dahle), Billings, for Mountain West; Joe Seifert (Keller, Reynolds, Drake, Johnson & Gillespie), Helena, for Fitte; Thomas Budewitz, Helena, for DeTienne.