

FILE COPY

IN THE SUPREME COURT OF THE STATE OF ALASKA



ALASKAN ADVENTURE TOURS,)	Supreme Court No. S-14483
INC., KIMBERLY RIEDEL-)	
BYLER, aka KIMBERLY C.)	
RIEDEL, K. CHRISTINA)	
RIEDEL and/or KIMBERLY)	Trial Court Case #1JU-08-438 CI
BYLER, and ABC LEASING,)	
LLC,)	
Appellants,)	
vs.)	
THE CITY AND BOROUGH OF)	
YAKUTAT,)	
Appellee.)	



APPEAL FROM THE SUPERIOR COURT,
FIRST JUDICIAL DISTRICT AT JUNEAU,
THE HONORABLE PATRICIA A. COLLINS, PRESIDING

APPELLANTS' EXCERPT OF RECORD
VOLUME 2 OF 2

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FILED in the Supreme Court
this 2 day of April 2012
Marilyn May, Clerk of Court

By:

Beth A. Pechota
Deputy Clerk

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

RECEIVED

Ingaldson, Maassen & Fitzgerald, PC

The City and Borough of Yakutat,

Plaintiff,

vs.

Alaskan Adventure Tours, Inc.,

Defendant.

The City and Borough of Yakutat,

Supplemental Complaint Plaintiff,

vs.

ABC Leasing, LLC and Kimberly Riedel-

Byler, a/k/a Kimberly C. Riedel, K.

Christina Riedel and/or Kimberly Byler,

Supplemental Complaint Defendants.

MAR 29 2011

File No: 2011-3 Cat: _____

Approved for File: _____

Case No: 1JU-08-434 CI

CBY'S OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT

A. Defendants' Motion Does Not Meet the Standards for Relief from Final Judgment

The City and Borough of Yakutat ("CBY") opposes defendants' C.R. 60(b)(3) Motion for Relief from Judgment, which is based upon alleged fraud and misconduct by CBY Chief of Police John Nichols, who testified at trial. Civil Rule 60

...is not a substitute for a party failing to file in timely appeal;
nor does it allow relitigation of issues that have been resolved
by the judgment.

Burrell v. Burrell, 696 P.2d 157, 163 (Alaska 1984), citing 11 C. Wright & A. Miller,
Federal Practice and Procedure § 2863 at 206 and § 2864 at 214 (1973). This is

Opposition to Motion for Relief from Judgment

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EXC. 163

precisely what the defendants are seeking to do. As discussed below, Chief Nichols' testimony as to his conversation with Kimberly Byler was contained in an affidavit filed in court and served upon the defendants on April 3, 2009, more than ten months before the February, 2010 trial.¹ Yet defendants did not perform the discovery they now seek into such issue; nor did they depose Chief Nichols or cross-examine him at trial on the issues upon which they now seek C.R. 60(b) relief and/or further discovery, nor did they present the witnesses they now advance to rebut or impeach Chief Nichols' testimony. Nor did the defendants timely appeal from the Final Judgment on Fraudulent Conveyance dated March 18, 2010, nor from the subsequent amended judgments, including the Third Amended Judgment entered January 29, 2011, nunc pro tunc March 18, 2010.

As stated in Moore's Federal Practice (3rd Ed. 2003) at § 60.43[1][c], at p. 60-132,

The very purpose of a trial is to test the truthfulness of testimony and other evidence proffered by the parties. Examining the possibility that testimony is perjurious is one of the principal functions of cross-examination.... Therefore, once the trial process has been completed, the resulting judgment should be given as much finality as possible [citation omitted.] Rule 60(b) should not reward the lazy litigant who did not adequately investigate his or her case, or who did not vigorously cross-examine a witness.

Therefore, when the claim of perjury at trial is raised under Rule 60(b)(3), relief is granted only when it is also shown that the perjury at trial somehow prevented the innocent party from fully and fairly presenting his or her case.

¹ See Exhibit 1 hereto, excerpts and certificate of service from April 3, 2009 Plaintiff's Reply Memorandum and accompanying March 27, 2009 Affidavit of John Nichols, and cover sheet from April 3, 2009 facsimile filing of these with Juneau Court.

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Relief has been denied in cases in which the moving party had ample opportunity to uncover the alleged fraud or perjury at trial through cross-examination.

See also E.F. Hutton & Co. v. Berns, 757 F.2d 215, 217 (8th Cir. 1985) (motion for relief denied because parties "had ample opportunity to cross-examine Hutton as to the nature of the SEC investigation" about which Hutton's witnesses allegedly lied); Anderson v. Cryovac, Inc., 862 F.2d 910, 924 (1st Cir. 1988) ("verdicts ought not lightly to be disturbed, so it makes very good sense to require complainants to demonstrate convincingly that they have been victimized by an adversary's misconduct") and Diaz v. Methodist Hosp., 46 F.3d 492, 497 (5th Cir. 1995) (movant's evidence failed to demonstrate that any perjured testimony prevented her from fully and fairly presenting her case).

Chief Nichols' trial testimony, that Kimberly Byler discussed CBY's sales tax assessment against AAT while being driven to the Yakutat Airport by Chief Nichols, was not a "crucial element" or the "missing link" of CBY's evidence that AAT was fully aware of the tax claim prior to its later fraudulent conveyance of assets. CBY had, prior to AAT's fraudulent conveyance, sent no less than 8 letters concerning tax assessment to AAT or Darren Byler and also presented testimony, backed up by telephone billing records, of Darren Byler's telephone call to CBY attorney contesting the sales tax. See Exhibit 2 hereto, copies of admitted trial exhibits 4, 5, 6, 7, 8, 66, 67, 68 and 69. There is no reasonable basis to conclude that the jury's verdict would have been any different had Chief Nichols' testimony not been presented; the jury had ample opportunity to evaluate the Bylers' credibility in claiming that they had no knowledge

whatever of Yakutat's sales tax claim when AAT conveyed all of its assets to Kimberly Byler the following year, in January, 2008.

As is discussed at the conclusion of this memorandum, AAT's current motion is only the latest in a series of gambits by Kimberly and Darren Byler to avoid payment of CBY's judgments and to avoid execution. AAT assembles a conspiracy theorist's brew of inaccurate technical analyses, unsupported speculation, contorted timeline analysis and self-contradictory evidence to assert that a longstanding police officer engaged in perjury and fraud in order to assist his employer, CBY, in a civil matter. Because of the seriousness of the allegations, CBY has been compelled to incur attorney's fees and costs in responding to each of AAT's myriad of evidentiary theories of fraud, which are addressed in the following sections.

As defendants have acknowledged, a party bringing a 60(b) motion to set aside a judgment has the burden of proving fraud by clear and convincing evidence. Moore's Federal Practice, supra at section 60.43[4][a]; Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982).

B. Review of Defendants' "Evidence" of Fraud

1. Alleged alteration/editing of audio recording.

As nearly as CBY can understand this allegation, AAT asserts that CBY Police Chief John Nichols intentionally modified the date/time information on the portable recording device on which he originally recorded the "Interview with Kim Byler" audio

file,² and that he also altered or edited its content. AAT asserts that this interview must have occurred after, not before, a separate "Interview with Brian Barton" audio file. AAT also asserts that Chief Nichols altered or edited the Interview with Kim Byler audio file, but does not indicate how this recording was allegedly altered.

To make any sense of AAT's allegations, the general sequence of relevant events must be discussed.

Jerry Byler, Darren Byler's father, drowned in the late afternoon of May 14, 2007, in Icy Bay, and his body was recovered later that evening. On the morning of May 15, 2007 Kimberly Byler and one employee, Brian Barton, flew into Yakutat on a Yakutat Coastal airplane, carrying the body of the deceased. Chief Nichols met them at Yakutat airport and immediately activated a portable audio device on which he recorded what was later entitled "First Contact with Kim Byler". At the outset of the recording, Chief Nichols gives the time as 10:31 (a.m.). Because the Yakutat Police Department had been requested by the Alaska State Troopers to do a preliminary investigation before Trooper Sergeant Cox was to arrive from Juneau later that day, Chief Nichols transported the decedent's body to the police station for examination and photographing, and also transported Kimberly Byler there to interview her. The "First Contact" recording continues through the time they arrive at the police station, through Chief Nichols escorting Kimberly Byler upstairs to his office, and then through the time Nichols returns downstairs to assist police officer Rose Gordon in offloading the

² Such action by Chief Nichols would have required incredibly manipulative malice aforethought, as he also verbally stated on the audio recording a time for conclusion of the interview which nearly matches the date/time recorded by the audio recorder's internal clock,

decedent's body in the Public Works bay for examination, and until Nichols returns upstairs prior to commencement of a formal interview with Kimberly Byler, which is separately recorded on an audio file he noted "Interview with Kim Byler".

As Officer Rose Gordon and another police employee, Angel Blazina examined and photographed the decedent's body downstairs, Chief Nichols first interviewed Kimberly Byler in his office, and then interviewed AAT employee Brian Barton.

When Ms. Byler originally arrived in Yakutat, she told Chief Nichols (as shown by the "First Contact" recording) that she intended to take the decedent's body on that day's northbound flight to Anchorage. She was advised that it was unlikely that this would be possible, because of the tight time schedule, and that it was likely that she would need to take the body southbound, through Juneau, that evening. However, Ms. Byler persisted in her desire to take the body northbound. The northbound flight from Juneau arrived late in Yakutat, at 11:56 a.m., and Ms. Byler made a last ditch effort to make this flight. At her request, Yakutat police personnel drove the decedent's body to the airport to attempt to get it on the northbound flight. Because there is no cell phone coverage in Yakutat, Ms. Byler made a series of telephone calls to the Arkansas relatives of the deceased from the Yakutat police department, ending at 12:18 p.m. Chief Nichols then drove her the 5 minute distance to the airport, during which they had the subject conversation regarding overdue AAT taxes.

After it became apparent that the decedent's body was not going to be able to be placed upon the northbound flight, Ms. Byler and Mr. Barton return to the police station. Trooper Sergeant Cox had arrived from Juneau on the northbound flight, and went to the

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Yakutat police station to conduct further investigation regarding Jerry Byler's death. In the interim, the Yakutat Coastal airplane which had initially transported Kimberly Byler and Brian Barton to Yakutat returned to Icy Bay to pick up two more AAT employees, Eddie MacDonald and Pam Girdwood. These individuals arrived in Yakutat sometime around noon, rented a van and went to the Yakutat police station, for the Alaska State Trooper's investigation. After they met with Trooper Sergeant Cox that afternoon, all of the AAT individuals (including Kim Byler and Brian Barton, who had returned to the police station, and Eddie MacDonald and Pam Girdwood) departed together. Kimberly Byler flew out of Yakutat with the decedent's body later that evening, southbound for Juneau.

It is in this context that AAT apparently seeks to demonstrate that Kimberly Byler was interviewed after Brian Barton, rather than before, though the significance of this assertion is unknown. Chief Nichols' audio interviews indicate that he completed his interview with Kimberly Byler at 11:10 a.m., and completed his interview with Brian Barton at 11:22. Computer date stamped information indicates that the Kim Byler interview was completed at 11:07, and the Brian Barton interview was completed at 11:24. It is not clear when AAT believes the Kim Byler interview actually occurred.

In any case, AAT's "evidence" that this interview occurred at a later time is unsupported by AAT's own expert's declaration and is directly rebutted by computer data as addressed by CBY's contract IT manager.

AAT's expert in "audio and video recordings", Douglas S. Lacey, has not concluded that there has been any fraud or alteration or editing of any audio recording.

His declaration (Declaration of Douglas S. Lacey, Exhibit D, defendant's motion), at p. 9, references the Estate's allegation that the interview of Kim Byler has been altered or edited since the time it was first recorded on May 15, 2007, and only concludes that "at present, that possibility cannot be ruled out...."; hardly compelling evidence of fraud. His own retrieval of the internal clock times of the original recording devices is highly consistent with CBY's timeline. At paragraph 3 of his Declaration, he shows that the interview with Kim Byler ended at 11:07:33 a.m.; CBY's data indicates that it ended at 11:07:32 - - a one second difference. Expert Lacey's information, like Yakutat's computer evidence, shows that the Interview with Kim Byler was completed four or five minutes before commencement of the interview of Brian Barton, thus directly rebutting AAT's own contention that the Brian Barton interview was conducted prior to the Kim Byler interview.

Because of this, AAT asserts (though its own expert cannot corroborate) that Chief Nichols must have altered the internal clock time/date stamp of his recording of the interview with Kim Byler. This outlandish assertion is directly rebutted by more definitive computer information, as reviewed by Matthew Joy, CBY's IT contractor.

The reason that defendant's expert cannot "rule out" the possibility of alteration is his erroneous conclusion that the audio file was not downloaded from the audio recorder to Chief Nichols' desktop computer until nearly two years later, on March 24, 2009, resulting in defendant's wild speculation that the audio recorder's internal clock must have been altered in the interim - - though there is absolutely no basis for such an assertion. In any case, the audio recording was actually immediately downloaded to

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Chief Nichols' computer, on May 15, 2007. Defendant's expert states that the recording device's internal clock showed the interview with Kim Byler being completed at 11:07:33 a.m. on May 15; CBY's computer system shows that it was first downloaded onto the computer at the same time, May 15 at 11:07:32. See Affidavit of Matthew Joy, paragraph 11 and Exhibits A and C thereto. This is also the time shown on the "properties" of a compact disc (CD) which was burned from the computer by Chief Nichols. Affidavit of Joy, paragraph 11, and Exhibit B thereto.

As shown by the affidavit of Joy, the original desktop computer upon which Chief Nichols downloaded the audio recording has since been replaced, but the data which was stored on it has been retained in storage in a backup program on the police department server. The oldest information regarding the interview with Kimberly Byler audio file, shown to have been initially stored on Chief Nichols' desktop computer was May 15, 2007, specifically an audio file which terminated at 11:07:32 a.m. The later date stamp of March 24, 2009 was likely associated with Chief Nichols having either accessed this audio file at that time to listen to the recording or duplicate it to a CD, or to convert the audio file to another format. Affidavit of Joy, paragraph 6.

Most importantly, the information stored on the backup server in relation to the later, March 24, 2009 date is precisely identical to that information which was stored in the server in association with the prior, May 15, 2007 date. The information on this audio file for each of these dates comprises 9,169,644 bytes, showing an identical quantity of data, indicating that the later dated information represented no alteration, editing or reduction of the initial audio file information. Affidavit of Joy, paragraph 7.

Moreover, both dates indicate the same, lengthy "hash code", which demonstrates that the audio file associated with each date contained precisely the same content. Id. at paragraph 8. This conclusively demonstrates that the audio file has not been altered, edited or modified in any manner since it was initially downloaded to the computer on May 15, 2007. Id. at paragraph 9. Mr. Joy has also reviewed the stored data for the interview of Brian Barton, and confirmed that this interview was conducted after completion of the Interview with Kim Byler.

Defendant also contends that the Brian Barton interview must have occurred before, rather than after the Kim Byler interview because a question asked of Ms. Byler by Chief Nichols indicated that he already knew that the decedent's body had been located by helicopter. Defendant asserts that "Chief Nichols had no other way to learn this fact." To the contrary, he had at least two independent sources of such knowledge prior to his interview with Kim Byler. The CBY Department of Public Safety's own Incident Card dated May 14, the night before, is attached hereto as Exhibit 3, and relates that "a civilian helicopter enroute from Yakutat to Cordova was enlisted to help search for [sic] the Byler. Byler's body was recovered from the water at approximately 2130 hours." Moreover, Chief Nichols had been contacted on the morning of May 15 by Alaska State Trooper Sergeant Cox by telephone, to discuss the case with him and to ask that he do a preliminary investigation; it is probable that Chief Nichols was advised of the helicopter involvement at that time, which was prior to his interview with Kim Byler. Finally, Yakutat is a small town, and the fact that a private helicopter had been dispatched from Yakutat and had located the drowning victim was the type of local news

that travels fast in a small community, another potential source of Chief Nichols' general knowledge of the helicopter's involvement.

Defendant AAT never spells out just how the content of the Interview with Kim Byler was allegedly altered. The fact that the hash codes, on later versions of the file, were precisely identical with the hash code original, May 15, 2007 downloaded audio file conclusively rebuts any suggestion of alteration, as does the identical number of bytes on all versions of the file.

AAT's only hint as to how the content of the audio file was allegedly altered is in Kimberly Byler's declaration (defendant's motion, Exhibit H, paragraph 2) that "part of the start of the interview is missing", because the recording starts with her saying "This is Jerry", rather than beginning with Chief Nichols stating the date and time. However, as defendant's own transcript (defendant's motion, Exhibit C) shows, at page 3, line 12, the interview actually began with Chief Nichols trying to state the start time, but being interrupted by Ms. Byler:

Q: This is Jeff [sic; should be Chief] Nichols. The time - -

A: This is Jerry. This is Jerry. This is a man enjoying his life.³

The audio recording thus began with Ms. Byler making a comment before being asked a question, and interrupting Chief Nichols' attempt to placemark the time. Nothing

³ Ms. Byler was commenting on pictures of Jerry Byler taken at some prior time, which she was showing to Chief Nichols. They were not pictures obtained by Chief Nichols from Brian Barton, as defendant asserts. They were not deemed evidentiary for purposes of the death investigation, and Chief Nichols did not seek copies. Any dispute between the parties on this matter is, in any event, utterly irrelevant to the issue of the truthfulness of Chief Nichols' testimony as to his unrecorded conversation with Ms. Byler regarding taxes, and to defendant's pending motion.

substantive was omitted from the actual interview.

2. Alleged conflict between radio call heard on audio recording and the "timeline".

As near as can be understood, defendant contends that Chief Nichols could not have completed the "First Contact with Kim Byler" recording, assisted in moving the decedent's body out of the truck, and then commenced the formal Interview with Kim Byler within a few minutes after the "First Contact" audio, as shown by both the times verbally stated on the recordings and as shown by the date/time stamped information stored in the computer and shown on the CD contemporaneously burned from the computer. Once again, AAT does not state precisely how its contention relates to the issue of alleged fraud.

In any case, AAT's unfounded suspicions on this matter appear to result from a single mistaken assumption: that the radio voice heard on the audio, who is three minutes away from the station, is Rose Gordon. However, the recorded voice was actually that of Angel Blazina, another police department employee who was not involved in helping Chief Nichols move the decedent's body out of the truck and into the Public Works bay.

Officer Gordon had already accurately testified to the sequence of events during a deposition recently taken by the attorneys for the Estate of Jerry L. Byler (Darren Byler, personal representative) in the Federal District Court case; relevant pages of the transcript are attached hereto as Exhibit 4. She testified, nearly a month before AAT's current motion, that she and Chief Nichols moved the body out of the patrol vehicle and

down into the bay area (Transcript, pp. 33 – 34), and that after this was completed, she waited for Angel Blazina, whose assistance she needed in examining the deceased (Transcript, p. 36). Chief Nichols did not wait with her for Angel to arrive, but rather went upstairs (Id.) Defendant's theory is that Rose Gordon was not even there at this time, but was calling in on a radio indicating she was three minutes away, such that the Chief would have had to have waited for her arrival before moving the body and then proceeding with the Interview with Kim Byler. This is erroneous; it was Officer Rose Gordon, in the presence of the Chief and just prior to moving the body of the decedent out of the patrol vehicle, who was calling Angel Blazina on the radio, and learning that Ms. Blazina was three minutes away from the station. See Affidavit of Rose Gordon, filed herewith.

Ms. Gordon has carefully reviewed the audio recording of the "First Contact with Kim Byler", which confirms that she was already at the station with Chief Nichols, prior to movement of the body out of the truck. At one point, the Chief can be heard to say "I'm just going to go upstairs really quick, Rose, and what I'm going to do is I'll come down and we'll bring...." "Rose" was Officer Gordon.⁴ Affidavit of Gordon, paragraph 8. After this discussion, Chief Nichols brought Kimberly Riedel-Byler upstairs, to wait in his office, then came back downstairs so that he and Officer Gordon could offload the deceased body onto the concrete slab. Id. at paragraph 9. Before offloading the body, Officer Gordon made a radio call to Angel Blazina, who was the Communications

⁴ The transcript of the "First Contact" audio provided by defendants (Motion for Relief Exhibit E, p.10) is incomplete; a duplicate of the actual audio recording can be provided to the court upon direction to do so. However, even the defendant's transcript, at E, p. 10, line 12, shows the Chief addressing his comment to "Rose" -- Officer Gordon.

Officer for the police department:

Officer Gordon: CO, Unit 4.

Angel Blazina on Radio: Go ahead Unit 4.

Officer Gordon: When do you estimate...[inaudible]

Angel Blazina on Radio: Three minutes.

"CO" was the Communications Officer Blazina; "Unit 4" was Officer Gordon's police department radio designation.

Because Angel Blazina was not essential to moving the body, Officer Gordon and Chief Nichols moved the body, sliding it off the truck in a manner which can be heard (and identified in Rose Gordon's affidavit) on the audio recording. Immediately after this was done, Chief Nichols went back upstairs, where he immediately began the recorded Interview with Kim Byler.

In short, neither Chief Nichols' "description of his activities" nor the "integrity of the recordings" is "quite suspect", other than in the fertile imagination of the defendants which causes them to leap to a conclusion of fraud and misconduct, on the basis of an obviously mistaken assumption.

3. Alleged conflict between time of Kimberly Byler telephone calls and arrival of Alaska Airlines flight.

It is true that Kimberly Byler hung around the police station after she and Brian Barton were interviewed, to take advantage of Chief Nichols' offer of free use of its telephones to make long distance calls to the decedent's next of kin in Arkansas, the last of which calls terminated at 12:18 p.m. on May 15. Prior to that time, Ms. Byler had

made known her desire to have the decedent's body rushed back to the airport in an effort to get it on the northbound Alaska Airlines flight, which was going to be arriving in Yakutat behind schedule. She had been advised that this was probably not going to work, and that she may have to transport the body on the evening southbound flight to Juneau. Perhaps her conversations with decedent's Arkansas relatives were to advise of these contingencies. In any case, the body was rushed to the airport, by Officer Gordon and Angel Blazina, an action to which they have each testified by deposition. Ms. Byler was separately driven to the airport by Chief Nichols shortly thereafter. It is a five minute drive from the police station to the Yakutat airport, and their departure for the airport after 12:18 p.m. would not be untimely for an individual to make that flight.⁵

The timing of Ms. Byler's telephone calls are not inconsistent with her arriving at the Yakutat airport at a reasonable time after the airplane arrived in Yakutat but prior to its departure for Anchorage.

4. It is Understandable That Chief Nichols did not introduce Kim Byler to Trooper Sergeant Cox at Yakutat airport.

Chief Nichols did not drive Kimberly Byler to the Yakutat airport for the express purpose of having her meet the arriving Trooper Sergeant Cox there. His purpose was to attempt to accommodate her expressed desire to try to catch the then-arriving northbound Alaska Airlines flight so that she could ship the body to Anchorage on that flight and accompany it. Particularly since Trooper Sergeant Cox would only just be arriving on this northbound plane, her departure on the same plane, had it been possible,

⁵ Last minute air freighting of a decedent's body, however, proved unworkable with Alaska Airlines.

would not have allowed for much, if any, time for her to meet with Sergeant Cox.

Memories of the precise sequence of events four years ago have faded, including Chief Nichols'. However, there are a variety of circumstances in which Kim Byler would not have met Sergeant Cox at the airport. First, she was primarily motivated to ship the body out on the northbound plan, which would have required immediate interaction with the Alaska Airlines freight office, and completion of paperwork, at the freight department's separate entry into the terminal. She may also have sought to rendezvous with her two other AAT employees who were just arriving in Yakutat on the second Yakutat Coastal flight from Icy Bay, with Ms. Byler knowing that these employees would probably be interviewed by Trooper Cox. It is altogether possible that she made not have been interested in meeting Trooper Cox, due to the Bylers' long history of acrimonious relations with the Alaska State Troopers. Ms. Byler may also have chosent to meet with her friend, George Davis who, according to his declaration (defendants' motion, Exhibit M), was at the airport at that time. In any event, Chief Nichols had already performed a recorded interview of Kim Byler which, as it turned out, was all that the State Troopers required; they ultimately did not even perform their own separate interview of her.

There is nothing incongruous, in the rush of events surrounding Sergeant Cox's arrival at the airport and Kimberly Byler's attempt to ship the body and her own attempted departure on the same airplane, in them not being brought together and introduced at the airport by Chief Nichols.

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5. Kimberly Byler's telephone call to Cal Wilson.

Ms. Byler made a 30-second telephone call to her Anchorage friend Cal Wilson at 11:16 a.m., in which, according to Mr. Wilson, she stated that "she might be coming to Anchorage that night and if she did she wanted to stay at my place." Declaration of Cal Wilson, Exhibit J to defendant's motion. This confirms that, as of 11:16 a.m., Ms. Byler was still hoping to take the northbound flight to Anchorage, which would have motivated her to thereafter accept a ride to the airport with Chief Nichols (who had transported her from the airport to the police station); it was during this ride back to the airport that the discussion of taxes occurred.

As part of defendant's effort to rebut the completion time of the Interview with Kim Byler at 11:07 a.m. (as shown by the computer backup data for the audio file, by the "properties" on the original CD burned from the audio file, as shown by defendant's own expert's determination of the time of the original recording, and by the statements of Chief Nichols during the recording), Ms. Byler and Cal Wilson both state that she told him at 11:16 a.m. that she was going to be interviewed by the police, which she asserts to contradict all the other evidence that this interview had actually just been completed. There are a variety of explanations for her recollection: (1) both she and Cal Wilson could be mistaken as to a conversation 4 years ago, having presumably discussed the matter since, (2) she was in a rush to make other arrangements, including utilizing the Yakutat police telephones to make long distance calls before she had to leave for the airport, and used her statement that she was "about to be interviewed" as an efficient excuse for what would otherwise be a rudely abrupt termination of her own telephone

call to a friend, or (3) she could have been referring to her expected upcoming interview by Alaska State Trooper Cox. In any event, 4 year old recollections are a poor substitute for four independent, contemporaneous, electronic and audio recording records, confirming the time of termination of her interview. In any case, even if her interview was a half hour later, what difference would this make? There was ample time for her to be interviewed, conduct her telephone calls (in which there was one gap of over thirty minutes) and still be driven to the airport.

6. George Davis declaration.

George Davis was the owner of the Icy Bay Lodge, in the small cove where AAT's vessels were anchored and Jerry Byler drowned. Mr. Davis was brought in by the defendant to testify telephonically at trial, for purposes of impeaching Chief Nichols' testimony as to his tax conversation with Ms. Byler, by relating a rumor he had heard that Chief Nichols had engaged in an extramarital affair. In cross-examination at trial, Mr. Davis acknowledged that (1) he was a prospective partner with Darren Byler on an upcoming business transaction and (2) he had a bad relationship with the Yakutat police department.

Given his obvious bias, one would think that Mr. Davis would have presented the strongest testimony available to him at trial to rebut Chief Nichols' testimony that he drove Kimberly Byler to the airport and, during this drive, engaged in a conversation about AAT's overdue sales taxes. Yet Mr. Davis never testified at trial that he was at the Yakutat airport on May 15, 2007, in conjunction with the northbound Alaska Airlines arrival; that he saw Chief Nichols drive to the airport in the police pickup truck at that

time; and that Chief Nichols was alone, not accompanied by Ms. Byler.

Now, however, a year after the trial, he signs a Declaration (defendant's motion, Exhibit M) to this effect.

John Nichols' affidavit regarding his conversation about taxes with Kim Byler while he was driving her to the Yakutat airport was filed over ten months before the February 10, 2010 trial in this matter. If Mr. Davis knew that Chief Nichols had arrived at the airport without Ms. Byler, why did he not testify at trial to this effect? More to the point, why did the defendants not present such testimony, but instead present this evidence for the first time one year later, in a motion to set aside a final judgment?

7. Declaration of Pamela Girdwood.

Ms. Girdwood's declaration fails to rebut Chief Nichols' testimony for the same reason that Eddie MacDonald's telephonic trial testimony failed to convince the jury that Chief Nichols' testimony was untrue.

Both Pamela Girdwood and Eddie MacDonald travelled from Icy Bay to Yakutat on a later plane than Kimberly Byler, and were not aware that Kimberly Byler had already been interviewed by Chief Nichols, was then driven by Chief Nichols to the airport, and then later returned to the police station to meet with (but not be formally interviewed by) Trooper Sergeant Cox. Ms. Girdwood's declaration, at paragraph 5, is presumably correct. After she arrived in Yakutat at noon or later, she did go to the station and was interviewed there, by Sergeant Cox and, thereafter, she went to lunch with the AAT people, including Kimberly Byler, after which Ms. Byler was dropped off at the airport for the southbound Alaska Airlines flight to Juneau. However, these facts,

all of which occurred on the afternoon of May 15, are not inconsistent with the earlier, morning interview of Kimberly Byler by Chief Nichols, nor with his driving her to the airport to catch the early afternoon flight to Anchorage, consistent with her 11:16 a.m. telephone call to Cal Wilson seeking a place to stay in Anchorage that night.

Ms. Girdwood was not in Yakutat during the morning of May 15, and is not competent to testify as to what occurred prior to her arrival in Yakutat.

8. Absence of pages from 29-page fax from Troopers.

Defendant's evidence of fraud includes the fact that Chief Nichols did not retain most of a 29-page fax he received from the State Troopers, when he had requested their file in conjunction with his preparation to testify at trial in this case. The reason he disposed of the remainder of the fax transmission is that most of the faxed Troopers file contained a duplication of CBY's own original investigation report and file, to which Chief Nichols already had access.

C. Defendants' Motion and Request for Further Discovery Should be Denied

As discussed in the following section, defendants' untimely and ineffective assault on the credibility of Chief Nichols in this motion was preceded by several efforts to have criminal perjury charges brought against him by federal and state law enforcement agencies, which rejected their efforts. When the Bylers' highly speculative theories of timelines and audio file alterations are scrutinized, they disintegrate.

In any case, each of the assertions they now make could have been the subject of investigation, discovery and cross-examination by defendants AAT and Kimberly Riedel-Byler, at trial, in response to Chief Nichols' affidavit filed ten months prior to

trial. C.R. 60(b) was never intended as a procedure to retry a case and disrupt the finality of judgments. Defendants had fair opportunity to raise these issues at trial, and failed to do so.

It is evident that defendants themselves are aware of the deficiencies in the theories of fraud and misconduct they have cobbled together for this motion, so they seek open-ended post judgment "discovery" to conduct a further fishing expedition. In the pending federal maritime case brought by the Estate of Jerry Byler through Darren Byler, the Estate has already conducted lengthy depositions of four members of the Yakutat police department. It also seeks complete expert analysis of the police department's computer hard drive, containing *all* files, not just those pertaining to this case.⁶

Regardless of what discovery efforts are made by the Estate of Byler in the federal case, litigation in the case at bar was terminated by the final judgment. Defendants' 60(b) motion for relief from judgment or for ongoing discovery on matters which, if meritorious, could and should have been raised at trial, should be denied.

D. CBY is Entitled to an Award of Reasonable Actual Attorney's Fees and Costs Incurred in Opposing This Motion

Since the time the jury entered its verdicts of fraudulent conveyance against AAT and Kimberly Riedel-Byler on February 16, 2010, AAT, Kimberly Riedel-Byler and her

⁶ The Estate's attorney, John Casperson's declaration states that "CBY is resisting that request". In fact, CBY has made it known that it will allow the Estate's expert to review and analyze the entire hard drive, either at the offices of CBY or at the office of its Anchorage IT contractor; but CBY will not permit the Estate or its expert to remove from these premises a hard drive copy containing sensitive information from other police cases, e.g., those involving minors.

husband, Darren Byler have engaged in a series of tactics designed to prevent CBY from enforcing both its prior Judgment for sales taxes and penalties (November 26, 2008) and this court's March 18, 2010⁷ Final Judgment on Fraudulent Conveyance awarding partial attorney's fees and costs against AAT and Kimberly Riedel-Byler.

The Bylers' first gambit to avoid CBY collection on its judgments was for Darren Byler, as personal representative of the Estate of Jerry Byler, to file a case in federal maritime court against AAT and its vessels, seeking to arrest the vessels on the basis of a purported \$2.5 million "settlement" of a wrongful death claim by the Estate against AAT and its vessels, which settlement was purportedly secured by a preferred ship's mortgage on the vessels. None of this had been disclosed by AAT during the pendency of the State Court action, including the February, 2010 jury trial. AAT's collaborative effort with the Estate to have the Federal Court arrest AAT's vessels was done *ex parte*, without notification to CBY. The federal Magistrate Judge initially denied the arrest motion; CBY then learned of the Byler's ongoing effort to arrest the vessel, intervened in the federal case and prevented the arrest. However, the Estate's claim against AAT is still pending, and will go to trial in federal court later in 2011. At this juncture, it appears that only intervenor CBY, and not nominal defendant AAT, will defend against the Estate's wrongful death claim for alleged "unseaworthiness" of AAT's vessel.

When the *ex parte* arrest gambit failed, AAT waited until CBY had made expensive arrangements for service of a writ of execution on the state court judgment,

⁷ Attorney's fees and costs totaling \$96,103.95 were awarded against Kimberly Byler and ABC Leasing on April 14, 2010; the Final Judgment on Fraudulent Conveyance was not initially entered against AAT at that time because of its intervening bankruptcy petition, but was later, after dismissal of the bankruptcy, entered against AAT; see Third Amended Judgment dated January 20, 2011.

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and seizure of AAT's vessel of the M/V ALASKAN LEADER, which was anchored in a remote location. Only after State Troopers had boarded the vessel, along with a contracted vessel operator and engineer, did AAT file a Chapter 11 bankruptcy petition, which automatically stayed the execution process. However, following a lengthy and expensive effort by CBY in the bankruptcy court, bankruptcy Judge MacDonald, on June 18, 2010, ordered a dismissal of AAT's bankruptcy filing on grounds that its petition was filed in bad faith. His decision stated in part:

In my view, the debtor is attempting to unreasonably deter and harass CBY through the filing of its chapter 11 petition. AAT is not attempting to effect a speedy, efficient reorganization, nor can it propose a feasible plan until the wrongful death claim has been liquidated. This court can neither liquidate the claim nor estimate it for purposes of confirming a chapter 11 plan. The debtor, through its principals, is seeking to game the system to its advantage, something that has occurred repeatedly in the past. As noted by Collier:

One of the basic underpinnings of the good faith doctrine, and a factor that helps explain its purpose, is the fundamental policy that bankruptcy relief is generally limited to the "honest but unfortunate debtor." As one court has explained in the context of dismissing a chapter 11 case for lack of good faith: "Congress had never intended that bankruptcy be a refuge for the irresponsible, unscrupulous or cunning individual."

The Bylers own and control AAT. They are not honest debtors. Their misfortune with CBY has been brought about by their own misconduct. They do not deserve the benefits of chapter 11. This case should be dismissed.

See copy of bankruptcy court's Memorandum on Dismissal, Exhibit 5 hereto.

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Unfortunately, this effort cost CBY over \$40,000 in nonrecoverable attorney's fees.

Apart from these unsavory civil court tactics, the Bylers have conducted a highly aggressive, but unsuccessful effort to have criminal perjury charges brought against CBY police chief John Nichols, because of his trial testimony as to his conversation concerning taxes with Kimberly Byler. Attached as Exhibit "A" to the Affidavit of Counsel, filed herewith, is a collection of the Bylers' criminal complaints seeking the bringing of charges of perjury by (1) the FBI, (2) the Alaska State Troopers and (3) the office of Alaska Governor Sean Parnell. CBY did not learn of these efforts until Governor Parnell's office sought information from the Borough, after which CBY then filed a public records request directed to the Governor's office.

The Bylers' complaints disclose many of the same wild accusations as are contained in their current motion for relief from judgment; the criminal complaint letters also are based upon additional allegations and "evidence" which even the Bylers have since abandoned and have not presented to this court.

AAT's initial letter of October 15, 2010 was to Special Agent Grace of the FBI; CBY does not have any written response from the FBI. However, Kimberly Riedel's emails of November 5 and November 10, 2010 both indicate that the FBI declined to pursue the matter. Ms. Byler's emails of November 5 and November 10, 2010 to the Department of Public Safety (Alaska State Troopers)⁸ resulted in a November 18, 2010 response from Colonel Audie Holloway, Director of the Alaska State Troopers, stating

⁸ Kimberly Riedel's November 5, 2010 email discloses that she initially filed a perjury complaint with the Juneau State Troopers office much earlier, on February 22, 2010.

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in part:

As I'm sure you are aware, a trial allows parties to an event to present their respective cases and requires a panel of impartial jurors to evaluate witness credibility, examine evidence and render a verdict. In your case, the jury rendered a verdict that was not in your favor. There is no question that in any given case there will be variations between what witnesses recall and the accuracy of each individual's recollection. Quite simply, people see and hear things from their own perspective and that is to be expected. That being said, an impartial jury panel apparently weighted the testimony, the evidence presented and the credibility of those involved and ultimately decided in favor of the City and Borough of Yakutat.

You mention in one of your emails that your attorney, Mr. Fitzgerald, cross examined Chief Nichols and that Chief Nichols was somewhat circumspect in his answers. It is your attorney's job to conduct such cross examinations to elicit further information and/or inconsistencies in a witnesses' statement. According to your own correspondence this exchange took place in open court where the jury had every opportunity to listen to and evaluate the veracity of Chief Nichols' testimony.

If your attorney was of the opinion that Chief Nichols committed perjury, I would expect that he would have quickly contacted the District Attorney's Office as is standard practice. On the other hand, if he did not believe himself that perjury had been committed, he would likely be concerned about making a false report, a criminal offense in and of itself.

Colonel Holloway's letter concludes that the Troopers would not pursue the matter.

Finally, an email of November 8, 2010 from Ms. Byler to the Governor's office indicates that her husband, Darren Byler, had talked to the Governor's office about the complaint against Chief Nichols, alleging that the Bylers were getting the "run around" by the Troopers. The Governor's office response of December 15, 2010 stated in part:

Please be advised that this office now has looked into the matter and determined that a jury found the testimony in question to have been credible and returned a verdict and

monetary award against you and in favor of the City of Yakutat. This office has also found no evidence to support your assertion that the Alaska State Troopers are "covering up" any wrongdoing by the City of Yakutat, its police department, or members of its police department.

Having unsuccessfully sought to thwart enforcement of CBY's judgments through (1) a federal maritime arrest based upon a collusive wrongful death "settlement" between Mr. and Mrs. Byler's respective entities, (2) filing a bad faith Chapter 11 bankruptcy petition and (3) serial efforts to obtain criminal investigation and criminal charges against Police Chief Nichols, the Bylers and their corporation, AAT, finally come back to this court to raise evidentiary issues which could have been presented at a trial which occurred ten months after Chief Nichols' affidavit testimony was first disclosed. The allegations of AAT and Kimberly Riedel-Byler in their motion could have been pursued in discovery and litigated prior to this court's final judgment following the jury verdict, and are demonstrably unfounded.

Because of the seriousness of these allegations, however, CBY has been compelled to incur substantial attorney's fees, as well as to incur substantial costs from its contract IT provider, Bright Solutions (Matthew Joy) in analyzing and responding to the defendant's serial allegations. The amount of these fees and costs are set forth in the Affidavit of Counsel and Affidavit of Matthew Joy, filed herewith.

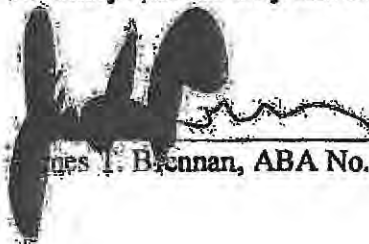
CBY requests an award of its full reasonable attorney's fees, as well as the costs charged by its computer services contractor, in opposing this motion. The court has inherent authority to award such fees and costs, which is consistent with the provision in Rule 82(b)(3)(G) and decisions thereunder that full attorney's fees may be awarded for

"vexatious or bad faith conduct". These adjectives have been given new meaning by the post-verdict, post-judgment conduct of defendants AAT and Kimberly Riedel-Byler herein.

These defendants accuse CBY of "aggressive" efforts to enforce the Borough sales tax ordinance against them. The defendant's tax and judgment avoidance conduct has necessitated such action, which is warranted by the Borough's duty to evenhandedly collect taxes from all guide services operating in the Borough. The Bylers' post-judgment actions have caused yet a further strain on the limited budget of a Borough whose population is 840. CBY is entitled to an award of its full expenses in opposing defendants' frivolous motion, unsubstantiated in both law and fact.

DATED at Anchorage, Alaska this 28th day of March, 2011.

HEDLAND, BRENNAN & HEIDEMAN
Attorneys for the City and Borough of Yakutat



James L. Brennan, ABA No. 7610080

CERTIFICATE OF SERVICE

I hereby certify that on March 28th, 2011
a copy of the foregoing was served via
U.S. mail on:

Kevin Fitzgerald
Ingaldson, Maassen & Fitzgerald, P.C.
813 W. 3rd Avenue
Anchorage, Alaska 99501-2001
Fax No: (907) 258-8751



Kristi Schandel

3000.81/502

Opposition to Motion for Relief from Judgment

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**YAKUTAT DEPARTMENT OF PUBLIC SAFETY
INCIDENT CARD**

U. S. C. G.			07-0437		
Complainant's First Name		M.I.	Last Name		Case #
SEARCH AND RESCUE			DEATH INVESTIGATION		
Nature of Complaint			Nature of Complaint #2		Nature of Complaint #3
AK Beverage Control			Icy Bay		
Location of Incident/Offense					
3 LAWLESS	1933	05/14/07	3 LAWLESS	911	
Received By	Time	Date	Assigned Officer	How Reported	
City					
D.O.B	S.S.N.#	I.D.	ST	Home Phone Number	Drugs Alcohol
Reported By			Address		Cell Back Number

Details of Complaint:
USCG notified YDPS that they received a report of a man who had fallen into the water .

It was believed that the individual was on the vessel Alaska Leader when he fell overboard. He was described as a 70 year old man later identified as Jerry Byler. The individual had been in the water for over an hour before USCG was notified. A civilian helicopter enroute from Yakutat to Cordova was enlisted to help search for the Byler. Byler's body was recovered from the water at approximately 2130 hours. Byler was deceased and taken back to the vessel North Pacific. The USCG notified Alaska State Troopers of Byler's death.

For further information refer to the investigation conducted by Sgt. Cox of the Alaska State Troopers.

Jerry L. BYLER DOB 1/19/36 SSN 430-72-1671

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3
7

Copy ☐ Original ☐ Officer _____ Dated _____

EXHIBIT 3
PAGE 1 OF 1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

Ingaldson, Maassen & Fitzgerald, PC

The City and Borough of Yakutat,)

Plaintiff,)

vs.)

Alaskan Adventure Tours, Inc.,)

Defendant.)

The City and Borough of Yakutat,)

Supplemental Complaint Plaintiff,)

vs.)

ABC Leasing, LLC and Kimberly Riedel-)

Byler, a/k/a Kimberly C. Riedel, K.)

Christina Riedel and/or Kimberly Byler,)

Supplemental Complaint Defendants.)

MAR 29 2011

File No: 20443 Cal: _____

Approved for File: _____

Case No: 1JU-08-434 CI

AFFIDAVIT OF MATTHEW JOY

STATE OF ALASKA)

THIRD JUDICIAL DISTRICT)

Matthew Joy, being duly sworn, states:

1. I am over the age of 18 and am knowledgeable about the facts discussed in this affidavit.

2. I am the president and lead computer consultant of Bright Solutions, Inc., a computer and internet commerce consulting firm located in Anchorage, Alaska. One of our clients is the City and Borough of Yakutat for whom, since 2001, we have provided contract consulting IT (information technology) services, including services relating to installation

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Affidavit of Matthew Joy

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EXC. 191

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and maintenance of desktop (workstation) computers and backup server systems. One of the CBY offices for which we have provided services is the CBY Department of Public Safety, the police department.

3. Since 1997, I have functioned as an expert in numerous cases in Alaska State court, as well as for federal and military jurisdictions, and have provided expert testimony in numerous cases, including cases in which allegations have been made of alteration or modification of files stored on computers.

4. I have been asked in this case to review the Declaration of Douglas S. Lacey, which states that Mr. Lacey is an expert in audio and video recordings, and to evaluate his conclusion that he cannot rule out the possibility of modification of the date/time information and content of an audio file entitled "Interview of Kim Byler". My understanding is that there has been an allegation that some portion of the "Interview with Kim Byler" audio file may have been altered to either add or remove some portion of the recording.

5. It is my understanding that the Interview with Kim Byler audio file was originally recorded on May 15, 2007 by CBY police Chief John Nichols on a portable digital audio recorder, and downloaded from the recorder onto Chief Nichols' desktop computer. The desktop computer used by Chief Nichols in 2007 has since been replaced. However, the data which was on that computer still exists in the stored backup data on a server located at CBY Department of Public Safety. The stored backup data includes five copies of the Interview with Kim Byler, four of which were in WMA (Windows Media) format, and one of which was in the .m4a format used by the iTunes media player.

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6. Mr. Lacey's declaration states that it is a "possibility" that "cannot be ruled out" that the audio file "Interview with Kim Byler" was "altered or edited" after it was created "without further information about the cause of the March 24, 2009 date of the file". I do have access to additional information, some of which is attached to this affidavit, which was apparently not reviewed by Mr. Lacey, and I can rule out the assertion that this audio file has been altered or edited. Alteration or editing of the Interview with Kim Byler audio file can be ruled out by reviewing the restored files from the backup and copies of the audio which were on CD's burned from the computer shortly after the recordings were made, and by referring to the timestamps and metadata within the file itself.

There are two places where date and time stamps are stored relating to each electronic copy of the "Interview with Kim Byler" audio file. One such place is within the audio recording itself, which Mr. Lacey references in Page 2 of his report. The other place for date and time stamps will be associated with the computer file system which is external to the actual recording itself. There are many ways that normal computer usage can alter the file system date stamps without changing the content within the file, and this is what appears to have happened to some, but not all copies of this particular audio file.

I did a comparison of each of the "07-0438-0043 Interview with Kim Byler.wma" audio files shown to have been first stored to Chief Nichols' old desktop computer on May 15, 2007 with the "07-0438-0043 Interview with Kim Byler.wma" associated with the later date stamp of March 24, 2009. The oldest windows file system modification date associated with any copy of the "07-0438-0043 Interview with Kim Byler.wma" which I was able to locate was not March 24, 2009, as Mr. Lacey states, but rather May 15, 2007. The later date stamp of March 24, 2009 was a windows file system date stored external to the actual "07-

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0438-0043 Interview with Kim Byler.wma". This more recent modification date associated with the file may have been updated by a number of possible actions other than the claim that Chief Nichols altered the audio content. Possible explanations for the newer modification date include that someone could have either (1) opened or moved this audio file at that time, either to listen to the recording, duplicate it onto a CD or both most likely using Windows media Player which known alter file modification dates, (2) converted the audio file to another format (i.e., from iTunes back to Window Media), at that time or (3) resorted the file from backup media with the update modified date option checked. This is not a complete list of the ways the windows file system date could have changed but are offered to illustrate probable causes for the file system date to change.

7. The backup data stored on the server allows comparison of the data which was initially stored on Chief Nichols' desktop computer on May 15, 2007 with the data stored in association with the March 24, 2009 date stamp. Attached as Exhibit A are data printed from the retrospect backup application, demonstrating that the number of "bytes", stored on May 15, 2007 and on March 24, 2009 copies of "07-0438-0043 Interview with Kim Byler.wma", respectively, are identical, indicating that the total quantity of characters stored within each of these files is identical, 9,169,644 bytes.

8. An analysis of the files I restored files from the backup also indicates the "hash code" for both the May 15, 2007 and March 24, 2009 dates on the Interview of Kim Byler audio file. The hash codes for each date, 839ec2afedf1b8d45cf1c3a815652b4a, are identical; see Exhibit B. This demonstrates that the precise content stored within the audio file for each of these two dates is identical.

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9. My conclusion from the foregoing is that the quantity and precise content of data on this audio file, date stamped May 15, 2007 and March 24, 2009, is identical, indicating that there has been no modification whatsoever to the Interview with Kim Byler audio file since the audio file was first downloaded to Chief Nichols' desktop computer.

10. The identity of the two externally date stamped copies of this audio file is further shown by a screen shot of the backup program (Retrospect) relating to this audio file; see Exhibit C. The screenshot shows both the initial download date/time (May 14, 2007 at 11:07:32 a.m.) and the later date of March 24, 2009, both relating to the identical audio file.

11. The last modified date time for completion of the initial download from the audio recorder to Chief Nichols' desktop computer for the Interview with Kim Byler shown on the backup is 11:07:32. This is nearly identical with the 11:07:33 time indicated by Mr. Lacey as the completion time shown by the internal clock of the Olympus digital recorder. It is also identical with the time data retrievable from the original compact disk ("CD") burned by Chief Nichols from his desktop computer, which CD was then placed into police evidence. I have reviewed this original CD, and taken a "screenshot" of its "properties". The screenshot, which is Exhibit D, shows that the Interview of Kim Byler was completed at 11:07:32 on May 15, 2007, the same as is shown by the backup as the time of completion of the download of the audio file to Chief Nichols' desktop computer. Additionally, the hash code calculated from the original Interview with Kim Byler CD is identical with the hash code calculated from each of the WMA (Windows Media) copies of the audio files stored on the backup, indicating that the content of the "07-0438-0043 Interview with Kim Byler.wma" audio recording on the original evidentiary CD is identical with the audio file initially downloaded onto Chief Nichols' computer.


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12. I also compared the completion times for the Interview of Kim Byler and Interview of Brian Barton, respectively, as shown on both the backup server data and on the properties of the CDs burned from the computer for each of these interviews. These confirm that the Interview of Brian Barton did not occur until after completion of the Interview of Kim Byler.

13. In conclusion, the data stored on Yakutat Police Department's backups, and on the original CDs burned from Chief Nichols' desktop computer, demonstrate conclusively that (1) this audio file has not been altered or edited since the time it was originally downloaded onto the Chief Nichols' desktop computer on May 15, 2007, and that (2) the Interview with Kim Byler was concluded at 11:07 a.m. on May 15, 2007, prior to commencement of the Interview with Brian Barton.

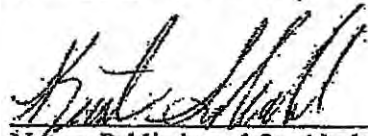
14. Bright Solutions has assigned its billing related to analyzing the issue of alleged alteration of audio files to a separate billing. I have attached as Exhibit "E" our March 25, 2011 statement for time spent on this matter, at our normal billing rate of \$150 per hour. This reflects total charges of \$1,737.50 to the City and Borough of Yakutat for this work. It does not include extensive time I have spent in analyzing this issue in connection with another case, Estate of Jerry Byler v. Alaskan Adventure Tours, Inc., in which I also prepared for and gave a lengthy deposition on March 18, 2011.

DATED AT ANCHORAGE, ALASKA this 25th day of March, 2011.


Matthew Joy

SUBSCRIBED AND SWORN to before me, this 25th day of March, 2011.




Notary Public in and for Alaska
My Commission Expires: 12-25-11

3000.77487

LAW OFFICES
HEDLAND BRENNAN & HEIDEMAN
A PROFESSIONAL CORPORATION
1227 WEST NINTH AVENUE, SUITE 300
ANCHORAGE, ALASKA 99501-3218
(907) 279-6528

Affidavit of Matthew Joy

Page 7 of 7

EXC 197

1
2 Directory of H:\Byler\Backup Set A\100GB\Chief\jsnichols2\Desktop\ChiefCleanup\Chief File\Reports
3 Forms\Olympus Recording
4
5 03/26/2010 04:30 PM <DIR> .
6 03/26/2010 04:30 PM <DIR> ..
7 03/26/2010 04:30 PM <DIR> 2007 Cases
8 0 File(s) 0 bytes
9
10 Directory of H:\Byler\Backup Set A\100GB\Chief\jsnichols2\Desktop\ChiefCleanup\Chief File\Reports
11 Forms\Olympus Recording\2007 Cases
12
13 03/26/2010 04:30 PM <DIR> .
14 03/26/2010 04:30 PM <DIR> ..
15 03/26/2010 04:30 PM <DIR> Case# 07-0438-0043
16 0 File(s) 0 bytes
17
18 Directory of H:\Byler\Backup Set A\100GB\Chief\jsnichols2\Desktop\ChiefCleanup\Chief File\Reports
19 Forms\Olympus Recording\2007 Cases\Case# 07-0438-0043
20
21 03/26/2010 04:30 PM <DIR> .
22 03/26/2010 04:30 PM <DIR> ..
23 05/17/2007 09:53 AM 8,411,336 07-0438-0043 First contact Kim Byler.WMA
24 05/15/2007 11:24 AM 5,786,390 07-0438-0043 Interview Brian Barton.WMA
25 03/24/2009 10:23 AM 9,169,644 07-0438-0043 Interview Kim Byler.WMA
26 3 File(s) 23,367,370 bytes
27
28 Directory of H:\Byler\Backup Set A\100GB\Chief\jsnichols2\My Documents
29

Report of findings regarding Byler Prepared by Matthew Joy of Bright Solutions Inc.

1 0 File(s) 0 bytes
2
3 Directory of H:\Byler\Backup Set A\Local Disk\shared\profiles\snichols2\Desktop\New Folder\Reports
4 Forms\Olympus Recording\Case# 07-0438-0043
5
6 11/26/2009 10:12 PM <DIR> .
7 11/26/2009 10:12 PM <DIR> ..
8 05/15/2007 11:07 AM 9,169,644 07-0438-0043 Interview Klm Byler.WMA
9 1 File(s) 9,169,644 bytes
10
11 Directory of H:\Byler\Backup Set A\Local Disk\shared\profiles\rgordon
12
13 03/22/2010 09:15 AM <DIR> .
14 03/22/2010 09:15 AM <DIR> ..
15 06/17/2008 05:41 PM <DIR> Desktop
16 03/28/2008 01:49 PM <DIR> My Documents
17 0 File(s) 0 bytes
18
19 Directory of H:\Byler\Backup Set A\Local Disk\shared\profiles\rgordon\Desktop
20
21 06/17/2008 05:41 PM <DIR> .
22 06/17/2008 05:41 PM <DIR> ..
23 06/20/2008 02:44 PM <DIR> Report Forms
24 0 File(s) 0 bytes
25
26 Directory of H:\Byler\Backup Set A\Local Disk\shared\profiles\rgordon\Desktop\Report Forms
27
28 06/20/2008 02:44 PM <DIR> .

1
2 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and Settings\Chief
3 Nichols\Desktop\Reports Forms\Olympus Recording\Case# 07-0438-0043
4
5 06/26/2007 04:08 PM <DIR>
6 06/26/2007 04:08 PM <DIR>
7 05/15/2007 11:07 AM 9,169,644 07-0438-0043 Interview Kim Byler.WMA
8 1 File(s) 9,169,644 bytes
9
10 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and Settings\JSNICHOLS
11
12 03/19/2010 02:56 PM <DIR>
13 03/19/2010 02:56 PM <DIR>
14 10/04/2009 10:47 AM <DIR> Desktop
15 0 File(s) 0 bytes
16
17 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and Settings\JSNICHOLS\Desktop
18
19 10/04/2009 10:47 AM <DIR>
20 10/04/2009 10:47 AM <DIR>
21 05/26/2009 01:03 AM <DIR> Chief File
22 0 File(s) 0 bytes
23
24 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and
25 Settings\JSNICHOLS\Desktop\Chief File
26
27 05/26/2009 01:03 AM <DIR>
28 05/26/2009 01:03 AM <DIR>

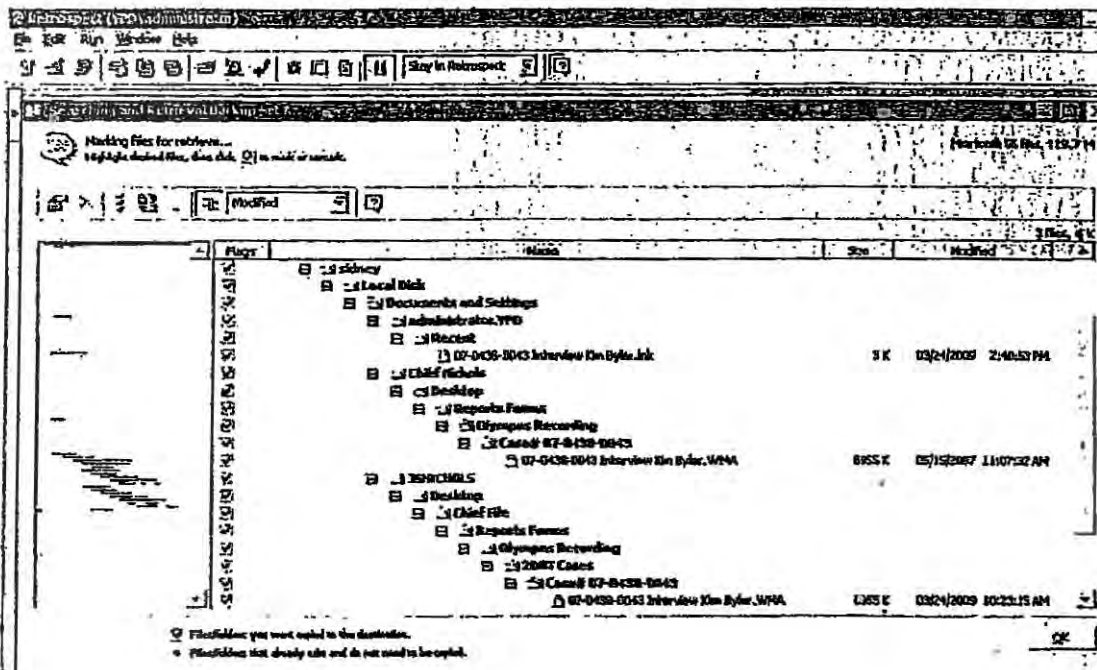
1 01/12/2009 04:17 PM <DIR> Reports Forms
2 0 File(s) 0 bytes
3
4 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and
5 Settings\JSNICHOLS\Desktop\Chief File\Reports Forms
6
7 01/12/2009 04:17 PM <DIR> .
8 01/12/2009 04:17 PM <DIR> ..
9 03/04/2009 11:23 AM <DIR> Olympus Recording
10 0 File(s) 0 bytes
11
12 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and
13 Settings\JSNICHOLS\Desktop\Chief File\Reports Forms\Olympus Recording
14
15 03/04/2009 11:23 AM <DIR> .
16 03/04/2009 11:23 AM <DIR> ..
17 02/02/2008 11:28 AM <DIR> 2007 Cases
18 0 File(s) 0 bytes
19
20 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and
21 Settings\JSNICHOLS\Desktop\Chief File\Reports Forms\Olympus Recording\2007 Cases
22
23 02/02/2008 11:28 AM <DIR> .
24 02/02/2008 11:28 AM <DIR> ..
25 01/24/2008 10:19 PM <DIR> Case# 07-0438-0043
26 0 File(s) 0 bytes
27
28 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and
29 Settings\JSNICHOLS\Desktop\Chief File\Reports Forms\Olympus Recording\2007 Cases\Case# 07-0438-
30 0043

1
2 01/24/2008 10:19 PM <DIR>
3 01/24/2008 10:19 PM <DIR> ..
4 03/24/2009 10:23 AM 9,169,644 07-0438-0043 Interview Kim Byler.WMA
5 1 File(s) 9,169,644 bytes
6
7 Directory of H:\Byler\Backup Set A\sidney\Local Disk\Documents and Settings\JSNICHOLS\Recent
8
9 04/15/2008 10:28 AM 1,376 07-0438-0043 First contact Kim Byler.WMA.Ink
10 02/12/2010 02:19 PM 1,508 07-0438-0043 Interview Brian Barton.WMA.Ink
11 02/12/2010 02:17 PM 1,493 07-0438-0043 Interview Kim Byler.WMA.Ink
12 3 File(s) 4,377 bytes
13
14 Total Files Listed:
15 57 File(s) 125,423,066 bytes
16 194 Dir(s) 59,175,682,048 bytes free
17
18

- 1 After restoring files to a temporary directory and ran a file comparison on them... using the MD5
- 2 summer application. MD5 hashing sums are a common way of calculating a code which can be used to
- 3 check a file to compare with another copy of the file and confirm content accuracy. If the calculated
- 4 hash values match then the files which they were calculated from can be considered identical.
- 5 Per Wikipedia - <http://en.wikipedia.org/wiki/MD5>
- 6 MD5 and other hash functions are also used in the field of electronic discovery, in order to
- 7 provide a unique identifier for each document that is exchanged during the legal discovery
- 8 process. This method can be used to replace the "Bates stamp" numbering system that has been
- 9 used for decades during the exchange of paper documents.
- 10
- 11 # MD5 checksums generated by MD5summer (<http://www.md5summer.org>)
- 12 # Generated 3/16/2011 1:07:04 AM
- 13 666d60c822f6380d6999ca1e44d29a1f *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 14 File/Reports Forms/2007 Cases/2007 Case Reports/07-0438-0043 Case report.doc
- 15 bb15df95e6e37fad076374dc0379e166 *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 16 File/Reports Forms/2007 Cases/2007 Evidence Sheets/07-0438-0043 ES 1JN.doc
- 17 e5ee64bfd9048a120f7488c25452e62 *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 18 File/Reports Forms/2007 Cases/2007 Evidence Sheets/07-0438-0043 ES 2JN.doc
- 19 4823c013fe4510c437b11b37d45adad2 *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 20 File/Reports Forms/2007 Cases/2007 Evidence Sheets/07-0438-0043 ES 3JN.doc
- 21 640fe9830d346aa2341a7792dd1819f6 *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 22 File/Reports Forms/2007 Cases/2007 Evidence Sheets/07-0438-0043 ES 4JN.doc
- 23 08d7bc7aeca974fbee7d5a8309c80bef *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 24 File/Reports Forms/2007 Cases/2007 Face Pages/07-0438-0043 FP.doc
- 25 b2cf369644439e576eedf91d9d148539 *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 26 File/Reports Forms/Olympus Recording/2007 Cases/Case# 07-0438-0043/07-0438-0043 First contact
- 27 Kim Byler.WMA
- 28 192aba5d4251249684b0ed843c31f9f0 *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 29 File/Reports Forms/Olympus Recording/2007 Cases/Case# 07-0438-0043/07-0438-0043 Interview Brian
- 30 Barton.WMA
- 31 839ec2afedf1b8d45cf1c3a815652b4a *100GB/Chief/jsnichols2/Desktop/ChiefCleanup/Chief
- 32 File/Reports Forms/Olympus Recording/2007 Cases/Case# 07-0438-0043/07-0438-0043 Interview Kim
- 33 Byler.WMA
- 34 6c521ce6c5d74cc8f527b93043037a0c *100GB/Chief/jsnichols2/My Documents/My
- 35 Music/iTunes/iTunes Music/Unknown Artist/Unknown Album/07-0438-0043 First contact Kim Byler.m4a
- 36 ccb392b545db81b7c7a00f809c7a9f01 *100GB/Chief/jsnichols2/My Documents/My

- 1 011.jpg
- 2 3e13cd15411c30ebed78ad1671fb87cd *apc/Acer/Users/jsnichols/Desktop/Byler Photos/07-0438-0043
- 3 012.jpg
- 4 009760ce78dce75242a6ae619097ba59 *apc/Acer/Users/jsnichols/Desktop/Byler Photos/07-0438-0043
- 5 013.jpg
- 6 3a51759362b2c3debbfde283f01bd1d8 *apc/Acer/Users/jsnichols/Desktop/Byler Photos/07-0438-0043
- 7 014.jpg
- 8 839ec2afedf1b8d45cf1c3a815652b4a *Local Disk/shared/profiles/jsnichols2/Desktop/New
- 9 Folder/Reports Forms/Olympus Recording/Case# 07-0438-0043/07-0438-0043 Interview Kim
- 10 Byler.WMA
- 11 17591c3ee3830190b3140c1ea61fe7e4 *Local Disk/shared/profiles/rgordon/Desktop/Report
- 12 Forms/Evidence Sheets/2007 Evidence Sheets/07-0438-0043 Byler 1RG.doc
- 13 43cbfd1170b215ae39eb11da083f57b3 *Local Disk/shared/profiles/rgordon/Desktop/Report
- 14 Forms/Supplemental Reports/2007 Supplementals/07-0438-0043 Byler.doc
- 15 07728e1b64f806cc68b01b94403312a *Local Disk/shared/profiles/rgordon/My Documents/My
- 16 Pictures/Case pix 2007/07-0438-0043 001.jpg
- 17 Seab10d2d9f952a73b5bb1287170b85c *Local Disk/shared/profiles/rgordon/My Documents/My
- 18 Pictures/Case pix 2007/07-0438-0043 002.jpg
- 19 e32e93e349b9a8dd22bbf4109a0fb160 *Local Disk/shared/profiles/rgordon/My Documents/My
- 20 Pictures/Case pix 2007/07-0438-0043 003.jpg
- 21 3b6203127f70e910ed25fd4a61963373 *Local Disk/shared/profiles/rgordon/My Documents/My
- 22 Pictures/Case pix 2007/07-0438-0043 004.jpg
- 23 2c7fbb2967bede0b805e5cc8e76afb66 *Local Disk/shared/profiles/rgordon/My Documents/My
- 24 Pictures/Case pix 2007/07-0438-0043 005.jpg
- 25 c8ab00f5ca6d84ea4004c60abc9501a2 *Local Disk/shared/profiles/rgordon/My Documents/My
- 26 Pictures/Case pix 2007/07-0438-0043 006.jpg
- 27 bdaf595ae7958c88c52d5490b31bbd78 *Local Disk/shared/profiles/rgordon/My Documents/My
- 28 Pictures/Case pix 2007/07-0438-0043 007.jpg
- 29 85a956d240b664c1d17ff69002416a64 *Local Disk/shared/profiles/rgordon/My Documents/My
- 30 Pictures/Case pix 2007/07-0438-0043 008.jpg
- 31 05fee1ab293d30a96bd98342290c07d0 *Local Disk/shared/profiles/rgordon/My Documents/My
- 32 Pictures/Case pix 2007/07-0438-0043 009.jpg
- 33 85ad9b2a7b77212b945d5475d2cadd05 *Local Disk/shared/profiles/rgordon/My Documents/My
- 34 Pictures/Case pix 2007/07-0438-0043 010.jpg
- 35 63b36790683273e3266b2a6be7fe5b6f *Local Disk/shared/profiles/rgordon/My Documents/My

- 1 Pictures/Case pix 2007/07-0438-0043 011.jpg
- 2 3e13cd15411c30ebed78ad1671fb87cd *Local Disk/shared/profiles/rgordon/My Documents/My
- 3 Pictures/Case pix 2007/07-0438-0043 012.jpg
- 4 009760ce78dce75242a6ae619097ba59 *Local Disk/shared/profiles/rgordon/My Documents/My
- 5 Pictures/Case pix 2007/07-0438-0043 013.jpg
- 6 3a51759362b2c3debbfde283f01bd1d8 *Local Disk/shared/profiles/rgordon/My Documents/My
- 7 Pictures/Case pix 2007/07-0438-0043 014.jpg
- 8 b2438999789a9deccf15eb2256c3cda1 *Local Disk/shared/profiles/rgordon/Recent/07-0438-0043
- 9 Byler.Ink
- 10 1ed1163b56fd0631582f1d288dc87c20 *sidney/Local Disk/Documents and
- 11 Settings/administrator.YPD/Recent/07-0438-0043 Interview Kim Byler.Ink
- 12 839ec2afedf1b8d45cf1c3a815652b4a *sidney/Local Disk/Documents and Settings/Chief
- 13 Nichols/Desktop/Reports Forms/Olympus Recording/Case# 07-0438-0043/07-0438-0043 Interview Kim
- 14 Byler.WMA
- 15 839ec2afedf1b8d45cf1c3a815652b4a *sidney/Local Disk/Documents and
- 16 Settings/JSNICHOLS/Desktop/Chief File/Reports Forms/Olympus Recording/2007 Cases/Case# 07-0438-
- 17 0043/07-0438-0043 Interview Kim Byler.WMA
- 18 0b60164dbef6ee2f5f0e770fdc7e2615 *sidney/Local Disk/Documents and
- 19 Settings/JSNICHOLS/Recent/07-0438-0043 First contact Kim Byler.WMA.Ink
- 20 6352f68f30f35a8509bf07240a554494 *sidney/Local Disk/Documents and
- 21 Settings/JSNICHOLS/Recent/07-0438-0043 Interview Brian Barton.WMA.Ink
- 22 4bfd8089076e9a706330db55660fe4b8 *sidney/Local Disk/Documents and
- 23 Settings/JSNICHOLS/Recent/07-0438-0043 Interview Kim Byler.WMA.Ink
- 24
- 25
- 26
- 27



6

EXHIBIT C
PAGE 1 OF 1

EXC. 197 (i)

May 13 2007 (E)

File Edit View Favorites Tools Help

Search

Folders

E:\

Files Currently on the CD

Write these files to CD

File and Folder Tasks

Rename this file

Move this file

Copy this file

Publish this file to the Web

E-mail this file

Delete this file

Other Places

My Computer

My Documents

My Network Places

Details

Go

07-0438-0043 Inter New Kim Byler Properties

General Summary



07-0438-0043 Interview Kim Byler

Type of file: Windows Media Audio file

Opens with: Windows Media Player

Change...

Location: E:\

Size: 8.74 MB (9,169,644 bytes)

Size on disk: 8.74 MB (9,170,944 bytes)

Created: Tuesday, May 15, 2007, 11:07:32 AM

Modified: Tuesday, May 15, 2007, 11:07:32 AM

Accessed:

Attributes: ☒ Read-only ☐ Hidden ☐ Archive

OK

Cancel

EXHIBIT D
PAGE 1 OF 2

EXC. 197 (i)

From the CD labeled May18 2007 - 07-0438-0043 Interview Kim Byler
MD5 checksums generated by MD5summer (<http://www.md5summer.org>)
Generated 3/18/2011 11:54:52 AM

839ec2afedf1b8d45cf1c3a815652b4a *07-0438-0043 Interview Kim Byler.WMA

Page 1

EXHIBIT D
PAGE 2 OF 2

EXC. 197 (k)

The City and Borough of Yakutat,
Plaintiff,
vs.
Alaskan Adventure Tours, Inc.,
Defendant.

The City and Borough of Yakutat,

Supplemental Complaint
Plaintiff,

vs.

ABC Leasing, LLC and Kimberly
Riedel-Byler, a/k/a Kimberly C.
Riedel, K. Christina Riedel and/or
Kimberly Byler,

Supplemental Complaint
Defendants.

COMES NOW Alaskan Adventure Tours, Inc. ("AAT") and replies to the
Opposition of the City and Borough of Yakutat ("CBY").

CBY argues that defendants' motion should be denied because they did not conduct discovery in order to unearth their fraud prior to trial. This position does not fit

City v. Alaskan Adventure
Case 1JU-08-434 CI
Reply

support in the law. The text of Rule 60(b) demonstrates that due diligence is not a requirement for a Rule 60(b)(3) motion:

(b) Mistakes -- Inadvertence -- Excusable Neglect -- Newly Discovered Evidence -- Fraud -- Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. (Bold in original, underline added).

Relief under Rule 60(b)(2) for newly discovered evidence requires a showing that due diligence could not have discovered the evidence. In contrast, Rule 60(b)(3) has no such requirement. Had the drafters intended the due diligence requirement to apply in instances of fraud, they would have included it within the Rule as they did with respect to newly discovered evidence. That they did not indicates that relief under Rule 60(b)(3) does not require the movant to demonstrate they employed due diligence to uncover the fraud before trial.

This interpretation finds support in numerous courts. See *Arnold v. ADT Sec. Servs.*, 627 F.3d 716, 722 (8th Cir. 2010) (discussing the elements of both 60(b)(2) and (b)(3) and not requiring due diligence for the latter); *Cedar Hill Hardware & Constr. Supply v. In Corp. of Hannover*, 563 F.3d 329, 354 (8th Cir. 2009)(same); *Cox Nuclear Pharm. Inc. v. C Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007)(same); *Greyhound Lines Inc. v. Wade*, 485 F.3d 930, 935 (8th Cir. 2006)(same); *Roger Edwards, LLC v. Fiddes & Sons*, 427 F.3d 129, 134 (

City v. Alaskan Adventure
Case 1:08-434 CI
Reply

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Cir. 2005)(same); *Hesling v. CSX Transp. Inc.*, 396 F.3d 632 (5th Cir. 2005)(same); *Tyson v. City of New York*, 81 Fed. Appx. 398, 400 (2d Cir. 2003)(same); *United States Steel v. M. DeMatteo Constr. Co.*, 315 F.3d 42, 52 (1st Cir. 2002)(same); *Abrahamsen v. Trans-State Express*, 92 F.3d 425, 428 n.1 (6th Cir. 1996)(same); *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994).

This interpretation finds further support in logic. How can a party be tasked with unearthing fraud, when the very nature of fraud is that it be kept hidden? Deposing or cross-examining a party who has already indicated their eagerness to conceal or alter the truth can hardly be expected to be fruitful. There is no reason to expect the perjured testimony to change.

The only factor that might change the effectiveness of deposing or cross examining a perjurious witness is if there is physical evidence that contradicts the testimony. That is exactly what AAT here has discovered. That this evidence has been discovered after judgment is unfortunate, but not dispositive. Finality of judgments is important, "but the fairness and integrity of the fact finding process is of greater concern." *Abrahamsen v. Trans-State Express*, 92 F.3d 425, 428 n.1 (6th Cir. 1996) (discussing a Rule 60(b)(3) motion "Parties ought not to benefit from their own mis-, mal-, or nonfeasance." *Anderson v. Cryova* 862 F.2d 910, 924 (1st Cir. 1988).

The appropriate standard in evaluating a Rule 60(b)(3) motion is whether the misconduct substantially interfered with the movant's ability to fully and fairly prepare for trial. *Id.* This includes, for example, closing-off a potentially fruitful avenue of cross examination. *Id.* If the misconduct does cause such interference, retrial is mandated. Additionally, where the evidence is concealed knowingly and purposefully, it can be presumed

City v. Alaskan Adventure
Case 1JU-08-434 CI
Reply

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that the evidence was damaging to the non-disclosing party. "[I]ts absence can be presumed to have inhibited the unearthing of further admissible evidence adverse to the withholder." *Id.*

Cases relied upon by CBY are inapposite. *Burrell v. Burrell*, 696 P.2d 157 (Alaska 1984), involved a Rule 60(b) motion based on a legal argument, not fraud. The movant desired relief from judgment in order to make an argument that the award of alimony was unconstitutional. *Id.* There was no allegation of fraud or misconduct. As the court there noted, legal argument is precisely the type of situation requiring appeal, and it is not the proper foundation for a Rule 60(b) motion. CBY has quoted *Burrell* out of context. Appeal is not a remedy for fraud that is discovered after the time for appeal has expired.

CBY also relies upon *E.F. Hutton & Co. v. Berns*, 757 F.2d 215 (8th Cir. 1985). *Berns* also does not involve fraud. In fact, that case is wholly distinguishable. There, the Rule 60(b) movant claimed that a witness testified that (1) the SEC investigated the party, (2) the SEC exonerated the party, and (3) that the SEC had not brought any charges against the party. *Id.* at 217. The court reviewed the trial transcript and discovered that no witness had actually testified to these three things. *Id.* In fact, trial testimony revealed that there was a pending SEC investigation, and it was believed that the party was not exonerated. *Id.* The testimony that movant's relied upon for the Rule 60(b)(3) motion was simply not there. The court added that if the movant thought the jury was at all confused or if movant wanted to emphasize the point to the jury, the movant could have cross-examined witnesses during trial. *Id.*

CBY relies on *Berns* for the proposition that AAT could have cross-examined Chief Nichols during trial, and therefore the Rule 60(b)(3) motion should be denied. Applying the *Berns* rationale to the present case is like forcing a round peg into a square hole. Cross-examination in *Berns* would have resulted in emphasis and clarification of a testimony already given. *City v. Alaskan Adventure*
Case 1JU-08-434 C1
Reply

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provided. *Id.* Conversely, cross-examination in the present case would have merely emphasized false testimony. At the time, Defendants lacked physical evidence to contradict Chief Nichols' testimony. See *Anderson*, 862 F.2d at 930 (acknowledging that in some circumstances it is reasonable not to call a witness at trial).

CBY CONTRADICTS CHIEF NICHOLS AND ITSELF ON THE FACTS

Introduction.

Chief Nichols concluded his trial testimony on re-direct in this case with some unequivocal assertions. He took Kimberly Byler to the airport at 11:30.¹ He took her there so she could make arrangements to have the body of her father in law flown out for burial.² He was very clear on both points.

CBY has decided that Chief Nichols was not truthful with the jury, for now we learn from its Opposition that Chief Nichols didn't go the airport at 11:30 am, but almost a hour later. "It is true that Kimberly Byler hung around the police station after she and Brian Barton were interviewed, to take advantage of Chief Nichols' offer of free use of its telephone to make long distance calls... the last of which terminated at 12:18 p.m. on May 15.³ It is a five minute drive from the police station to the Yakutat airport, and their departure for the airport after 12:18 p.m. would not be untimely..."⁴ In other words, the opportunity to hang out at the police station and make free calls was too much temptation for Ms. Byler to resist. Chief Nichols has been thrown under the bus by his employer.

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¹ Exhibit A to Casperson Declaration of March 18, 2011, Nichols Testimony on February 12, page 10.

² Exhibit A to Casperson Declaration of March 18, 2011, Nichols February 12 Testimony, page 10.

³ CBY Opposition, page 14.

⁴ CBY Opposition, page 15.

Apparently not bothered by taking a position inconsistent with Chief Nichols, CBY takes another. Instead of giving Ms. Byler a ride to the airport to make arrangements for transport of the body, as Chief Nichols swore under oath at trial, CBY now alleges that he took her to the airport so she could try to catch the northbound jet to Anchorage.⁵ The ride was provided in a "rush," a "last ditch effort" to help Ms. Byler catch the north-bound flight to Anchorage.⁶ Was she "hanging around," or was she in a "rush"? CBY wants it both ways.

Chief Nichols' Testimony.

On direct in CBY's case in chief, Chief Nichols testified that he took Ms. Byler to the airport for the evening flight to Juneau. Later, after Mr. Edward McDonald testified that Ms. Byler went to the airport with him and other AAT employees, CBY had to bring Chief Nichols back to rehabilitate his testimony. This time, the story changed, and Chief Nichols stated for the first time that he later saw Ms. Byler back at the police station after he had taken her to the airport.⁷ Chief Nichols' testimony of a year ago on the time of the ride to the airport and the purpose was unequivocal.

Q: And your testimony is that you transported her there at what, about 11:30 for a 5:30 p.m. flight?

A: No. I transported her out there so she could make arrangements to have the body flown.

Q: Oh, she had already made those arrangements at the police station. Were you there when she did that?

A: No, I was not.

⁵ CBY Opposition, pages 15-16.

⁶ CBY Opposition, pages 6.

⁷ CBY, in its Opposition at page 6 states, without any factual support, that she returned to the police station with Brian Barton. CBY didn't learn this from Chief Nichols, who testified that he didn't know what happened to Mr. Barton after he interviewed him. See Nichols Transcript of testimony on February 9, 2010, pages 10-11, attached as Exhibit 11 to Byler Declaration.

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Q: Okay. So is it your testimony then that you transported Ms. Byler to the Yakutat Airport at about 11:30 for a 5:30 or 6:00 flight?

A: That's the time I transported her, yes. Somewhere around that time after 11:30.

Q: And that's when the flight leaves, right?

A: No. The flight doesn't leave until like 5:30 or so; Flight 61.

Q: That was my point. The flight doesn't leave until something like 5:30, right?

A: That is correct.⁸

The questioning was designed to highlight the apparent nonsense of Chief Nichols dropping off Kimberly Byler by herself at the Yakutat airport some 6 hours before the southbound flight was supposed to leave, while all the rest of the AAT crew stayed at the police station, no doubt to use the phone. At the time of trial, the only excuse Chief Nichols could come up with for leaving her at the airport for 6 hours was the need to handle cargo arrangements for the remains of the deceased.

If, as CBY now contends, Chief Nichols was trying to get Ms. Byler on the north-bound jet that left at mid-day, why didn't he say so at trial last year? The reason is obvious. That was not his intent at the time, but CBY now says it was, in an effort to deal with the many other problems with his testimony. If that was what he was trying to do at the time he would have said so. Only now, when proof that he did not take Ms. Byler to the airport as he testified has been revealed, does CBY contradict its own witness.

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To Rush or Not to Rush.

This newly discovered "rush"⁹ to make the flight going to Anchorage is now used to cover a number of inconsistencies, most notably the failure of Chief Nichols to introduce Ms. Byler to Sergeant Cox at the airport.¹⁰ There is not a shred of truth to these new claims by CBY. This is another recent fabrication.

Not to be overlooked is the fact that Chief Nichols was equally clear about the time when he took Ms. Byler to the airport. He testified at trial on direct as follows:

Q: And after that interview with Mr. Barton ended at 11:26, what did you do next?

A: Then I gave Ms. Byler a ride out to the airport.¹¹

As noted above, on re-cross he stood by his story.

Q: So it is your testimony then that you transported Ms. Byler to the Yakutat airport at about 11:30 for a 5:30 or 6:00 flight?

A: That's the time I transported her, yes. Somewhere around that time after 11:30.¹²

Now, however, CBY concedes in its opposition that "it is true" that Ms. Byler did not go to the airport at 11:30, and instead, notwithstanding the "rush" to make the northbound flight, is instead "hanging around" the police station so she can make some "free calls."¹³ CBY is of apparently two minds, depending on which argument it is making. Either there was a rush to catch the north bound jet, or there was no rush, to get in some free pho

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⁹ CBY Opposition, pages 16 and 17.

¹⁰ CBY Opposition, page 16.

¹¹ Nichols February 12 Testimony, page 5.

¹² Nichols February 12 Testimony, page 10.

¹³ CBY Opposition, page 14.

time. Either way, Chief Nichols recalled the events very differently at the time of trial, when there was nary a word about the north bound jet nor a delay for phone calls.

Why the New Story?

CBY's concession in its Opposition that Chief Nichols did not take Ms. Byler to the airport as he testified was forced by the very recent production of the telephone records in the federal case that revealed the time of Ms. Byler's calls from the CBY offices on May 15. That incontrovertible proof of Ms. Byler "hanging around" in the CBY offices, making "free phone calls" until well after noon, forced the admission. CBY attempts to salvage some part of the story with the "rush" job, but still contradicts itself and Chief Nichols' contrary testimony a trial.

These are not mere details or trivialities. More than other witnesses, the Chief of Police brings with him a presumption of honesty and veracity. As the one who claims he told Ms. Byler about the taxes on the ride to the airport, the inconsistencies in his testimony about these very important details cannot simply be brushed away. CBY's own arguments are demonstrative of fraud.¹⁴

The Helicopter and More Newly Discovered Evidence.

As noted above, Chief Nichols testified that he interviewed Brian Barton last right before he took Ms. Byler to the airport. AAT contends that Mr. Barton's statement was taken first. As evidence of that fact, AAT noted in its opening memorandum that Chief Nichols asked questions of Ms. Byler that demonstrated an understanding of facts that he could not

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¹⁴ The fact that CBY produced other evidence in an effort to establish notice is of no moment. See CBY Opposition, page 3. Evidence of fraud is compelling evidence, and the jury was not given a chance to hear it.

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have learned from Mr. Barton, such as the fact that the body was located by a helicopter and the details of the recovery.

In response, CBY has produced for the first time¹⁵ an "Incident Card" from May 14, the night Mr. Byler drowned.¹⁶ It states, as CBY is at pains to point out, "a civilian helicopter enroute from Yakutat to Cordova was enlisted to help search..."¹⁷ If this information was recorded, as CBY asserts, the night of May 14, thereby providing the means for Chief Nichols to learn of the helicopter prior to the interviews, then the Incident Card is as phony as Chief Nichols' testimony, and further demonstrates the lengths CBY will go to paper over the holes in its story.

The Incident Card purports to detail a call from the Coast Guard at 1933 (on a 24 hour clock, which is 7:33 p.m. local time) to "911" concerning a missing person, who fell from the vessel Alaskan Leader. The Coast Guard timeline of events quite clearly proves the falsity of this record.¹⁸ That timeline, in "Zulu" or "Z" time, which is Greenwich Standard Time and is customary usage for the military, states that the first contact to the Coast Guard from AAT occurred at "150321Z", which is May 15 at 3:21 a.m. GST, or May 14 at 1921 (7:21 p.m.) local time, only 12 minutes before the Incident Card reports the Coast Guard 911 call.

In fact, the Coast Guard never called CBY. The Coast Guard record reveals that 35 minutes after the initial contact, at 1956 (150356Z time), "CDR Pollock requested that Command Center Call the State Troopers." This is 23 minutes after the CBY Incident Card

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¹⁵ Byler Declaration, paragraph 3.

¹⁶ CBY Opposition, Exhibit 3.

¹⁷ CBY Opposition, page 10.

¹⁸ Byler Declaration, paragraph 4, Exhibit 1. Except where indicated, the Exhibits are attached to Byler's declaration.

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states they were contacted, and of course there is no mention of any contact in the Coast Guard timeline with CBY at any time. Darren Byler has spoken with the Coast Guard about this issue, and has been advised that the Coast Guard makes a record of every contact in such cases, and if they had contacted CBY, it would be in their records.¹⁹ A review of the Coast Guard record makes this apparent. The record is very detailed. Had CBY actually been contacted by the Coast Guard, it would be in the Coast Guard record. Indeed, it makes no sense that the Coast Guard would call CBY 23 minutes before they first contacted the State Troopers.

As to the Incident Card's other contents, prior to the entry concerning the helicopter, it states that "the individual was on the vessel Alaska Leader." This is another fabrication, for, while true, this fact was unknown to anyone until the next day, when the witnesses were interviewed in Yakutat. Prior to that time, the Coast Guard records mention only the North Pacific, another vessel that was part of AAT's fleet at the time.²⁰ No one outside of AAT and its employees and George Hook, the helicopter pilot who found the body knew anything about these details.²¹

CBY's own records demonstrate that no 911 call was received that night. The police log for May 14 has no record of any such call.²² The last entry on that day is almost hours earlier.

Once again, CBY has produced false and misleading evidence when it suits the purpose, evidence that, until this motion was filed, was not produced in the federal case, where hundreds of pages have been produced, including what was supposed to be all of the CBY file

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¹⁹ Byler Declaration, paragraph 4.

²⁰ See Byler declaration, Exhibit 1.

²¹ George Hook Declaration, Exhibit 3.

²² See police logs, Exhibit 8 to Byler Declaration.

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CBY suggests that Nichols knew about the helicopter because "Yakutat is a small town, and the fact that a private helicopter had been dispatched from Yakutat and had located the drowning victim was the type of local news that travels fast in a small community, another potential source of Chief Nichols' general knowledge of the helicopter's involvement."²³ In fact, the helicopter was dispatched out of Ketchikan, only stopped to refuel in Yakutat, and the pilot spoke with no one about this from there. He had left Yakutat before he learned of the man overboard from the Coast Guard.²⁴ Also Chief Nichols, who has submitted an affidavit in support of CBY's Opposition, says nothing about this. Of course, the reason for this omission is obvious. If he said he heard about this from someone locally, AAT would check out his story, and that would probably lead to another inconsistency.

This whole question started with Mr. Barton's interview that ended at 11:24 a.m. Chief Nichols testified that he had previously interviewed Ms. Byler. AAT contends that Mr. Barton was interviewed first, not second, and there was no time for Chief Nichols to interview Ms. Byler after Mr. Barton and still leave at 11:30 to go to the airport as he testified at trial. Mr. Barton was interviewed before Ms. Byler, as noted in AAT's opening memorandum, Chief Nichols learned of the helicopter from Mr. Barton first, then asked Ms. Byler about it.

In the Barton interview, the transcript reveals the following exchange:

Nichols: How did you recover the body, find the body?

Barton: Oh, we, the helicopter found it, and then me and Eddie and Kimberly and Darren got back on the landing craft; me and Eddie jumped out of the boat, put him on the boat, covered him with a tarp.

²³ CBY Opposition, pages 10-11.

²⁴ George Hook Declaration, Exhibit 3.

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Nichols: So you guys went over to where the helicopter was.

Barton: Yeah.

Nichols: Were you guys in communication with them?

Barton: Yes. He said he's seen the body and we untied the boat; because the landing craft is tied up next to the Alaska Leader, so the waves and stuff don't beat them really hard. We jumped in.....

.....

Nichols: So then you guys jumped in the landing craft?

Barton: Yep.

Nichols: And went over to where the helicopter was?

Barton: And he pointed to me, Eddie jumped in, and loaded him up.²⁵

Compare that with the interview of Ms. Byler:

Nichols: My understanding is that you went over to where the helicopter was, and...

Byler: Yeah....

.....

Nichols: And that's where they told you, then they notified you of his location.

Byler: Yeah, and they landed their copter right there on the beach and they got out and pointed.

Nichols: And then did you guys jump in the skiff?

Byler: Immediately.²⁶

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²⁵ See page 3 of Barton Interview Transcript, Exhibit 4 to Byler Declaration.

²⁶ Second Byler Interview, page 12, Exhibit C to Caspersen Declaration.

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Chief Nichols' "understanding," which he had when he interviewed Ms. Byler, was that they went over to the location of the helicopter. Since he already knew that when he spoke with Ms. Byler, where did he learn it? It is not in the contact interview. Obviously, he learned it from Mr. Barton, and repeated his understanding to Ms. Byler when he interviewed her next, for it appears nowhere else. Next, Mr. Barton told Chief Nichols that they "jumped in the skiff" (landing craft). Chief Nichols repeated that very same story, using those very same words, to Ms. Byler before she had a chance to volunteer that information. Again, this is something he learned from Mr. Barton, not Ms. Byler. This is further evidence that Chief Nichols did not, as he testified, interview Ms. Byler before Mr. Barton, and further evidence that he did not take Ms. Byler to the airport at 11:30 as he testified. That trip never happened.

The significance of the order of the interviews is obvious. Chief Nichols testified to the order, and put Mr. Barton's last, just before the alleged ride to the airport. He stated the ending time of the Barton interview on the recording. He did the same at the end of Ms. Byler's second interview. If in fact the Barton interview preceded the Byler interview then the recordings have been altered. The interview recordings were produced by CBY the day of the trial, when Chief Nichols revealed the existence of the recordings in his testimony at cross examination and brought a copy, which was only then provided to counsel.²⁷ If the recordings have been altered, then CBY's evidence is false. There was no ride to the airport and both the jury and AAT were misled by fraud.

Computer Evidence.

Matthew Joy, CBY's computer expert, has the advantage of access to the CBY

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²⁷ See page 8 of Nichols Testimony of Feb. 9, 2010, Exhibit 11 to Byler Declaration.
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computers. AAT does not have that advantage, but Mr. Joy's affidavit leaves many questions unanswered. Attached is the Declaration of Alfred Johnson, a computer expert retained by the Estate in the federal case.²⁸ He has reviewed Mr. Joy's allegations and raises a number of issues. Chief Nichols testified in his deposition in the federal case that he downloaded four photos from Brian Barton's camera. It is AAT's contention that he downloaded many more, including photos of the deceased, but in any event, Mr. Joy's detailed list of what he found on the CBY computers does not include the 4 photos that were supposedly downloaded. It only includes the 14 photos taken of the deceased by Officer Gordon. This strongly suggests that the computer records have been altered.

Second, Mr. Joy did no search of the unallocated or deleted space on the computer drives, common practice when doing a forensic review of a computer record to look for deleted or modified files. Mr. Joy's efforts to demonstrate that there have been no changes to the Byler interview, while interesting, have not been tested for reliability in a proper manner. His software program is not a proper forensic program, as Mr. Johnson makes clear. Furthermore, the order of the interviews on the computer is consistent with AAT's claim that Mr. Barton's interview preceded Ms. Byler's interview.

Finally, the disc produced by CBY in the federal case that Mr. Lacey analyzed contains download times that are inconsistent with the times reported by Mr. Joy. Mr. Joy ignores that part of Mr. Lacey's report and provides no explanation for the discrepancies. However, CBY is only too happy to point out other problems with Mr. Lacey's work that are solely the result of CBY not providing copies of the original interviews from 2007.

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²⁸ Byler Declaration, Exhibit 7.
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AAT should be provided an opportunity to have an independent analysis of the CBY computers. There remain serious questions about the computer records that Mr. Joy ignores or does not adequately answer.

The Time Between Interviews.

CBY also contests AAT's assertions concerning the timing, identity and words of the persons recorded at the end of the contact interview of Ms. Byler and how long Chief Nichols had to move the body and return to start the second interview. The parties disagree over who said what and when on the recording. The parties' disagreement over a very important point cannot be resolved without further discovery. AAT asks for time to do that discovery. These questions have answers; they just cannot be answered with certainty on the limited record available. One of the problems is that, like so many things, CBY's police records are incomplete. In addition to the missing photos and faxes noted in AAT's opening brief, CBY's police log for May 15 is mostly blank or incomplete between 10 am and 2 pm.²⁹ Compare that day with the detailed logs for May 16 and 17, which are complete and detailed.³⁰ Except for the mysterious gap on May 15, the records reveal the location and identities of the officers and the relevant times. There is nothing of this nature during the time in question in this case, which makes absolutely no sense. If the May 15 log recorded the happenings as events as was done before 10 am, after 2 pm, and on the next two days, much of the mystery concerning the activities and whereabouts of Chief Nichols would be solved. The holes in the record are quite suspicious.

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²⁹ Byler Declaration, Exhibit 8.

³⁰ Byler Declaration, Exhibit 8.

Sergeant Cox and Ms. Byler at the Airport.

CBY next argues that Chief Nichols did not introduce Ms. Byler to Sergeant Cox because she was in a hurry to make arrangements for the body to go north, she may have been meeting other AAT employees, or wanted to avoid meeting him.³¹ The business about being in a hurry has been answered twice already, by Chief Nichols' trial testimony that proves that getting Ms. Byler on the northbound flight was not part of what he was about, and by the evidence that she was still making phone calls from the police station to relatives at 12:18 pm. The Yakutat airport is not LAX, and no one is likely to come or go without seeing anyone and everyone who is there. The fact that Ms. Byler and Sergeant Cox had a great many reasons to meet each other, and with Chief Nichols' testimony that Sergeant Cox was there when he supposedly took Ms. Byler to the airport, is a complete answer to this argument. Ms. Byler's supposed meeting with AAT employees at the airport did not happen. Mr. McDonald testifies that after he arrived in Yakutat,

[T]he Yakutat [inaudible] informed me that Kimberly and Luke Barton were both at the police station which they gave me directions how to get there. I drove down there because they wanted, they said that the state cop wanted to get testimonies from us also of what happened that day and from that point I drove into the police station. We were probably there about an hour for, you know, Pam's testimony, my testimony. When I arrived there Kimberly was still getting interviewed and then once she come out, I can't remember which one went first, if it was Pam or me. I'm not exactly sure. And then after we were interviewed, Kimberly took all four of us to lunch. There was Kimberly, Pam, Luke, and myself and I drove them over to the place where we ate lunch. And from there, once we were done eating lunch, I brought her to the airport and I dropped her off.³²

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³¹ CBY Opposition, pages 15-16.

³² McDonald Trial Testimony, Exhibit 12 to Byler Declaration at page 4.
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As for Ms. Byler's supposed trouble with the Troopers, if that was a problem why, having successfully avoided Sergeant Cox at the airport, would she return to the police station later where Sergeant Cox was doing his investigation? CBY grasps at straws.

Cal Wilson.

CBY has little or nothing to rebut Mr. Wilson's declaration.³³ The events he relates are significant. Mr. Byler's death has fixed the events and circumstances in everyone's minds. If Ms. Byler needed or wanted to get off the phone, she didn't need to make up a story for Mr. Wilson. She was obviously upset, dealing with a very difficult experience. The likelihood of her telling Mr. Wilson anything that was not true, especially something as trivial at that time whether she was about to be interviewed by the police, is not a credible challenge to his testimony. She certainly wasn't talking about a pending interview with Sergeant Cox whose plane was at that time still 45 minutes away from the arrival gate, for the call was at 11:16 am. CBY comes closer to the truth when they concede, for purposes of argument, that the interview happened later than what Chief Nichols stated in the recording was the ending time (11:10 am) for the interview.³⁴

Other witnesses.

George Davis is accused by CBY of being a business partner with Darrell Byler.³⁵ In fact, he testified at trial that he was not, although he admitted to being friends.³ Mr. Davis' declaration makes clear that he did not see Ms. Byler at the airport.³⁷

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³³ CBY Opposition, pages 17-18.

³⁴ CBY Opposition, page 18.

³⁵ CBY Opposition, pages 18-19.

³⁶ Davis Testimony, page 6, Exhibit 5.

³⁷ Davis Declaration, page 2, Exhibit M to Casperson Declaration.

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Pamela Girdwood got to Yakutat "sometime around noon."³⁸ In fact, she arrived around 11 or 11:30 with Mr. McDonald, who gave detailed testimony on the time and sequence of events.³⁹ They went to the station for interviews, then went with Ms. Byler to lunch, and then to the airport. See Mr. McDonald's testimony above. This testimony was offered by AAT to rebut Chief Nichols' alleged trip to the airport. CBY alleges that this testimony is "not inconsistent with the earlier, morning interview of Kimberly Byler by Chief Nichols, nor with his driving her to the airport to catch the early afternoon flight to Anchorage, inconsistent with her 11:16 am telephone call to Cal Wilson..."⁴⁰ Of course, what CBY conveniently overlooks is its earlier admission that Ms. Byler was on the phone with family back at the station more than one hour later, at 12:18 pm, never mind 11:16 am., which is the new earliest possible departure time for the ride to the airport with Chief Nichols. A 5 minute drive from the airport to the police station is short. It is impossible for Chief Nichols to run Ms. Byler out at something after 12:18, have Ms. Byler do her (alleged) business with the cargo office, then return to the police station before Ms. Girdwood. Ms. Byler never left the police station until she went for lunch with the AAT crew.

This is problematic for 2 more reasons. First, the air cargo office in Yakutat is closed from 30 minutes before a flight arrives until 30 minutes after the jet leaves, according to Alaska Airlines.⁴¹ In other words, there is no air cargo service in Yakutat from roughly 11:30 am until 12:30 pm, assuming a noon arrival. Whether Chief Nichols took Ms. Byler out at 11:30 or 12:30, she was not going to get the body of her father in law on the northbound flight.

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³⁸ CBY Opposition, page 7.

³⁹ McDonald Trial Testimony, Exhibit 12 to Byler Declaration at pages 7-9.

⁴⁰ CBY Opposition, page 20.

⁴¹ Byler Declaration, paragraph 12 and Exhibit 9.

It is likely that the Yakutat police force was aware of the cargo closure practices. Second, if there is any remaining doubt, the waybill tracking report from Alaska Airlines shows that Mr. Byler's body was accepted for shipping at 4:10 pm on May 15.⁴²

Other Battles.

CBY rightly notes that the parties' battles continue in other venues. Never mind the tax dispute, the fact is that Jerry Byler fell overboard and was drowned. There is no reason the Estate should be denied a remedy, and that claim is pending before the federal court. It is also true that AAT sought bankruptcy protection when CBY attempted to execute on its judgment. CBY quotes extensively from the Bankruptcy Court order of June 18, 2010.⁴³ In what is by now a familiar pattern, CBY only tells part of the story. The Bankruptcy Court entered a later order that clarified or reversed the findings recited by CBY.⁴⁴

Gary Spraker, attorney for the debtor, and Steve Shamburek, attorney for the creditor, were in contact with one another regarding the Bylers' dispute with CBY in early April of 2010. Spraker pleaded with Shamburek not to execute against the Bylers' two vessels. He requested time to prepare a bankruptcy petition. Shamburek refused his request and indicated CBY's intention to execute on its judgment.² CBY arrested the debtor's vessels on April 8, 2010 at approximately 10:00 a.m. The debtor filed its bankruptcy petition at 12:20 p.m. on the same day. Bankruptcy Order, pp. 1-2.

CBY repeatedly points to this court's memorandum of June 17, 2010 and my finding that the debtor was attempting to "unreasonably deter and harass" CBY through the filing of the Chapter 11 petition. CBY also cites my statement that the debtor's principals were seeking to "game the system" as further grounds for sanctions. Additionally, I also stated that the debtor's principals fraudulently transferred assets and entered into a collusive transaction where the debtor's assets

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⁴² Byler Declaration, paragraph 12 and Exhibit 10.

⁴³ CBY Opposition, page 22.

⁴⁴ Byler Declaration, paragraph 9, Exhibit 6.

were mortgaged for \$2.5 million to the estate of Jerry Byler. It's certainly true that I made all those statements in the memorandum. But in reviewing the totality of the circumstances, I made other findings that are not consistent with a finding of improper purpose under Rule 9011. Order, pp. 8-9.

My June 17th memorandum also considered the debtor's and its principals' prepetition conduct at length. That conduct played a large part in my conclusion that the debtor was continuing, through the bankruptcy, its efforts to deter and harass CBY. My perspective has changed, however. It can now be seen that in fact the debtor was making substantial and good faith efforts on behalf of the estate which continued past the point of conditional dismissal. Order, p. 9.

Through the efforts of the Bylers and Spraker, CBY has received over \$100,000.00 in payments. The bankruptcy estate has also received substantial amounts of cash. CBY dismisses this good fortune as simply a "fortuitous event" that the Bylers and Spraker could not foresee when the petition was filed. I disagree. Order, p. 10.

Given the debtor's pre-petition contacts with Aldrich and their subsequent actions, I conclude that the filing of the petition was not made for any improper purpose or harassment within the meaning of Rule 9011(b)(1). Rather, it was made for the legitimate purpose of reorganizing the debtor's business affairs. Order, p. 11.

Bankruptcy offered the only possibility of forestalling the imminent loss of the debtor's two vessels to CBY. CBY refused to give the debtor any time to prepare a bankruptcy petition before arresting of the vessels. Order, p. 12.

CBY sought to seize and sell the debtor's primary business assets. Because those assets were endangered, the debtor's Chapter 11 petition was not a frivolous filing. Order, p. 13.

The debtor and Mr. Spraker have produced a benefit for CBY and the estate. They should not be penalized for their efforts. I will not sanction Gary Spraker, Kimberly Riedel or the debtor for filing a Chapter 11 petition under the circumstances of this case. Order, p. 15.

City v. Alaskan Adventure
Case 1JU-08-434 CI
Reply

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It is obvious that AAT was not found guilty of the many bad acts by the Bankruptcy Court as alleged by CBY.

CBY notes that AAT and Mr. Byler have been tireless in their efforts to have Chief Nichols held to account for his false testimony at trial.⁴⁵ Whatever one may think of their tactics, it certainly demonstrates the sincerity of their deeply held belief that the verdict was unfairly rendered. Of course, CBY does not tell the Court that the FBI refused to investigate for jurisdictional reasons.⁴⁶ CBY concludes with a complaint about the burden of the litigation on their small community. It hardly need be observed that the burden spread over a borough versus a small family business is quite disproportionate. The aggressive tactics of CBY have only exacerbated their expenses, as the Bankruptcy Court Order makes clear.

CONCLUSION

Chief Nichols' testimony at trial is undercut by the facts discovered since trial and CBY's Opposition. There was no ride to the airport. Chief Nichols is a police officer, and was undoubtedly given special credence by the jury.

CBY accuses AAT of using "self-contradictory evidence," making "outlandish assertions", and having a "fertile imagination." AAT's story has never changed. There was no ride to the airport. CBY is confused about which party is guilty of such conduct.

For all of the foregoing reasons, discovery should be reopened and AAT allowed to develop the evidence of fraud. Once that process is complete, AAT will renew motion to set aside the verdict and either ask that the case be dismissed or a new trial granted.

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⁴⁵ CBY Opposition, page 24.

⁴⁶ CBY Opposition, Exhibit A, pages 3 of 13.

Dated at Anchorage, Alaska April 7, 2011.

INGALDSON, MAASSEN &
FITZGERALD, P.C.

Attorneys for Defendants

By: 

Kevin T. Fitzgerald

ABA No. 8711085

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on
the 7 day of April
2011, a copy of the foregoing was
sent to the following via:

- ☒ U.S. Mail, First Class, Postage Prepaid
☐ Hand-Delivery
☒ Fax to 278-0877
☐ Federal Express

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City v. Alaskan Adventure
Case 1:10-cv-00434-CI
Reply

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

The City and Borough of Yakutat,

Plaintiff,

v.

Alaskan Adventure Tours, Inc.,

Defendant.

Case No. 1JU-08-434 CI

DECLARATION OF DARREN BYLER

I, Darren Byler, declare as follows:

1. I am over the age of 18, am competent to be a witness and make the following declaration based on my personal knowledge.

2. Approximately one week ago, I called the 17th Coast Guard District Command Center in Juneau, Alaska. I had questions regarding the timeline of the events that took place on the afternoon and the early evening of May 14, 2007.

3. The reason I called the Coast Guard was to ask questions about a new document that I had never seen before in any litigation between the Estate of Jerry Byler, my wife's company, AAT, or CBY. The document is an Incident Card produced by CBY as Exhibit 3 to its Opposition. The information on the card alleges that a 911 call came in at 7:33 p.m. on the evening of May 14, 2007 that contains details of my father Jerry Byler's drowning accident. My attorneys went to the office of Mr. Brennan in December of last year and received a copy of what was supposed to be the entire CBY file. This Incident Card was not included. I have carefully reviewed the hundreds of pages of

documents produced by CBY. At no point prior to the filing of their opposition has CBY produced this Incident Card.

4. I made contact with Paul Webb who is a head of the Command Center in Juneau. I asked Mr. Webb if the information on the Yakutat's incident card was true and correct. He told me it was not. Mr. Webb went on to say that the Coast Guard documents a strict timeline of events in their MISLE time logs after an emergency call comes in. They prepared one in connection with my father's drowning (Exhibit 1). It records all of the Coast Guard actions in "Zulu" time, which is standard military protocol. Zulu time is Greenwich Standard Time, and must be converted to local time for the numbers to make any sense. Mr. Webb also told me that it is not Coast Guard Protocol to call a local police station as the only law enforcement agency they contact is the Alaska State Troopers. Mr. Webb researched the MISLE case file No. 380306 and confirmed that there was no call made to the Yakutat Department of Public Safety by the United States Coast Guard on May 14, 2007. Mr. Webb stated that it would have been impossible to make a 911 call from Juneau on a landline phone and reach the Yakutat Police Department which is 194 air miles away and has no cell phone service. Mr. Webb further stated that if the Coast Guard would have placed a 911 call from Juneau, they would have received the emergency line of the Juneau Police Department, not the Yakutat Police Department.

5. On the week of April 1, 2011, I called Coast Guard Lt. Thompson who is the head of Investigations of Coast Guard Sector Anchorage. Lt. Thompson also verified that the Coast Guard did not make a call to the Yakutat Department of Public Safety on May 14, 2007. See Email from Lt. Thompson (Exhibit 2).

6. Attached hereto is the Declaration of George Hook dated April 5, 2011 (Exhibit 3).

7. Attached hereto are excerpts taken from the testimony of Brian Luke Barton (Exhibit 4).

8. Attached hereto are excerpts taken from the trial testimony of George Davis (Exhibit 5). CBY questions the failure of Mr. Davis to testify concerning Chief Nichols' return to the airport without Ms. Byler. We did not learn that Mr. Davis saw Chief Nichols at the airport when the jet arrived from Juneau until long after the trial.

9. Attached hereto is the Memorandum on Sanctions and Attorney Fees, which was filed in United States Bankruptcy Court District of Alaska on November 17, 2010 (Exhibit 6).

10. Attached hereto is the Declaration of Alfred L. Johnson dated April 5, 2011 (Exhibit 7).

11. Attached hereto are copies of CBY police logs for May 14 through 17, 2007 produced in the federal case (Exhibit 8).

12. I spoke with Alaska Airlines regarding the cargo office in Yakutat. They told me that the cargo office closes 30 minutes before each flight arrives and doesn't reopen until 30 minutes after the plane leaves. They sent a statement that confirms this (Exhibit 9). I also attach the cargo records for shipping my father's body. They show that his body was not received until after 4 pm. (Exhibit 10).

13. I attach a true and correct copy of the transcript of the testimony of Chief Nichols on February 9, 2010 (Exhibit 11).

14. I attach a true and correct copy of the transcript of the testimony of Edward McDonald on February 9, 2010 (Exhibit 12).

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 7 day of April, 2011.


Darren Byler

EXHIBIT 3

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ESTATE OF JERRY L. BYLER,

Plaintiff,

v.

ALASKAN LEADER, Official No. 558637, its
Engines, Machinery, Appurtenances, etc.,
In Rem, and ALASKAN ADVENTURE
TOURS, INC., *in personam*,

Defendants,

CITY AND BOROUGH OF YAKUTAT,

Intervenor.

IN ADMIRALTY

TH

Case No. 3:10-cv-00055-HRH

DECLARATION OF GEORGE HOOK

I, George Hook, declare as follows:

1. I am over the age of 18, am competent to be a witness and make the following declaration based on my personal knowledge.
2. I am a helicopter pilot employed by Temsco Helicopters in Ketchikan, Alaska.

DECLARATION OF GEORGE HOOK
Estate of Jerry L. Byler v. ALASKAN LEADER
Case No. 3:10-cv-00055-HRH - Page 1 of 4

EXC. 226

Exhibit 3, Page 1 of 3

3. On May 14, 2007, I was en route from Ketchikan to Denali to work on a flight related project.

4. At approximately 7:00 p.m., I landed in Yakutat to refuel the helicopter. I am not from Yakutat and do not know anyone from there. After refueling in Yakutat, I headed northwest for Cordova.

5. At approximately 7:30 p.m., as I was approaching the Icy Bay area, I heard the Coast Guard broadcast a Pan-Pan alert for a man overboard in the Icy Bay area. I radioed back to the Coast Guard and asked if they needed my assistance. They said yes. I made radio contact with the vessels below on Channel 16 VHF radio which is the emergency station.

6. At approximately 8:15 p.m., I located the man's body in the water near the beach. At that time, I contacted the vessels and relayed the information. After contacting the vessels, I then contacted the Coast Guard in Juneau and relayed the information to them.

7. The 8:15 p.m. call to the Coast Guard was short and brief. All I told them was that I had located the man's body and contacted the vessels below. I then left the area and continued on my path as I was getting short on fuel and the weather was bad.

8. At approximately 9:30 p.m., I landed the helicopter in Cordova due to the bad weather and needing to refuel. I stayed the night at a local hotel in Cordova and then continued my trip to Denali the next morning.

9. I am not from Cordova, have never lived there, and do not know anyone from Cordova. I did not talk to anyone nor explained details of the body recovery that I had just assisted with in Icy Bay.

GH

10. The next day on May 15, 2007, I was in the air most of the day en route to my destination. I did not talk to the Alaska Troopers and give them any details of this event until the afternoon of the next day, May 16, 2007.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 5 day of April, 2011.

George Hook
GEORGE HOOK

EXHIBIT 4

EXHIBIT 4

Estate of Jerry L. Byler v. ALASKAN LEADER, et al.
Our File No. 5194.25043
Interview of Brian Barton

BB = Brian Barton
 CN = Chief Nichols

Spkr	Comments
CN	This is Chief Nichols. The date is May 15, 2007, time right now is 11:15; I'm at the Yakutat Public Safety; I'm speaking with Brian Barton.
BB	Yes, sir.
CN	Brian, do you work for Darren Byler?
BB	Yes, this is the first season I've worked for him.
CN	And in your [inaudible] work for him, what are you considered?
BB	Assistant guide.
CN	Assistant guide? I guess last night there was a report, last night that to the Coast Guard they had a man overboard. Can you explain to me what happened, to the best of your knowledge?
BB	Well, we were, we have a big tent on the North Pacific that's set up for us guides with a TV and everything in there--
CN	Now, the North Pacific--is that a boat?
BB	It's a crab boat that --- yeah; a big crab boat.
CN	How big is it?
BB	I'd say 60 foot; I really don't know how big it is. Pretty big boat.
CN	Okay
BB	And there's a TV area, we were watching TV in there, and there's a generator going, and Darren came over and we asked if we could go to his boat, which is the Alaska Leader, it's the same size, pretty big, so we could watch satellite TV. It'd been a while since we watched news or anything. So we went over there and watched -- what were we watching--
CN	So where is his boat now, the North Pacific and the Alaska Leader?
BB	Yeah; you wanna see pictures?
CN	Yeah, that would be great.
BB	That'll kind of give you a better idea of what it looks like. [Gets pictures] This is our guide tent; this is where we were hanging out before we asked to go--
CN	This is on the North Pacific, right?
BB	Yeah, this is the North Pacific.
CN	And this is just right out on deck or something?
BB	Yeah, it's out on deck.
CN	Okay.
BB	This is from the back, the North Pacific, that's the Maaco back there. He had pulled this boat up to the North Pacific, or up to the Alaska Leader.
CN	So that's the Maaco, that's another boat?
BB	Yeah, he was trying to get on that boat to pump it apparently that's what

Spkr	Comments
CN	--what you think? Okay
BB	_____ has the rope out there. He'd pulled it up and tied it off to the Whaler.
CN	Usually it's not this far out.
BB	No.
CN	Usually it's far out, but it was tied up close.
BB	So that's the Alaska Leader; it's tied up next to the North Pacific.
CN	But you guys weren't tied up next to each other were you?
BB	Yes, they're tied up.
CN	Oh, they're tied up; so you guys just went from this boat over to the other boat, to watch satellite TV.
BB	Yes. And I think that's all the boat pictures.
CN	If you don't mind, can we try to download those pictures: I don't want to look at your camera ---
BB	Absolutely.
CN	Okay, cause I want to--
BB	You can take anything off there you like
CN	That would be great.
BB	I'll just turn it off, take the chip out for you. There it is.
CN	Oh, no; do you have a hook up on this thing?
BB	Yeah, right there.
CN	Oh, perfect; we'll just hook that up, if that's not a problem.
BB	Not a problem at all.
CN	So, you guys went over to the Alaska Leader to watch TV; and you said "you guys;" who was all that?
BB	Me and Eddie.
CN	You and Eddie?
BB	Yeah, he's another guy out there; an assistant guide.
CN	And Eddie's last name?
BB	MacDonald.
CN	MacDonald? Okay.
BB	Then, we were watching "Oil Sweatin' Rigs;" we watched that for about a half hour; then "Deadliest Catch" came on; and Darren came in and watched that with us; and then he got up and went outside and he looked off the back of the boat, and he could tell that the boat was pulled up so he ran in and asked if we'd seen his dad; we searched the boats and then kind of panicked; everyone panicked. Me and Darren and Kimberly jumped in the landing craft and Joe Brown by the boats for about, I don't know--maybe 15 minutes, 20 minutes maybe and then we went back to the Maaco, to the boat that's on the line, and he jumped in there to see if his dad actually made it in there, pumped the bilge; the boat got away, so I had to turn the boat around to pull it back, so I don't know if it actually was pumped or not, but I brought the boat back, they got back on board, we drove around a little bit more, around the logs they have there, the logging company that we went and tied up; called the Coast Guard from the Alaska Leader and it was kind of

Spkr	Comments
	just chaos.
CN	How did you recover the body, find the body?
BB	Oh, we, the helicopter found it, and then me and Eddie and Kimberley and Darren got back on the landing craft; me and Eddie jumped out of the boat, put him on the boat, covered him with a tarp.
CN	So you guys went over to where the helicopter was.
BB	Yeah.
CN	Were you guys in communication with them?
BB	Yes. He said he's seen the body and we untied the boat; because the landing craft is tied up next to the Alaska Leader, so the waves and stuff don't beat them really hard. We jumped in--
CN	Did you have three boats tied side-by-side?
BB	Yes.
CN	You had the North Pacific, the Alaska Leader, and then the landing craft on the other side?
BB	Yeah; and then the Whaler and the Maaco were tied up behind them.
CN	Tied up behind---
BB	The Alaska Leader.
CN	The Alaska Leader. Okay. So then you guys jumped in the landing craft?
BB	Yep.
CN	And went over to where the helicopter was?
BB	And he pointed to me, Eddie jumped in, and loaded him up.
CN	When you got to him, could you tell if he was deceased at that time?
BB	He was deceased. He was very blue and stiff.
CN	Stiff. Do you remember the last time that you saw Jerry?
BB	We were watching a movie in the guide tent and he just poked his head in momentarily and Eddie kind of grabbed him by the leg--just messing around with him; and he kind of smiled like he always did--and turned around and walked out.
CN	Do you know what time that was around?
BB	You know I don't wear a watch or anything so I really don't recollect the time at all.
CN	But you and Eddie were there watching a movie and that, and he just kind of popped in and that's the last time you saw him rather than when he--
BB	Yeah, and he had a big cup of tea; I asked him what he was drinking; he said he was drinking tea.
CN	And then how long do you think you guys searched; when he came in and said, you know, he's looking for his dad; I mean, could you tell he, Darren was upset or something--
BB	He was definitely panicking. He was very concerned.
CN	Okay. But you weren't on the Alaska Leader at the time.
BB	Yeah, watching TV.
CN	Watching TV. And then you guys just got up and started looking at all the boats
BB	Yeah, we went to engine rooms and bunks, and bathrooms, and
CN	--everything. And after that his son came up with the idea about possibly the Maaco or

Spkr	Comments
	something. Do you remember who it was that said that?
BB	Darren had said that he mentioned going out there and pumping the boat because it was filling up with water from the rain; Darren mentioned that he said not to do it without one of our help to hold the line
CN	Okay and so that's what they think what happened is that?
BB	Yeah.
CN	Now, Kimberley said he had a pacemaker. Were you aware of the defibrillator?
BB	That was the first time I heard about it was today.
CN	And he's been up there—how long have you been up there?
BB	Four weeks.
CN	Four weeks. And he's been up there the whole time to, right?
BB	Yeah.
CN	He ever complain about any health injuries or anything?
BB	Not at all. He got around good, he took people out hunting; some of his clients—I can't remember there name—but they actually said that walked them a lot. They didn't want to walk that much, but he was very healthy. Very happy. Always the first one up making coffee and
CN	Just a good guy—he sounds like it; just an excellent guy. How long do you guys think you searched for him? Before notifying the Coast Guard?
BB	I'd say at least 20 to 30 minutes.
CN	Twenty to thirty minutes? And then you notified the Coast Guard.
BB	Yeah.
CN	And then you probably continued—is that when you jumped in that—after you notified the Coast Guard—you started looking--
BB	We looked around before we notified the Coast Guard.
CN	So you were already in the water looking around, and then you notified the Coast Guard.
BB	Yeah; he went back—we went back to the Alaska Leader, and that's where he contacted the Coast Guard.
CN	Okay; and then--
BB	Me and Eddie mentioned to him, right when we noticed that he probably should call someone. And I just think he was so worked up that he was panicking; he was panicking bad.
CN	And then, the helicopter—how did that come into play? How were you guys notified about him helping you with the search?
BB	They had went up in the wheelhouse—and I don't know if they used the radio or the phone to call—I was out on deck with binoculars looking at the water. And then I went in—because I just had cotton and long johns on—and I was starting to freeze. So I went in, and was looking through the window and could see the plane--helicopter start circling the little Icy Bay area where we were anchored up. Then we had a radio, we were listening to him—he said that he was going to make one last pass, and when he made the pass he said, "There he is—face down." So we all jumped back _____, me and Eddie and Kimberley and Darren and went over and pulled him back in. Me and Eddie covered him with a tarp.

Spkr	Comments
CN	Was there any CPR done or anything like that?
BB	No.
CN	Nothing?
BB	No, he was past.
CN	You could tell that—
BB	It had been a while since he went in, I think.
CN	And by the time that say you saw him—when he popped into your tent, until the time you found the body—could you say approximately how long that had been? Couple hours?
BB	I think two hours.
CN	About two hours.
BB	Maybe two and a half. Somewhere in there.
CN	And the way that I kinda figured out that, I looked at those pictures, and you have those other boats as, there's a Maaco and there's a Whaler?
BB	Yes.
CN	And they're tied up to the end of the Alaska Leader, right?
BB	Yes.
CN	And they have a long one—looking at the photo—there's a lot of ---out there
BB	Lot of rope
CN	Lot of rope.
BB	And he had pulled that clear up to the Whaler, which you can't see in the picture, but he pulled it clear up to the Whaler and tied it off.
CN	And the Whaler, was that closer to the boat?
BB	Yes.
CN	Is that a smaller boat than the Maaco or something?
BB	Yes.
CN	And the Maaco is the one he needed to
BB	Pump the bilge
CN	You just have to hit a bilge pump or something
BB	Just hit a switch and it pumps out.
CN	Okay, so someone had pulled the Maaco up.
BB	Yes.
CN	Okay.
BB	And that's kind of when he noticed that, realized that he probably went over.
CN	Now is it hard to step down for the Alaska Leader onto ---
BB	Yeah, there's kind of like a ramp there. Just like some railroad ties on some rollers that are tied off. So you just kind of walk down—there's a rubber raft tied up to the ramp kind of; just walk down, and you jump into the Whaler and then pull the line and get into the Maaco.
CN	Okay, so you have to get in the Whaler first and then into the Maaco.
BB	Yeah.
CN	Did you notice any injuries to --- when you pulled him—when you looked at him afterwards?

Spkr	Comments
BB	It kind of looked like his face had some scrapes on it—I didn't really want to look—he was pretty blue and –it did look like his chin, and maybe his nose had some scrapes on it.
CN	Scrapes on it?
BB	Yeah.
CN	Is there anything else that you think is important about what happened or anything like that? Do you have any questions or anything?
BB	No, I don't.
CN	This is Chief Nichols and now it's 11:26 when we stopped the interview.

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