

DISTRICT COURT

NEGLIGENT SPOILIATION claim against City relating to items not preserved at scene of fire barred by public duty doctrine ... Gustafson.

A fire occurred in the JJC Center in Billings 9/4/01. Dep. Fire Marshall Michael Spini led the investigation. He called then Fire Marshall Lonnie Larson who was home on vacation. Larson's interviews of firefighters were taped, but the tapes disappeared from his vehicle while he finished his vacation. Thermal images taken by the suppression crew were not recorded, and the crew used a backhoe to move debris before it could be investigated. Spini concluded that the fire originated in the attic due to an electrical failure. The investigation team collected 9 attic fans, a padlock, a hasp, and a roof hatch. Spini informed each suite owner or tenant that the FD retained some items and they should advise if they were interested in any of them. Robert & Mary McDermott, owners of 2 units, sent a letter of interest regarding the retained items and complained about how the fire was suppressed. They allege negligent spoliation by the City. The City contends that liability is barred by the public duty doctrine. McDermott's assert exceptions: that the City undertook specific actions to preserve evidence to protect interested persons including them, and that it induced detrimental reliance.

From Masee (Mont. 2004) it appears that the public duty doctrine is not limited to law enforcement, but is applicable to negligence claims against any "public entity or person." Pursuant to the doctrine, the City cannot be liable for duties it owes to the public absent a special relationship. Nelson (Mont. 1999). The parties agree that the 1st and 4th Nelson factors are inapplicable.

There are no facts to satisfy the 2nd factor that an agent for the City undertook a specific action to protect McDermott's. They at no time during or after the fire spoke with anyone from the FD or PD about the fire. Their only communication was their letter expressing interest in the items retained from the scene, and it made no mention or inquiry as to the manner in which items were preserved. The FD's objectives of determining if criminal activity was involved and preventing similar fires were for the protection of the public, not the particular benefit of McDermott's so they could pursue litigation.

As to the 3rd factor, McDermott's have not established that they were induced to detrimentally rely on the FD to collect & preserve evidence. The reliance contemplated is more than just a general reliance. They must show that they depended on specific actions of the FD which led them to forego other means of protecting themselves such as conducting their own inspection and their own collection & preservation of possible evidence. They admit that they did not receive any personal assurances from the FD that it would collect & preserve evidence for them, and they never inspected the items collected & retained by the FD when invited to do so. As they had no knowledge regarding the investigation they could not have reasonably relied on FD's investigation and preservation of evidence to their detriment. At best they can establish that they generally relied on FD employees to investigate cause & origin and collect & preserve evidence as they believed such to be part of the employees' jobs.

While the FD has a duty pursuant to §50-63-202 to investigate cause & origin, there is no statute or other authority imposing a duty to preserve evidence from every fire. McDermott's argue that in undertaking to preserve some evidence and not other evidence the City assumed a special duty to individuals affected by the fire. However, merely retaining items from a fire in the normal course of the investigation is not sufficient to create a special duty to preserve evidence from every fire scene. Summary judgment for the City.

McDermott v. Billings, Yellowstone DV 04-915, 6/17/05. Thomas Singer (TTS Civil Trial Attorneys), Billings, for McDermott's; Jared Dahle (Nelson & Dahle), Billings, for the City.