

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 2

WCC No. 2007-1863

SHELLY WEIDOW

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Third-Party Petitioner

vs.

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST

Third-Party Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Montana Supreme Court 2/19/10

AFFIRMED 12/30/10

Summary: Petitioner began working on a residential construction project on property owned by Bradley Howard or the Howard Family 1995 Trust as an employee of the general contractor. Howard fired the general contractor and began paying Petitioner directly. Petitioner was injured on the job on June 13, 2006. Howard did not have workers' compensation insurance. Bradley Howard/Howard Family 1995 Trust argue that neither is liable for Petitioner's injuries because Petitioner was a casual employee.

Held: Petitioner's activities while employed by Howard do not constitute casual employment. The UEF is therefore liable for Petitioner's medical benefits. Petitioner has not proven that he is entitled to indemnity benefits. Pursuant to § 39-71-541, MCA, Bradley Howard/Howard Family 1995 Trust must indemnify the UEF for benefits paid to Petitioner.

Topics:

Witnesses: Credibility. Where a witness unfamiliar to the Court testified telephonically by stipulation of the parties, the Court determined that it could consider the credibility of the witness' telephonic testimony, but would assign that testimony less weight since the witness' testimony could not wholly be assessed via telephonic appearance.

Trial: Telephonic Testimony. Where no party objected to a witness testifying telephonically at trial, and no party raised any concerns regarding the identity of the witness or the possibility that he could refer to documents during his testimony, and the Court found that it could not evaluate the witness' demeanor nor determine whether he was being coached or improperly referring to documents, the Court noted that it was at a disadvantage to evaluate the witness' testimony. However, the witness also submitted an affidavit and other documentation which were admitted into evidence. While the Court found itself in a position where it could not truly assess the witness' credibility, the Court concluded that it could assign weight to the testimony.

Evidence: Credibility. Where no party objected to a witness testifying telephonically at trial, and no party raised any concerns regarding the identity of the witness or the possibility that he could refer to documents during his testimony, and the Court found that it could not evaluate the witness' demeanor nor determine whether he was being coached or improperly referring to documents, the Court noted that it was at a disadvantage to evaluate the witness' testimony. However, the witness also submitted an affidavit and other documentation which were admitted into evidence. While the Court found itself in a position where it could not truly assess the witness' credibility, the Court concluded that it could assign weight to the testimony.

Employment: Casual Employment. The Court found the UEF's reliance on *Howe v. UEF*, 2006 MTWCC 7, in concluding that the claimant was a casual employee to be misplaced. In *Howe*, the UEF attempted to impute liability to another party from speculating that the party may have received a tax advantage; in the present case, actual evidence of a tax advantage was presented, distinguishing this case from *Howe*.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. Where the claimant has submitted no evidence that

he has been taken off work, and no evidence as to whether he has reached maximum healing, he has not proven an entitlement to TTD benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Although the claimant submitted no medical evidence, where the parties stipulated that the claimant suffered injuries and incurred medical expenses as a result of his industrial accident, the Court concluded that he is entitled to medical benefits pursuant to § 39-71-704, MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. Where the claimant was injured while working on the construction of a vacation home, and significant evidence demonstrated that the employer/homeowner deducted the property as a business expense in previous years' tax returns, used the property's address as the registration address for his private airplane in order to avoid significant tax liability in his home state, and represented to the IRS that the property was a business property, the Court concluded the property was part of a "business" as defined in *Colmore v. UEF*, 2005 MT 39, and therefore the claimant's work on the property was not "casual employment."

Employment: Casual Employment. Where the claimant was injured while working on the construction of a vacation home, and significant evidence demonstrated that the employer/homeowner deducted the property as a business expense in previous years' tax returns, used the property's address as the registration address for his private airplane in order to avoid significant tax liability in his home state, and represented to the IRS that the property was a business property, the Court concluded the property was part of a "business" as defined in *Colmore v. UEF*, 2005 MT 39, and therefore the claimant's work on the property was not "casual employment."

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-541. Where the uninsured employer was joined as a party to the action and participated in a department mediation and where the Court ordered the uninsured employer to be joined as a third-party respondent prior to trial, the statutory requirements of § 39-71-541(1), -(2)(a), MCA, have been met. Since the uninsured employer has not raised any arguments that he should not be ordered to indemnify the UEF, the Court will enter judgment ordering the uninsured employer to indemnify the UEF pursuant to § 39-71-541(2)(b), MCA.

Indemnification: Uninsured Employers Fund. Where the uninsured employer was joined as a party to the action and participated in a department mediation and where the Court ordered the uninsured employer to be joined as a third-party respondent prior to trial, the statutory requirements of § 39-71-541(1), -(2)(a), MCA, have been met. Since the uninsured employer has not raised any arguments that he should not be ordered to indemnify the UEF, the Court will enter judgment ordering the uninsured employer to indemnify the UEF pursuant to § 39-71-541(2)(b), MCA.

Uninsured Employers Fund: Indemnification. Where the uninsured employer was joined as a party to the action and participated in a department mediation and where the Court ordered the uninsured employer to be joined as a third-party respondent prior to trial, the statutory requirements of § 39-71-541(1), -(2)(a), MCA, have been met. Since the uninsured employer has not raised any arguments that he should not be ordered to indemnify the UEF, the Court will enter judgment ordering the uninsured employer to indemnify the UEF pursuant to § 39-71-541(2)(b), MCA.

¶ 1 The trial in this matter was held on May 4-5, 2009, in the Workers' Compensation Court, Helena, Montana. Petitioner Shelly Weidow (Weidow) was present and represented by James G. Hunt and Jonathan McDonald. Respondent Uninsured Employers' Fund (UEF) was represented by Joseph Nevin. Third-Party Respondent Bradley Howard/Howard Family 1995 Trust was represented by G. Andrew Adamek.

¶ 2 Exhibits: Exhibits 1 through 27 were admitted without objection. The Court admitted the affidavits of Lawrence Becker and Cynthia A. Utterback as Exhibit 28.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Weidow, Glenn Weidow, and Bradley Howard can be considered part of the record. Weidow, Bradley Howard, Bernadette Rice, and Cynthia Utterback were sworn and testified on May 4, 2009. On May 5, 2009, Bradley Howard resumed his testimony. Deborah R. Howard, George McNee, David Scott, and Charlie Callander were sworn and testified. Lawrence Becker, CPA, was sworn and testified telephonically.

¶ 4 Issues Presented: The Final Pretrial Order,¹ as amended at trial, states the following contested issues:

¹ Final Pretrial Order at 3, Docket Item No. 91.

¶ 4a Whether Bradley Howard/Howard Family 1995 Trust was an uninsured employer at the time of Weidow's injuries on June 13, 2006;

¶ 4b Whether Weidow is entitled to benefits pursuant to §§ 39-71-701 - 704, MCA;

¶ 4c Whether Bradley Howard/Howard Family 1995 Trust was an "employer" as that term is defined under the Workers' Compensation Act (WCA) at the time of the incident at issue;

¶ 4d Whether Weidow was an "employee" of Bradley Howard/Howard Family 1995 Trust as that term is defined under the WCA at the time of the incident at issue;²

¶ 4e Whether Weidow's work activity at the Yellowstone Club home of Bradley Howard/Howard Family 1995 Trust was "casual employment" and exempt from insurance coverage requirements under the WCA at the time of the incident at issue;

¶ 4f Whether Weidow timely filed his Petition for Hearing pursuant to § 39-71-520, MCA, so as to invoke the jurisdiction of the Workers' Compensation Court to entertain this case;

¶ 4g Whether Bradley Howard or the Howard Family 1995 Trust must indemnify the UEF should the UEF be found liable.

FINDINGS OF FACT

¶ 5 Bradley Howard (Howard) is a trustee of the Howard Family 1995 Trust (Trust). The Trust was created to own and operate real property, personal property, and hold other assets.³

² In *Weidow v. Uninsured Employers' Fund*, 2009 MTWCC 4, I granted summary judgment on this issue, ruling that Weidow was not an independent contractor and therefore was an employee of either Bradley Howard or the Howard Family 1995 Trust. Therefore, although this issue remained in the Final Pretrial Order, it is not discussed further in the present decision.

³ Final Pretrial Order, Uncontested Fact No. 1.

¶ 6 Howard purchased Lot 72 at the Yellowstone Club with Trust assets in order to build a residential home. Howard used Trust assets to pay for the cost of designing and constructing a residential home on the lot.⁴

¶ 7 Howard contracted with William Brickowski/Northwest Timber Structures (Brickowski) to construct the home. The construction contract is dated June 1, 2004.⁵

¶ 8 In November 2004, Glenn Weidow (Glenn) began working for Brickowski on Howard's home at the Yellowstone Club. Glenn worked exclusively for Brickowski and did not take other jobs.⁶ Glenn was initially hired to perform finish carpentry on the residence; however, at the time he was hired the construction had not reached the finishing stage, so Glenn did siding and framing until approximately January 2005.⁷

¶ 9 After the finish work began, Glenn recommended his brother, Weidow, to Brickowski, and Brickowski hired him.⁸ Glenn and Weidow have worked together periodically on construction jobs.⁹ The brothers have never operated a business together. Weidow independently operated a business called All Trades Construction, which did finish carpentry and some framing work.¹⁰

¶ 10 Weidow began working for Brickowski as a carpenter in approximately April 2005. He was a regular employee who was paid \$33 per hour. He was covered by Brickowski's workers' compensation policy. Weidow's work on Howard's home in the Yellowstone Club was within the course and scope of his employment.¹¹

¶ 11 Howard ordered Brickowski off the job in February or March of 2006 because of performance issues.¹² Glenn estimated that Howard's home was 90 to 95% complete

⁴ Final Pretrial Order, Uncontested Fact No. 2.

⁵ Final Pretrial Order, Uncontested Fact No. 3.

⁶ Glenn Dep. 8:14 - 9:9.

⁷ Glenn Dep. 10:4-14.

⁸ Glenn Dep. 10:18-25.

⁹ Glenn Dep. 7:3-13.

¹⁰ Glenn Dep. 7:24 - 8:13.

¹¹ Final Pretrial Order, Uncontested Fact Nos. 4, 5.

¹² Final Pretrial Order, Uncontested Fact No. 6.

when Howard fired Brickowski.¹³ Glenn recalled that workers had enclosed the structure; hung, textured, and painted the drywall; and installed the floors, doors, and cabinets. Trim work remained for Glenn and Weidow. Glenn further recalled that the carpeting had not been laid and the roofing was incomplete.¹⁴

¶ 12 Glenn arranged for Weidow and himself to continue working on the Howard residence after Howard fired Brickowski.¹⁵ They continued working at the job site to complete the cabinetry and finish work that they had started under the construction contract executed by Howard and Brickowski.¹⁶ Weidow, Glenn, and Howard all believed the remaining work could be completed in a relatively short period of time.¹⁷ Weidow and Glenn orally agreed to complete their finish carpentry work, but no written agreement was created.¹⁸

¶ 13 Glenn explained that Brickowski earned a poor reputation at the Yellowstone Club, and Glenn did not want to continue being affiliated with him.¹⁹ Glenn and Weidow believed that it was important to their reputations to finish their work on Howard's residence.²⁰ Glenn creates high-end finish work, and no one else could match his work exactly if he were to leave a project unfinished. He told Howard that he would finish the job because he knew that Howard would not find someone who could match Glenn's finish work, and Glenn's reputation would suffer for walking out on a client.²¹

¶ 14 When Glenn and Howard discussed the possibility of Glenn and Weidow remaining at the Howard residence to finish the job if Brickowski were fired, Glenn understood that Howard would pay Glenn and Weidow directly. They did not discuss a wage beyond agreeing that the brothers would continue to make the same wage as they had made while

¹³ Glenn Dep. 19:4-6.

¹⁴ Glenn Dep. 19:7-23.

¹⁵ Glenn Dep. 26:19 - 28:2.

¹⁶ Final Pretrial Order, Uncontested Fact No. 8.

¹⁷ Final Pretrial Order, Uncontested Fact No. 9.

¹⁸ Final Pretrial Order, Uncontested Fact No. 11.

¹⁹ Glenn Dep. 27:14-17.

²⁰ Glenn Dep. 27:18-20.

²¹ Glenn Dep. 29:2-21.

working for Brickowski.²² The Trust paid Weidow \$33 per hour for his work at the Yellowstone Club house after Brickowski left the job.²³

¶ 15 After Glenn and Weidow began working directly for Howard, Glenn had more direct contact with Howard than Weidow did, and spoke to him on an almost daily basis.²⁴ Glenn stated that he would usually tell Howard what he was working on, and Howard would ask him when the home was going to be finished.²⁵ Glenn periodically called Howard to tell him how many hours the brothers had worked, and Howard would send them each a check.²⁶ The brothers averaged 40 hours per week.²⁷ During this time, the brothers' only job was at the Howard home.²⁸

¶ 16 Although Glenn, Weidow, and Howard initially believed that they would finish Howard's home within three to six weeks of Brickowski's termination, the project took significantly longer. Many subcontractors were still finishing their work, and Glenn took it upon himself to help Howard keep the subcontractors on track.²⁹ In part, Glenn took on this duty because he wanted to hasten completion and move on to other projects.³⁰ Glenn and Weidow also completed a few non-carpentry projects, including pouring a concrete slab and fixing an uneven floor.³¹ Glenn agreed that many of these tasks were "punch list" items that Brickowski normally would have completed.³²

¶ 17 Glenn testified that most of the subcontractors who worked on the Howard home after Brickowski's firing had been hired while Brickowski was the general contractor, and

²² Glenn Dep. 33:24 - 34:14.

²³ Final Pretrial Order, Uncontested Fact No. 10.

²⁴ Glenn Dep. 81:18-24.

²⁵ Glenn Dep. 82:14-23.

²⁶ Glenn Dep. 88:12-22.

²⁷ Glenn Dep. 89:6-11.

²⁸ Glenn Dep. 89:17-23.

²⁹ Glenn Dep. 31:1-22.

³⁰ Glenn Dep. 32:2-7.

³¹ Glenn Dep. 32:16-23.

³² Glenn Dep. 33:1-4.

they were finishing work they had already been contracted to do.³³ Howard hired a few people to finish some projects.³⁴

¶ 18 On June 13, 2006, Weidow was caught in a dumbwaiter at Howard's Yellowstone Club home and suffered injuries as a result of the accident.³⁵ Glenn stated that it was his idea to fix the dumbwaiter. He informed Howard that it was not working properly and that he and Weidow planned to fix it, and Howard agreed.³⁶

¶ 19 Weidow described his industrial accident as follows:

A. Glenn and I were working on a dumbwaiter that kept falling off the track, wouldn't go up and down smoothly, so [Howard] had asked us to see if we could figure out what was wrong with it.

So I crawled in. We raised it and lowered it a couple times, and it kept falling off. So when it was down, I looked inside of there to see if it had fell off the track again at the bottom

. . . .
. . . [W]hen I was looking at why it was falling off the track, [Glenn] had went upstairs and turned it [on] to bring it back up. That was his way of seeing if it fell off the track again. And it just tried to go up, and I couldn't get my head and shoulder out of it³⁷

¶ 20 Howard did not have workers' compensation insurance in place on June 13, 2006. The UEF has denied coverage on the grounds of casual employment. The Trust and Howard assert that neither had to provide workers' compensation coverage under § 39-71-401(2)(b), MCA, because Weidow was a casual employee.³⁸

³³ Glenn Dep. 127:15-25.

³⁴ Glenn Dep. 128:2-14.

³⁵ Final Pretrial Order, Uncontested Fact Nos. 12, 13.

³⁶ Glenn Dep. 96:13 - 97:10.

³⁷ Weidow Dep. 130:17 - 131:19.

³⁸ Final Pretrial Order, Uncontested Fact No. 14.

¶ 21 At the time of his deposition, Weidow resided with his wife Bunny in a rented home in Corvallis, Montana.³⁹ Weidow completed school through the 10th grade.⁴⁰ Weidow went to work for Brickowski after his brother Glenn invited him to talk to Brickowski about employment as a finish carpenter.⁴¹ At the time, Weidow ran his own business, All Trades Construction, but he shut the business down and went to Big Sky, Montana, to work for Brickowski.⁴² Weidow explained that he was tired of searching for work and he wanted benefits, and so he told Brickowski that he would go to Big Sky in two or three weeks after finishing up his active jobs. Weidow finished those jobs and went to work for Brickowski.⁴³ Weidow estimates that the home was approximately 50% completed at the time he began to work on it.⁴⁴ By the end of 2005, Weidow estimates approximately 80% of the home was completed.⁴⁵

¶ 22 Weidow knew that Howard was dissatisfied with the speed and cost of Brickowski's progress on the house.⁴⁶ Between December 2005 and March 2006, Howard spent more time at the home and took a more active role in directing and supervising the finish carpentry work which Weidow performed.⁴⁷ By that time, Glenn and Weidow were the only employees of Brickowski performing significant work on the home. The other workers were subcontractors.⁴⁸ Weidow did not perform any work for any other homeowners or builders from December 2005 until March 2006.⁴⁹

³⁹ Weidow Dep. 6:20 - 7:9.

⁴⁰ Weidow Dep. 18:1-4.

⁴¹ Weidow Dep. 20:2-10.

⁴² Weidow Dep. 20:11-18.

⁴³ Weidow Dep. 21:4-19.

⁴⁴ Weidow Dep. 34:23 - 35:1.

⁴⁵ Weidow Dep. 35:13-19.

⁴⁶ Weidow Dep. 33:13-22.

⁴⁷ Weidow Dep. 37:18-23.

⁴⁸ Weidow Dep. 38:7-14.

⁴⁹ Weidow Dep. 42:22-25.

¶ 23 When Howard fired Brickowski, Weidow estimates 90% of the home was completed, but the dwelling was not habitable.⁵⁰ Weidow stated that Howard spent more time at the Yellowstone Club property after Brickowski left. Howard met with the subcontractors, observed their work, and discussed what projects remained. He would tell them in what order to complete the remaining projects.⁵¹ Most of these subcontractors had been on the job prior to Brickowski's firing. Weidow believes Howard hired at least two subcontractors after Brickowski left.⁵²

¶ 24 Weidow generally did not speak to Howard, but Glenn did. After Howard fired Brickowski, Glenn told Weidow that Howard wanted the brothers to remain, so Weidow kept working. The next time Howard came to the job site, he asked the brothers if they would stay to finish the project, and the brothers agreed.⁵³ The parties did not discuss wages, and the brothers continued to be paid the same amount as they had been paid by Brickowski.⁵⁴

¶ 25 Weidow stated that he wanted to finish the job because he always completes his jobs, and he was proud of the work he had done on Howard's house. Weidow also knew that he would be able to show the work to others and that it would help him find future work.⁵⁵

¶ 26 Prior to Brickowski's firing, Weidow believed he was an employee of Brickowski's company and that he was covered by Brickowski's workers' compensation insurance.⁵⁶ Weidow testified that after Brickowski left, he discussed his concerns about not being covered by workers' compensation insurance with Howard. Weidow suggested that he could reestablish All Trades Construction if Howard would pay for the set-up costs and the workers' compensation insurance coverage.⁵⁷ Weidow told Howard that he would have to

⁵⁰ Weidow Dep. 61:11-18.

⁵¹ Weidow Dep. 79:16 - 80:5.

⁵² Weidow Dep. 80:6-16.

⁵³ Weidow Dep. 64:2-16.

⁵⁴ Weidow Dep. 65:5-12.

⁵⁵ Weidow Dep. 75:16 - 76:4.

⁵⁶ Weidow Dep. 66:4-18.

⁵⁷ Weidow Dep. 67:2-15.

use a payroll company to handle withholding and suggested that he could arrange for this if Howard would pay for it. Howard asked Weidow to investigate it.⁵⁸

¶ 27 Weidow also told Howard that he had an exemption.⁵⁹ Weidow explained that he had used his exemption for All Trades Construction; however, he did not give a copy of the exemption to Howard although Howard asked him for it.⁶⁰ Weidow testified that he refused to provide his exemption form to Howard because he did not want to be exempt on this job. He wanted Howard to either provide workers' compensation insurance or pay Weidow more money so that Weidow could get his own insurance.⁶¹ Weidow testified that he told Howard that if Howard wanted Weidow to use his exemption, Howard would have to increase his rate of pay over what he had been making for Brickowski while covered by Brickowski's policy.⁶² Weidow eventually learned through Glenn that Howard was not interested in increasing Weidow's pay to cover the cost of a workers' compensation insurance policy. Weidow understood that Howard would "take care of" the coverage issue, and he assumed that since Howard had other businesses which maintained employee payrolls that Weidow would be covered through one of those entities.⁶³ I find Weidow's explanation regarding his refusal to supply Howard with his exemption to be credible. It would make little sense for Weidow to stay on the job and earn the same wages as an independent contractor that he had earned as Brickowski's employee, without also receiving the benefits of being an employee.

¶ 28 When Weidow investigated the feasibility of running the payroll through All Trades Construction, he learned the payroll company would need \$17,000 up front to take over the payroll, arrange for workers' compensation coverage, and update Weidow's license.⁶⁴ Howard told Weidow that he did not want to set up the payroll with only a few months left on the job.⁶⁵ Howard never asked Weidow about his exemption again.⁶⁶

⁵⁸ Weidow Dep. 68:3-20.

⁵⁹ Weidow Dep. 67:9-15.

⁶⁰ Weidow Dep. 69:1-22.

⁶¹ Trial Test.

⁶² Weidow Dep. 70:4-13.

⁶³ Trial Test.

⁶⁴ Weidow Dep. 83:12-23.

⁶⁵ Weidow Dep. 84:1-4.

⁶⁶ Weidow Dep. 87:15-22.

¶ 29 Weidow believed that Howard would arrange for workers' compensation coverage elsewhere, and thought that he would fall under Howard's other business' payroll.⁶⁷ Weidow knew the checks he received from Howard were written on a family trust account, but Weidow was unconcerned as long as he continued to get paid for his work.⁶⁸

¶ 30 After his industrial injury, Weidow reactivated All Trades Construction and has completed some projects under that business name.⁶⁹

¶ 31 Howard lives in Burbank, California.⁷⁰ He manages real estate – his own and property owned by others – through two corporations: Jackbilt, Inc., and Duke Enterprises, Inc., d/b/a Classic Properties.⁷¹ Howard's father created Jackbilt. A trust now owns Jackbilt, with trust interests belonging to Howard, his sister, and their respective children.⁷² Jackbilt manages approximately 70 properties, including a mobile home park, industrial buildings, and shopping centers.⁷³ Jackbilt employs general maintenance workers.⁷⁴ Jackbilt does not keep plumbers, electricians, or other tradesmen on its payroll, but hires them as needed.⁷⁵ Howard testified that Jackbilt was not involved with building or managing the house in the Yellowstone Club.⁷⁶ Howard testified that the funds to build the house came from his and his wife's trust, and none of the funds came from Jackbilt.⁷⁷

¶ 32 Howard testified that prior to 1981, he did construction and carpentry and occasionally flipped homes. He also worked as a real estate agent and developed property

⁶⁷ Weidow Dep. 85:18-24.

⁶⁸ Weidow Dep. 86:5-24.

⁶⁹ Weidow Dep. 114:3-19.

⁷⁰ Howard Dep. 4:9-10.

⁷¹ Howard Dep. 31:1-21.

⁷² Howard Dep. 32:3-23.

⁷³ Howard Dep. 54:1-10.

⁷⁴ Howard Dep. 56:7-14.

⁷⁵ Howard Dep. 55:11-17.

⁷⁶ Howard Dep. 33:20-22.

⁷⁷ Howard Dep. 80:1-8.

until approximately 1996. Since that time, he has primarily managed property for Jackbilt and he has also been a real estate broker for Duke Properties, d/b/a Classic Properties.⁷⁸ Classic Properties is a real estate agency with one agent in addition to Howard.⁷⁹ Howard is the sole proprietor.⁸⁰ Howard testified that Classic Properties was not involved with the house he built in the Yellowstone Club.⁸¹

¶ 33 Howard stated that the Trust was created to hold his personal assets, including real estate, and that it is a different trust from the trust which owns Jackbilt or Jackbilt's assets.⁸² Howard testified that in the 1980s, an attorney recommended that Howard form a trust to hold his property. They believed it was important to do so since Howard owned significant personal assets prior to his marriage.⁸³ Howard further explained that in California, having property in a trust avoids probate.⁸⁴

¶ 34 Howard pays all his personal expenses out of the Trust.⁸⁵ Howard testified that he paid for all the labor and materials for the Yellowstone Club property out of the Trust account.⁸⁶ Howard is the sole manager of the Trust's assets.⁸⁷ Howard and his wife are trustees.⁸⁸ The trustees are empowered to retain and operate any investment property which the trustees acquire under the Trust, with profits or losses inuring or being charged to the Trust and not the trustees.⁸⁹ The Trust's assets include: the Yellowstone Club property; a residential property in Burbank; an office building in Burbank; a residential property in Ventura, California; an apartment building; a residential duplex; a condominium

⁷⁸ Trial Test.

⁷⁹ Howard Dep. 33:23 - 34:7.

⁸⁰ Howard Dep. 35:1-4.

⁸¹ Howard Dep. 35:5-8.

⁸² Howard Dep. 89:2-18; 90:15-17; 91:6-14.

⁸³ Trial Test.

⁸⁴ Trial Test.

⁸⁵ Howard Dep. 93:1-16.

⁸⁶ Trial Test.

⁸⁷ Howard Dep. 97:16-17.

⁸⁸ Trial Test.

⁸⁹ Ex. 13 at 26.

in Big Sky; and some commercial buildings.⁹⁰ Its other assets include life insurance policies, an airplane, and several motor vehicles.⁹¹

¶ 35 Howard primarily visits Big Sky to ski. He estimated that since 2004, he usually comes to Big Sky for a few days at a time in the winter, and makes occasional trips to Big Sky at other times of the year, spending a total of 20 to 30 days per year there.⁹²

¶ 36 In addition to the Yellowstone Club property, Howard also owns a condominium in Big Sky. He originally acquired the condominium in 2004 by trading a piece of real estate he owned in Bakersfield, California, for it.⁹³ At that time, he already owned the Yellowstone Club lot, but he had not yet decided if he was going to build on it. Howard explained that his wife was unenthusiastic about building a vacation home in Big Sky. He used the condominium while trying to convince her to build a vacation home in the Yellowstone Club.⁹⁴

¶ 37 Howard obtained the Big Sky condominium as part of a 1031 exchange. He testified that, in order for the 1031 exchange to occur, he had to “theoretically” rent the condominium for tax purposes. However, Howard never intended to use the condominium as a rental property. He used it as a place to stay when he visited Big Sky and he occasionally allowed friends to use it.⁹⁵ Howard testified that he maintained the condominium for personal use and kept personal possessions there.⁹⁶ With the completion of the Yellowstone Club residence, Howard began renting the condominium about six months prior to the trial in this case.⁹⁷ Prior to that rental, the only money he received for the condominium was from friends who used the condominium and paid to cover the cleaning costs.⁹⁸ Howard testified that the condominium unit is currently rented out on a one-year lease to a family which is not related to him, but which is paying below-market

⁹⁰ Howard Dep. 89:15-18; 90:15-17; 91:6-14.

⁹¹ Howard Dep. 92:8-19.

⁹² Trial Test.

⁹³ Trial Test.

⁹⁴ Trial Test.

⁹⁵ Trial Test.

⁹⁶ Trial Test.

⁹⁷ Trial Test.

⁹⁸ Trial Test.

rate for the rent.⁹⁹ The condominium was listed on Schedule E of Howard's tax returns for the years 2004,¹⁰⁰ 2005,¹⁰¹ and 2006.¹⁰² Howard testified that he did not change how he treated the condominium on his tax return from 2006 to 2007.¹⁰³

¶ 38 Howard contracted with Brickowski for the construction of the Yellowstone Club residence. Construction began in approximately July 2004, and Brickowski worked on the home until March 2006, when Howard fired him. Howard explained that he was initially satisfied with Brickowski's progress, but construction slowed significantly although Howard received bills for substantial amounts of labor. Howard periodically traveled from California to Montana to check on the construction of the home, and he did not believe the pace of progress was commensurate to the amount of labor costs he was incurring. Howard decided to send two of his Jackbilt employees to Montana to work on the home and to report on Brickowski's progress.¹⁰⁴

¶ 39 The Jackbilt employees flew to Montana in Howard's private airplane. Howard stated that he paid the men out of his Trust and not as Jackbilt employees for their work in Montana.¹⁰⁵ The Jackbilt employees reported to Howard that very little progress was being made on the residence. Howard questioned Brickowski, but did not believe his explanations. He investigated further and determined that Brickowski was billing Howard for the labor of employees who were not working on Howard's home, but who were working on Brickowski's other job sites. Howard later discovered that he had paid for materials which Brickowski used on other job sites.¹⁰⁶

¶ 40 On a separate occasion, the same two Jackbilt employees drove a truck owned by Jackbilt from California to Montana to deliver some of Howard's possessions to the home. Howard testified that he paid the men for their time out of the Trust, but he did not reimburse Jackbilt for use of its truck. Howard explained that his sister also uses a Jackbilt

⁹⁹ Trial Test.

¹⁰⁰ Ex. 14 at 276.

¹⁰¹ Ex. 14 at 385.

¹⁰² Ex. 14 at 618.

¹⁰³ Trial Test.

¹⁰⁴ Trial Test.

¹⁰⁵ Howard Dep. 87:1-20.

¹⁰⁶ Trial Test.

truck for personal use, and so he did not feel obligated to reimburse the business for using one of its vehicles.¹⁰⁷ Howard recalled that on both occasions, he paid the men for their work in Montana out of his Trust account and not from the Jackbilt payroll. Howard testified that one of the employees used vacation time from Jackbilt while the other took unpaid leave from Jackbilt to work for Howard in Montana.¹⁰⁸

¶ 41 Howard testified that when he fired Brickowski, he did not have a plan for completing the home. Glenn approached Howard and explained that he did not want to leave his part of the home unfinished and offered to stay on instead of remaining with Brickowski. Howard knew that Glenn and Weidow were employees of Brickowski and not subcontractors. Glenn and Weidow both left their employment with Brickowski and continued to work on Howard's Yellowstone Club property. Howard testified that he paid Glenn and Weidow \$33 per hour because that is the amount they requested. At the time, Howard did not know whether that was the same amount that the brothers had been paid by Brickowski.¹⁰⁹

¶ 42 Howard also contacted subcontractors who Brickowski had hired to complete certain parts of Howard's home, and Howard had the subcontractors remain on the job.¹¹⁰ Howard explained that after Brickowski left, four subcontractors remained. Howard inspected their work and noted which parts of their jobs were incomplete. He told the subcontractors that he would pay them when they finished the jobs they were contracted to perform.¹¹¹

¶ 43 Howard testified that the Yellowstone Club property is bound by covenants which require him to carry workers' compensation insurance.¹¹² Howard testified that after he fired Brickowski, he called his homeowners' insurer and asked if he could get a workers' compensation policy from it, and a representative told him to call the State of Montana. Howard stated that he called the number his insurer provided and he was told that he could not obtain workers' compensation insurance because he was a homeowner, not an employer.¹¹³ However, after Weidow's industrial accident, Bernadette Rice (Rice), claims

¹⁰⁷ Howard Dep. 134:23 - 135:13.

¹⁰⁸ Trial Test.

¹⁰⁹ Trial Test.

¹¹⁰ Trial Test.

¹¹¹ Howard Dep. 21:18 - 22:2.

¹¹² Howard Dep. 130:1-14.

¹¹³ Howard Dep. 103:2-18.

adjuster for the UEF, gave Howard the contact information for “someone in Big Sky” and Howard immediately obtained a policy to cover maintenance workers and housekeepers.¹¹⁴ Howard testified that he would have obtained workers’ compensation coverage immediately if he had not been informed that it was unavailable to him.¹¹⁵

¶ 44 Prior to Weidow’s industrial injury, Howard had discussed the issue of workers’ compensation insurance with Weidow and Glenn. Howard testified that he was concerned about the lack of workers’ compensation insurance because he knew he needed to have it. Howard stated that he was always concerned that Brickowski carry the proper insurance and that at one point he received notice that Brickowski’s coverage had lapsed. Howard was upset, demanding an explanation and ordering Brickowski to renew his policy immediately. Howard further explained that in California, workers’ compensation insurance is built into the insurance policy of a single family home and he thought the same was likely true in Montana. He also knew that independent contractor exemptions were available in Montana and he asked the brothers if they had exemptions. Howard testified that Weidow stated that he had an exemption but that Glenn did not. Weidow suggested investigating the possibility of using his former business, All Trades Construction, and obtaining workers’ compensation coverage through the business. Howard asked Weidow to look into it.¹¹⁶

¶ 45 Howard never received a copy of Weidow’s independent contractor exemption.¹¹⁷ Howard believed that Weidow and Glenn were working on his house individually, and not as All Trades Construction.¹¹⁸ Howard testified that after Weidow investigated the possibility of using a payroll company, he informed Howard that it would cost \$17,000 to cover the workers’ compensation insurance. Howard thought that was too expensive for a job that was supposed to last less than a month, and he offered to pay half. Weidow turned down the offer.¹¹⁹

¶ 46 Howard also testified that he called “Workmen’s Comp” and was told that he needed a business license and a contractor’s license in the State of Montana in order to obtain coverage. Howard learned that it would take six to eight weeks to get these licenses, and

¹¹⁴ Howard Dep. 106:11 - 107:3.

¹¹⁵ Howard Dep. 124:8-16.

¹¹⁶ Trial Test.

¹¹⁷ Howard Dep. 45:18-20.

¹¹⁸ Howard Dep. 51:14-19; 52:18-24.

¹¹⁹ Howard Dep. 67:9-19.

since he believed his home would be completed in three or four weeks, he did not pursue the licenses. At that point, Howard ceased to pursue workers' compensation coverage for the Weidows and he and the brothers did not discuss it further.¹²⁰

¶ 47 Howard initially paid Weidow and Glenn from his Trust account, but he learned that they had difficulty cashing the checks because they were out-of-state checks. Howard began having his secretary transfer money from the Trust account into an account which he opened in Montana. He would then write Weidow's and Glenn's checks against the Montana account. Howard testified that all the wages paid to Weidow and Glenn originated from the Trust account.¹²¹

¶ 48 Howard uses an accountant to handle his tax returns. However, he admitted that he personally understood the difference between Schedule A and Schedule E, and that rental and business properties were placed on Schedule E. Howard testified that he placed the Yellowstone Club property on Schedule E in order to track his basis in the property; however, he acknowledged that he knew that he could track the basis without placing the property on Schedule E. He further testified that he told his accountant that the property was purchased with the intention to use it as a vacation property, and he left it up to his accountant as to how to deal with it for tax purposes.¹²² Howard further stated that his home in Ventura is not listed on Schedule E of his tax returns, but he tracks his basis in this property separately.¹²³

¶ 49 Howard testified that he did not take any deductions during 2004 for costs incurred on the Yellowstone Club property. He further stated that he never intended to use the property as a rental, but intended to use it as a personal vacation home for his family and friends. Howard testified that he could write off the property on his taxes regardless of whether it was a vacation home and testified that he was unaware that he received an additional tax benefit for listing the property on Schedule E instead of Schedule A because he is subject to the alternative minimum tax.¹²⁴

¶ 50 Howard further testified:

¹²⁰ Trial Test.

¹²¹ Howard Dep. 43:4 - 45:17.

¹²² Trial Test.

¹²³ Trial Test.

¹²⁴ Trial Test.

Q. . . . Now, is it your testimony that you didn't know that the Lot 72, the Yellowstone Club property, was on this Schedule E when he did this?

A. I just didn't pay attention to it.

Q. So you didn't know about it?

A. I didn't focus on it at all.

Q. Were you aware that the condominium at Big Sky was on it?

A. Yes.

Q. Why were you aware of that being on there and not the lot?

A. Because I wanted to make sure on the trade, the depreciation and everything was across - - I just wanted to make sure that it was accounted for in the 1031 Exchange.

Q. Did you look at this page (indicating)?

A. Probably, yes.

Q. And you just missed the fact that Lot 72 was on there?

A. I just didn't - - you know, the column was blank, probably. I'm just - - I would only assume what I saw back then. I'm not supposed to assume, so the answer to your question is, I don't remember.

Q. Then in the upper right-hand corner, No. 2 there, it says for each rental real estate property listed in line 1, did you or your family use it during the tax year for personal purposes for more than the greater of 14 days or 10 percent of the total rental rented at fair rental value? And from your testimony you, in fact, used the condo for more than 14 days; isn't that correct?

A. Most likely.

Q. And you didn't use it 10 percent of the total days rented at fair rental value, because if you used it more than 14 days - - if you used it 15 days, for example, you'd have to rent it for 150 days, correct?

A. That would be correct, I guess.

Q. And you also didn't rent that out at fair rental value, did you?

A. No.

Q. So with that in mind, it shouldn't be on Schedule E, should it?

A. From a tax point of view, I took advantage of a situation that I wanted to get out of the property in Bakersfield, like I told you. That was the only alternative I had was to put it over here.

Q. The other alternative was to pay capital gains tax on the property in California and buy this. It was as a personal asset, right?

A. So I was addressing it on my taxes here.

Q. Right. And so you paid less taxes because you did that, correct?

A. Yes.

. . . .

Q. And what you did with Lot 72 - - the Yellowstone Club property - - on your taxes was you apparently purchased it for \$1,143,489[,] right?

A. Yes.

Q. And then you capitalized your expenses, correct?

A. That's what it says.

Q. And so you increased your basis, correct?

A. That's what he wrote.

Q. And so you would only do this for tax purposes if you intended to rent it, correct?

A. Again, this is on a Schedule E form.

Q. Yes, it is.

A. This was not my intent for the property; although, it's on here, it was not the intent that I ever had for it, ever.

Q. You're reporting to the IRS that that's your intent, correct?

A. The tax return was prepared that way. I must have obviously overlooked this portion of it at the time because I wasn't paying attention to it.

. . . .

Q. Did you ever intend to sell the condo? Have you ever intended to sell it?

A. Eventually, I probably would have traded it out into something different than what it is, if the market sustained itself. . . .

Q. Would it ever have been your intent to trade that condo out for another residence or would you have traded it for a business property?

A. I would have probably traded it for a business property.¹²⁵

¶ 51 Howard acknowledged that although he transferred the Yellowstone Club property off of Schedule E for his tax returns beginning in 2006, he has not corrected his previous years' tax returns. Howard stated that he could not recall how he became aware that the property was improperly listed on Schedule E, but he admitted that it could have been brought to his attention because of this pending litigation.¹²⁶

¶ 52 Howard further testified that he owns an airplane which he stated on his tax returns is used 60% for business use and 40% for personal use. Howard uses the airplane to fly to and from Montana, and has never driven to Montana. Howard used to fly on a

¹²⁵ Partial Hr'g Tr., May 4-5, 2009 (Examination of Howard) 89:22 - 94:15.

¹²⁶ Trial Test.

commercial aircraft to visit Montana, but he now almost always uses his personal airplane.¹²⁷

¶ 53 Howard's current aircraft is a Turbo Commander which he acquired in September 2004. Prior to purchasing this aircraft, he owned an older airplane. Howard took delivery of his current airplane in Montana in September 2004, and then took the airplane to Oklahoma for refurbishing. He chose to accept delivery of the airplane in Montana because he would have had to pay taxes on the airplane if he accepted delivery of it in California. He further explained that after he purchased the airplane, he could not take it to California for several months in order to avoid paying taxes on it. Howard stated that the airplane remains registered in the State of Montana for tax purposes. Howard stated that it is his understanding that he had to own property in Montana in order to register the airplane in Montana and take advantage of the tax savings. The airplane is housed in a hangar in Big Sky and is registered to Howard's Yellowstone Club address.¹²⁸ Howard paid \$642,000 for the airplane, and with upgrades he installed, he has a basis for depreciation of \$888,000 in the airplane.¹²⁹ Howard further testified that he has not switched the airplane's registration from Montana to California in order to avoid having to pay county taxes in Los Angeles.¹³⁰

¶ 54 Howard's wife Deborah testified at trial. I found her to be a credible witness. She testified that the family uses the Yellowstone Club property as a vacation home and that it was built for that purpose. She asserted that the Howards never planned to use the property as a rental property.¹³¹

¶ 55 George McNee testified at trial. I found him to be a credible witness. McNee stated that he is Howard's friend and has known him since the mid-1960s. Howard learned about the Yellowstone Club when McNee and Howard were invited to ski there. Howard then became interested in purchasing property in the Yellowstone Club and building a vacation home. McNee has stayed at Howard's Yellowstone Club home as the Howards' guest on

¹²⁷ Trial Test.

¹²⁸ Trial Test.

¹²⁹ Trial Test.

¹³⁰ Trial Test.

¹³¹ Trial Test.

many occasions. McNee does not believe Howard ever intended to use the property as a rental property.¹³²

¶ 56 David Scott testified at trial. I found him to be a credible witness. Scott resides in Belgrade, Montana, and has worked on the Architectural Review Committee of the Yellowstone Club since 2004. He also deals with contractor compliance for the Yellowstone Club. Scott testified that while members have occasionally built spec homes for resale within the club, Howard's home was never referred to as a spec home in the plans submitted to the Architectural Review Committee, but always as the Howards' residence. Scott opined that many of the elements Howard included in his home design and Howard's willingness to pursue specific materials which the Architectural Review Committee initially disapproved spoke to Howard's intention to use the property as a family home. Scott stated that he believed someone building a spec home would have gone with less expensive, preapproved materials instead of fighting for approval of expensive customized elements and materials.¹³³

¶ 57 On May 4, 2006, Scott issued a letter of substantial completion for Howard's Yellowstone Club home on behalf of the Yellowstone Club Property Owners' Association. Scott explained that he walked through the house and looked at the completion level for the elements he considered necessary to make the home habitable, including alarm systems and other safety measures. At that point, Scott believed Howard's home required only minor finish work including the installation of some trim and light fixtures. He estimated that the home was 90% completed and found it to be habitable.¹³⁴

¶ 58 Charlie Callander, the director/vice-president of marketing and sales for the Yellowstone Club, testified at trial. I found him to be a credible witness. Callander stated that he is also the broker for the club and his "team" handles all of the real estate transactions within the club. Callander testified that he knows that Howard was not listing his Yellowstone Club property for resale because he would have needed to list the property with Callander to do so. Callander further testified that all rentals within the Yellowstone Club are handled through the Yellowstone Mountain Club and that he knows Howard has not listed the property as available for rent with the Yellowstone Mountain Club.¹³⁵

¹³² Trial Test.

¹³³ Trial Test.

¹³⁴ Trial Test.

¹³⁵ Trial Test.

¶ 59 Cynthia Utterback is a Certified Public Accountant. Utterback testified at trial and I found her to be a credible witness.

¶ 60 Utterback reviewed some of Howard's tax records as provided by Weidow's counsel, including Howard's 2004, 2005, and 2006 tax returns, and an affidavit from Lawrence Becker – the accountant for the Trust.¹³⁶

¶ 61 Utterback testified that she did not agree with everything Becker stated in his affidavit. In particular, Utterback noted that while Becker asserted that the Yellowstone Club property was never intended to be used as a rental property, it was treated as a rental property on Howard's 2004 and 2005 tax returns because Becker listed it on Schedule E. Utterback explained that Schedule E is used to report activity in rental properties or royalties, and that if a property is not intended to be used as a rental property and is not used in a trade or business, it belongs on Schedule C with its associated deductible expenses placed on Schedule A. Utterback stated that when a taxpayer lists a property on Schedule E, the taxpayer is representing to the IRS that the property is a rental property.¹³⁷

¶ 62 Utterback further stated that she has never seen an accountant list a home on Schedule E for the purpose of tracking the underlying basis. Utterback opined that it would be more convenient to either keep track of the basis in a nonreported document or by using accounting software or a general ledger. Utterback further testified that Becker's accounting firm uses the same tax preparation software as the accounting firm where she works, and that it takes extra steps to list a property on Schedule E as that information would have to be manually entered into the tax reporting software from the general ledger.¹³⁸

¶ 63 Utterback further testified that from the statement of rental and royalty income, she determined that Howard carried the real estate taxes from the property onto Schedule E and carried the full amount, including the real estate taxes, to the depreciation and amortization schedule. Utterback opined that this is not the proper way to amortize or capitalize the real estate taxes and to deduct them because it allows the taxpayer to have a double deduction at some point in time. Utterback explained that if the taxpayer currently deducts the taxes, the taxes should not also be capitalized.¹³⁹

¹³⁶ Trial Test.

¹³⁷ Trial Test.

¹³⁸ Trial Test.

¹³⁹ Trial Test.

¶ 64 Utterback examined Howard's tax return for 2005 and determined that he was subject to the alternative minimum tax that year. Utterback further explained that if Howard had listed the Yellowstone Club property on Schedule A instead of Schedule E in 2005, he would not have received any tax benefit for the deduction since he was subject to the alternative minimum tax that year. She determined that by listing the Yellowstone Club property on Schedule E instead of Schedule A, Howard realized a tax savings of approximately \$2,000.¹⁴⁰

¶ 65 In 2006, Howard was not subject to the alternative minimum tax and would have benefitted from a tax deduction for the Yellowstone Club property regardless of whether he listed it on Schedule E or Schedule A. Utterback examined Howard's 2006 tax return and determined that for that year, Howard had listed the Yellowstone Club property on Schedule A instead of on Schedule E as he had in the previous year.¹⁴¹

¶ 66 Utterback further testified that while Becker asserted that the Yellowstone Club property was erroneously listed on Schedule E in 2005, and that this error was "corrected" in 2006 when the Yellowstone Club property was moved to Schedule A, this is a mischaracterization because the listing "error" was never corrected by way of amending Howard's 2005 tax return.¹⁴²

¶ 67 Utterback further testified that in 2004, Howard treated both the Yellowstone Club property and the Big Sky condominium as rental properties on his tax return. She explained that if a property is rented below fair market value, that is viewed as personal use and would count against the 14 days per year a property owner is allowed to use a rental property for personal use without affecting the property's tax status. Utterback opined that on Howard's 2004 tax return, the condominium was treated as if it were used 100% as a business property.¹⁴³ Utterback testified that in 2004 and 2005, the property taxes on the Yellowstone Club property were treated as a 100% business asset.¹⁴⁴

¹⁴⁰ Trial Test.

¹⁴¹ Trial Test.

¹⁴² Trial Test.

¹⁴³ Trial Test.

¹⁴⁴ Trial Test.

¶ 68 Lawrence Becker testified via telephone. At trial, I advised the parties that, pursuant to *Bonamarte v. Bonamarte*,¹⁴⁵ I was not entirely convinced that I could assess Becker's credibility. After trial, additional consideration of this issue convinced me that I could consider the credibility of Becker's telephonic testimony, but would assign it less weight since I was unable to satisfactorily assess his credibility as he appeared telephonically.

¶ 69 In *Bonamarte*, the Montana Supreme Court held that a district court abused its discretion when it allowed a party to testify by telephone over the objection of the opposing party. The court concluded that the telephonic testimony denied the opposing party a meaningful opportunity to confront the witness and to conduct a proper cross-examination.¹⁴⁶ The court considered whether the telephonic testimony fell within the exceptions found in Mont. R. Evid. 611(e)¹⁴⁷ and concluded that it did not. The court explained:

A witness' personal appearance in court:

1. assists the trier of fact in evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand;
2. helps establish the identity of the witness;
3. impresses upon the witness, the seriousness of the occasion;
4. assures that the witness is not being coached or influenced during testimony;
5. assures that the witness is not referring to documents improperly; and
6. in cases where required, provides for the right of confrontation of witnesses.¹⁴⁸

¶ 70 The Montana Supreme Court further noted that the district court could not make a determination as to the relative credibility of the party-witnesses because it did not have an opportunity to observe both of them testify. The court noted that the trial court's role is to determine who is the more credible witness, which can be accomplished most effectively by observing each party's demeanor during testimony. The court explained that in the case of the party who appeared telephonically, the trial court could not evaluate the demeanor of the witness nor determine whether the witness was being coached or was

¹⁴⁵ *Bonamarte*, 263 Mont. 170, 866 P.2d 1132 (1994).

¹⁴⁶ *Bonamarte*, 263 Mont. at 174, 866 P.2d at 1134.

¹⁴⁷ "Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine."

¹⁴⁸ *Bonamarte*, 263 Mont. at 174, 866 P.2d at 1134.

improperly referring to documents.¹⁴⁹ However, the court further noted that it could foresee circumstances where telephonic testimony would be permissible:

Finally, we do not here adopt a *per se* rule that would preclude the use of telephonic testimony at trial in all cases or circumstances. Where the trial court approves and all parties consent, or at least have sufficient notice to object and/or make alternative arrangements, we see no reason why telephonic testimony cannot be utilized in appropriate situations where special or exigent circumstances dictate the necessity for that type of testimony, where rights of confrontation and cross-examination are not substantially compromised or are otherwise adequately preserved, where the identity and credibility of a witness are not critical and where there is no need to use documentary or tangible exhibits in examining the witness.¹⁵⁰

¶ 71 In the later case of *State v. Megard*,¹⁵¹ the Montana Supreme Court affirmed a district court's decision to allow telephonic testimony from two law enforcement officers who were familiar to the court and who were unable to attend a revocation hearing. Although the defendant objected to the telephonic testimony, the district court ruled that his fundamental rights would be adequately protected and that the testimony was not barred either by *Bonamarte* or Mont. R. Evid. 611(e).¹⁵² The Montana Supreme Court distinguished this case from *Bonamarte*, noting that in *Bonamarte*, the court acknowledged that knowledge of a witness' identity and credentials may constitute a special circumstance under which telephonic testimony is allowed, and stating that in the present case, other witnesses corroborated the testimony of the telephonic witness.¹⁵³

¶ 72 The principal fact which distinguishes the present case from both *Bonamarte* and *Megard* is that no parties objected to Becker testifying telephonically. All parties were aware prior to trial that Becker's testimony was expected to be conducted telephonically, and therefore they all had the opportunity to object. None of the parties raised any concerns about Becker's identity or the documents to which he may have referred during testimony. However, as the trier of fact, I could not evaluate Becker's demeanor nor

¹⁴⁹ *Bonamarte*, 263 Mont. at 175-76, 866 P.2d at 1135.

¹⁵⁰ *Bonamarte*, 263 Mont. at 177, 866 P.2d at 1136.

¹⁵¹ *Megard*, 2004 MT 67, 320 Mont. 323, 87 P.3d 448.

¹⁵² *Megard*, ¶¶ 1-2, 7.

¹⁵³ *Megard*, ¶ 19. While not on point in the case before this Court, in *Megard*, the Montana Supreme Court further noted that Mont. R. Evid. 611(e) was inapplicable because the Rules do not apply to proceedings "granting or revoking probation or parole." *Megard*, ¶ 21.

determine whether – as *Bonamarte* suggested – he was being coached or was improperly referring to documents. I found myself somewhat skeptical of Becker’s testimony and at a disadvantage to assess his credibility in light of my unfamiliarity with the witness and the fact that his testimony was telephonic. *Bonamarte* suggests that telephonic testimony may be utilized “where the identity and credibility of a witness are not critical and where there is no need to use documentary or tangible exhibits in examining the witness.”¹⁵⁴ *Megard*, in allowing telephonic testimony, further noted that in that particular case, other witnesses testifying in person corroborated the testimony of the telephonic witnesses. Although the parties agreed to accept Becker’s testimony telephonically, other factors suggested by *Bonamarte* and *Megard* are not present in this case. I am unfamiliar with Becker, his identity and credibility are critical, and the tax records he prepared were necessary in his examination. No other witnesses corroborated the key evidence Becker provided which concerned how he determined to treat the Yellowstone Club property on Howard’s tax returns. Only Becker could provide that information.

¶ 73 I note, however, that in addition to Becker’s telephonic testimony, he previously submitted an affidavit and documentation he prepared was submitted into evidence. I consider his telephonic testimony as well as Becker’s other contributions to the record in this case, although I assign less weight to Becker’s telephonic testimony since I am not in a position to truly assess his credibility as a witness. While I do not believe I can truly assess Becker’s credibility as a testifying witness, I can assign weight to his testimony. As explained within these Findings and Conclusions, I am not wholly persuaded by Becker’s explanations as to why he treated the Yellowstone Club property as a rental property on Howard’s 2004 and 2005 tax returns.

¶ 74 Becker has been a certified public accountant since 1974. He is a partner with the firm of Caldwell, Becker, Dervin, Petrick & Company, LLP, in Woodland Hills, California. Becker has been providing tax services for Howard since the early 1980s.¹⁵⁵

¶ 75 Becker stated that he typically receives Howard’s tax information from Howard’s bookkeeper and he prepares Howard’s annual tax returns from that information. Becker stated that he occasionally speaks to Howard directly, but usually speaks to Howard’s bookkeeper or to another accounting firm which also does work for Howard’s trusts and partnerships.¹⁵⁶

¹⁵⁴ *Bonamarte*, 263 Mont. at 177, 866 P.2d at 1136.

¹⁵⁵ Trial Test.

¹⁵⁶ Trial Test.

¶ 76 Becker stated that Howard's tax return is never filed by April 15 because it is large and complex and the information usually cannot be gathered in time to meet the April 15 deadline. Becker testified that Howard always requests an extension and the return is usually filed a few days prior to the October 15 extension deadline.¹⁵⁷

¶ 77 Becker testified that, as of the time of this trial, he was under the impression that Howard's Yellowstone Club property was never intended to be used as a rental property. Becker acknowledged the Schedule E is used solely for rental property. However, at the time that Becker entered the property onto Schedule E of Howard's 2004 and 2005 tax returns, he stated he was uncertain as to how Howard intended to use the property. Becker stated that, based on the information Howard's bookkeeper provided him, he learned that Howard had purchased and was in the process of developing this property.¹⁵⁸ Becker stated that he decided to list the property on Schedule E as a means of tracking the property since he was uncertain at that time as to whether the property was intended to be a rental or personal property. Becker testified that he did not know if other accountants listed properties of uncertain usage in this way, and that this was not in fact typical of how he listed properties for other clients. Becker stated that, generally, he had the opportunity to speak directly to clients and clarify property usage so as to properly list it on the tax schedules; however, in Howard's case, his tax returns were voluminous and typically filed at the last minute and so Becker did not always have the opportunity to clear up every uncertainty. Becker agreed that there may have been easier ways to track Howard's basis in the Yellowstone Club property, but he decided to put it on Schedule E because he did not want to lose track of it in future years.¹⁵⁹

¶ 78 Becker testified that the first time he realized that the Yellowstone Club property did not belong on Schedule E was in 2007, after Howard's bookkeeper gave him the information for the 2006 tax return. Becker stated that someone from Howard's office had written a note stating that the Yellowstone Club property was a personal residence. Becker listed the property on Schedule A instead of Schedule E on Howard's 2006 tax return. Becker testified that the first time he discussed the Yellowstone Club property with Howard was in December 2007. Becker noted, however, that Howard does not provide him with expenses on his personal residence while he did provide him with expenses on the Yellowstone Club property.¹⁶⁰

¹⁵⁷ Trial Test.

¹⁵⁸ Trial Test.

¹⁵⁹ Trial Test.

¹⁶⁰ Trial Test.

¶ 79 Having considered Utterback's testimony, the documentary evidence, and Becker's testimony, I am not persuaded that Becker placed the Yellowstone Club property on Schedule E merely to keep track of the basis in the property when there was also clearly a tax advantage for doing so. I am skeptical of Becker's assertion that he did not discuss the initial tax characterization of the property with Howard and then neglected to ask Howard about the property's intended use for three years.

¶ 80 Rice testified at trial. I found Rice to be a credible witness. Rice testified that the UEF investigated Weidow's claim after it received his First Report of Injury. After reviewing the information gathered, Rice determined that Weidow was a casual employee of either Howard or the Trust and denied his claim on that basis. Rice explained that she considered this Court's decision in *Howe v. Uninsured Employers' Fund*¹⁶¹ and found the present situation to be factually similar. Rice noted that in *Howe*, the industrial accident occurred while renovating the primary residence of a homeowner who maintained the residence as part of a trust, and that the homeowner also owned income-producing properties. Rice explained that this Court determined that the employee was a casual employee because the accident occurred on a personal residence where the homeowner had not worked in the construction field in several years. Rice stated that in the present case, the UEF's investigation revealed that the Yellowstone Club property was a recreational property and no evidence indicated that it was part of Howard's business.¹⁶²

¶ 81 Rice acknowledged that in *Colmore v. Uninsured Employers' Fund*,¹⁶³ the Montana Supreme Court determined that an employee was not a casual employee after examining the employer's tax treatment of the property at issue, but she stated that she believed the present case was more factually similar to *Howe* than to *Colmore*. Rice stated that she had not examined Howard's income tax records in reaching her determination that Weidow was a casual employee because she relied on the Court's analysis in *Howe*.¹⁶⁴

¶ 82 In determining Weidow's employment status, Rice considered Howard's response to her inquiries, and investigated the type of properties Howard owned and the type of business he conducted.¹⁶⁵

¹⁶¹ *Howe*, 2006 MTWCC 27.

¹⁶² Trial Test.

¹⁶³ *Colmore*, 2005 MT 239, 328 Mont. 441, 121 P.3d 1007.

¹⁶⁴ Trial Test.

¹⁶⁵ Trial Test.

¶ 83 On November 22, 2006, Rice wrote to Weidow and informed him that the UEF was denying liability for his claim on the grounds that he was performing casual labor at the time of his injury and was therefore exempt from workers' compensation coverage.¹⁶⁶

¶ 84 I find Rice's reliance on *Howe* to be misplaced. *Howe* revolved around whether the injured worker was an employee of the homeowner or of the contractor the homeowner hired to renovate the homeowner's primary residence.¹⁶⁷ Ultimately, I concluded that the injured worker was an employee of the contractor, not the homeowner.¹⁶⁸ More relevant to the present case, however, in *Howe*, the UEF argued that the contractor's liability may also migrate to the homeowner because the UEF alleged that improving the property was part of a regular course of business in using the trust as an income-producing property. I rejected the UEF's argument, stating:

Although the UEF attempts to argue that the Wilmer Family Trust received tax benefits as a result of the deductions taken for improvements to the trust corpus, the testimony at trial was that the Wilmers did not even know if a separate tax return was filed for the trust, or if any deductions or other advantageous tax benefits occurred. The UEF did not introduce any tax returns or other documents into evidence or submit any testimony that would raise their income-production argument to more than mere speculation. Therefore, the Court rejects the UEF's argument that improvements made to the Wilmer residence constitute a regular or recurrent part of the trust's "business" because of potential tax benefits.¹⁶⁹

This is in stark contrast to the facts in the present case, in which Weidow put extensive tax records of Howard and the Trust into evidence and Howard and his accountant testified as to the tax benefits Howard received from the Yellowstone Club property. Unlike *Howe*, where the UEF attempted to impute liability to another party through mere speculation that a tax advantage *may* have occurred via the homeowner's trust, in the present case, ample evidence of Howard's tax advantages have been presented to the Court. Therefore, I do not find *Howe* to be applicable to the present case.

CONCLUSIONS OF LAW

¹⁶⁶ Ex. 12 at 24.

¹⁶⁷ *Howe*, ¶ 4.

¹⁶⁸ *Howe*, ¶ 59.

¹⁶⁹ *Howe*, ¶ 57.

¶ 85 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Weidow's industrial accident.¹⁷⁰

¶ 86 Weidow bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹⁷¹

Issue One: Whether Bradley Howard/Howard Family 1995 Trust was an uninsured employer at the time of Weidow's injuries on June 13, 2006.

¶ 87 Under § 39-71-501, MCA, an "uninsured employer" is defined as an employer who has not properly complied with the provisions of § 39-71-401, MCA. Section 39-71-401, MCA, codifies which types of employment are covered and exempted from the WCA. In the present case, Howard has asserted that he is exempt from the WCA because Weidow was a casual employee pursuant to § 39-71-401(2)(b), MCA. This defense is discussed extensively in the resolution of Issue Four. Therefore, I reserve my analysis for that portion of the Conclusions of Law.

Issue Two: Whether Weidow is entitled to benefits pursuant to §§ 39-71-701 - 704, MCA.

¶ 88 Section 39-71-701, MCA, sets forth the circumstances under which an injured worker may be entitled to temporary total disability (TTD) benefits. Section 39-71-704, MCA, sets forth the circumstances and conditions under which an injured worker may be entitled to certain medical benefits. The parties have agreed that Weidow suffered injuries and accrued medical expenses as a result of his industrial accident.¹⁷² Weidow further contended that he is entitled to wage-loss benefits.

¶ 89 Under § 39-71-701(1), MCA, a worker is eligible for TTD benefits when he suffers a total loss of wages as a result of an injury and until he reaches maximum healing, or until he has been released to return to his time-of-injury employment or employment with similar physical requirements. The only evidence in the record regarding Weidow's employment status is his own testimony that he has reactivated All Trades Construction and completed some projects under this business name. No medical records or other evidence were submitted to indicate whether Weidow was taken off work or whether he has reached maximum healing. The parties have not introduced any evidence in support of Weidow's

¹⁷⁰ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¹⁷¹ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¹⁷² Final Pretrial Order, Uncontested Fact No. 13.

claim that he is entitled to TTD benefits. Although the nature of Weidow's accident causes me to suspect that he may ultimately be entitled to indemnity benefits, he has not met his burden of proof to support a conclusion in favor of his entitlement to such benefits at this time.

¶ 90 As to the issue of medical benefits, the parties have agreed that he suffered injuries and accrued medical expenses as a result of his industrial accident. I therefore conclude that he is entitled to medical benefits pursuant to § 39-71-704, MCA, as I have further denied Howard's and the UEF's affirmative defense that Weidow was engaged in casual employment, as more fully set forth below.

Issue Three: Whether Bradley Howard/Howard Family 1995 Trust was an "employer" as that term is defined under the Workers' Compensation Act (WCA) at the time of the incident at issue.

¶ 91 In a pretrial motion, Weidow moved for summary judgment on the affirmative defenses raised by Howard and the UEF which alleged that Weidow was either an independent contractor or a casual employee. I granted in part and denied in part the motion, concluding that Weidow was not an independent contractor, but was an employee – casual or otherwise – of Bradley Howard or the Howard Family 1995 Trust.¹⁷³ Therefore, although he may be absolved of liability if Weidow were a casual employee, Howard's status as an employer has been established.

Issue Four: Whether Weidow's work activity at the Yellowstone Club home of Bradley Howard/Howard Family 1995 Trust was "casual employment" and exempt from insurance coverage requirements under the WCA at the time of the incident at issue.

¶ 92 Under § 39-71-116(6), MCA, casual employment is defined as "employment not in the usual course of the trade, business, profession, or occupation of the employer."

¶ 93 In *Colmore*,¹⁷⁴ the Montana Supreme Court noted that the WCA does not define "course of trade, business, profession, or occupation."¹⁷⁵ Relying on older case law, the court noted that the word "business" has been defined as the "habitual or regular

¹⁷³ *Weidow v. Uninsured Employers' Fund*, 2009 MTWCC 4.

¹⁷⁴ *Colmore*, 2005 MT 239, 328 Mont. 441, 121 P.3d 1007.

¹⁷⁵ *Colmore*, ¶ 18.

occupation that a person [is] engaged in with a view to winning a livelihood or gain,”¹⁷⁶ and further noted that the “line of demarcation between what is and what is not employment in the usual course of trade, business, profession, or occupation of the employer is vague and shadowy” and “such determination must be made on a case-by-case basis”¹⁷⁷

¶ 94 Although the *Colmore* decision also briefly discussed the occupation of the employee, recently, in *Raymond v. Uninsured Employers’ Fund*, I noted:

Although in *Colmore*, the Supreme Court noted, “The important fact is that [the injured worker] was employed to work for Colmore in the course of his agricultural business, and that [his] only occupation at the time was to repair and replace fences for Colmore,” § 39-71-116(6), MCA, specifically states that casual employment is defined by whether the employment is in the usual course of the trade, business, profession or occupation of the **employer** – not the employee. And while the Supreme Court noted that Colmore’s employee’s only occupation was to work for Colmore, it ultimately concluded that the employee was not a casual employee because of the **employer’s** “profit motive.”¹⁷⁸

¶ 95 I distinguished *Raymond* from *Colmore* on the fact that in *Raymond*, no evidence before the Court demonstrated that the property owner deducted the property upon which the industrial accident occurred as a business expense; all the evidence submitted demonstrated that the property was intended to be used solely as a vacation property.¹⁷⁹ In the present case, significant evidence demonstrates that Howard not only intended to deduct the Yellowstone Club property as a business expense, but did so on his 2004 and 2005 tax returns. Although Howard ceased listing the Yellowstone Club property on Schedule E on his 2006 return, he did so only after this litigation began and at the time of trial had not corrected his previous tax returns. As with the Big Sky condominium, Howard never intended to actually rent the property, but that did not stop him from claiming it as a rental for tax purposes. He further used the property as the registration address for his airplane, thus avoiding significant tax liability in California. Although Howard may have intended to use the Yellowstone Club property as a vacation home, Howard represented to the IRS that the Yellowstone Club property was a business property because it was financially advantageous for Howard to do so.

¹⁷⁶ *Colmore*, ¶ 19. (Citations omitted.)

¹⁷⁷ *Colmore*, ¶ 22. (Citations omitted.)

¹⁷⁸ *Raymond*, 2009 MTWCC 31, ¶ 40. (Emphasis in original. Internal citations omitted.)

¹⁷⁹ *Raymond*, ¶ 38.

¶ 96 Howard treated the Big Sky condominium in a similar manner, treating it for tax purposes as if it were a rental property while actually using it as a personal residence with no intention of renting it. Clearly, Howard received significant tax benefits for doing so. Howard purchased and maintained property in Montana not merely for recreational purposes but because he was able to achieve significant tax savings by deducting expenses associated with these properties from his taxes and by using the Yellowstone Club property as the registration address for his airplane. As reflected in Howard's testimony and in his tax returns, Howard used his Montana properties as part of a "business" as defined in *Colmore*: "with a view to winning . . . a gain."¹⁸⁰ While Howard did not develop the Yellowstone Club property solely for business purposes, the statute and case law does not require that he do so, but only that it be part of his usual course of trade, business, profession, or occupation. I conclude that Howard's use of the Yellowstone Club property, particularly in his use of that property for advantageous tax purposes, was part of Howard's usual course of trade, business, profession, or occupation. Therefore, Weidow's work on that property was not "casual employment" within the meaning of § 39-71-116(6), MCA, and was not exempt from workers' compensation insurance coverage.

Issue Five: Whether Weidow timely filed his Petition for Hearing pursuant to § 39-71-520, MCA, so as to invoke the jurisdiction of the Workers' Compensation Court to entertain this case.

¶ 97 Prior to trial, the UEF moved for dismissal of this case, arguing that Weidow did not timely file his petition pursuant to § 39-71-520, MCA. After briefing by the parties, I resolved this issue in favor of Weidow, declaring § 39-71-520(2), MCA, to be unconstitutionally vague.¹⁸¹ Therefore, the Court has resolved this issue.

Issue Six: Whether Bradley Howard or the Howard Family 1995 Trust must indemnify the UEF should the UEF be found liable.

¶ 98 Although the 2005 version of the Montana Code Annotated applies in the present case, § 39-71-541, MCA, which codifies indemnification by uninsured employers to the UEF, became effective on April 1, 2009, and applies retroactively. The statute provides, in pertinent part:

(1) An uninsured employer or an employer alleged to be uninsured is a party to all disputes concerning any benefits for which the employer may become obligated to indemnify the department pursuant to 39-71-504(1)(b).

¹⁸⁰ See ¶ 93, above.

¹⁸¹ *Weidow v. Uninsured Employers' Fund*, 2008 MTWCC 56.

(2) (a) After mediation pursuant to department rules, an uninsured employer or an employer alleged to be uninsured is joined as a party when a dispute over benefits is brought before the workers' compensation judge pursuant to 39-71-2905.

(b) The workers' compensation judge may enter a judgment, including a default judgment, requiring an uninsured employer to indemnify the department with respect to any benefits paid or ordered payable by the department in relation to the claim.

.....
(3) (a) An uninsured employer is obligated to make claim reimbursements as provided in 39-71-504(1)(b), plus the interest and other charges assessed on the claim reimbursement as provided in 39-71-504(2), when demand for those payments is made to the uninsured employer.

¶ 99 In the present case, the uninsured employer was joined as a party to the action and participated in a department mediation.¹⁸² The Court ordered Bradley Howard/Howard Family 1995 Trust joined as a Third-Party Respondent prior to trial.¹⁸³ Therefore, the statutory requirements of § 39-71-541(1), -(2)(a), MCA, have been met. Howard has raised no argument nor offered any reasons why this Court would not order Howard to indemnify the UEF and make reimbursement should the UEF be found liable for payment to Weidow. Therefore, I will enter judgment below, ordering Howard to indemnify the UEF pursuant to § 39-71-541(2)(b), MCA.

JUDGMENT

¶ 100 The issue of whether Bradley Howard/Howard Family 1995 Trust was an uninsured employer at the time of Weidow's injuries on June 13, 2006, is redundant to the issue of whether Weidow's work activity at the Yellowstone Club home of Bradley Howard/Howard Family 1995 Trust was "casual employment" and exempt from insurance coverage requirements under the WCA at the time of the incident at issue.

¶ 101 Weidow is entitled to medical benefits pursuant to § 39-71-704, MCA. Weidow has not proven his entitlement to TTD benefits pursuant to § 39-71-701, MCA.

¶ 102 Bradley Howard/Howard Family 1995 Trust was an "employer" as that term is defined under the WCA at the time of the incident at issue.

¹⁸² See Uninsured Employers' Fund's Motion for Leave to File Third-Party Petition for Statutory Indemnity and Brief in Support, Docket Item No. 81, at 2; Intervenor's Notice of Acquiescence, Docket Item No. 82.

¹⁸³ Order Granting Uninsured Employers' Fund's Motion for Leave to File Third-Party Petition for Statutory Indemnity and Amending Caption, Docket Item No. 87.

¶ 103 Weidow's work activity at the Yellowstone Club home of Bradley Howard/Howard Family 1995 Trust was not "casual employment" and exempt from insurance coverage requirements under the WCA at the time of the incident at issue.

¶ 104 The Workers' Compensation Court has jurisdiction to entertain this case.

¶ 105 Bradley Howard or the Howard Family 1995 Trust must indemnify the UEF.

¶ 106 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 22nd day of January, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Hunt/Jonathan McDonald
G. Andrew Adamek
Joseph Nevin
Submitted: May 15, 2009