

IN THE SUPREME COURT FOR THE STATE OF ALASKA

Alaskan Adventure Tours, Inc., et. al. )  
 )  
 Appellants, ) Supreme Court No. S-14483  
 )  
 vs. )  
 )  
 The City and Borough of )  
 Yakutat, )  
 )  
 Appellee. )  
 )  
 \_\_\_\_\_ ) Superior Court Case no. 1JU-08-434 CI

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

**APPELLEE'S BRIEF**

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\_\_\_\_\_, Clerk  
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COURT RULES RELIED UPON

**Rule 60. Relief From Judgment or Order.**

[...]

**(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:

[...]

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

[...]

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c)

[...]

ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in holding that AAT failed to meet its burden of proving by clear and convincing evidence that the City and Borough of Yakutat procured its judgment by fraud?
2. Did the Superior Court err in holding that AAT was aware of Chief Nichols' allegedly perjurious statements long before trial, such that it was not deprived of a full and fair opportunity to present its defense?
3. Has AAT demonstrated a meritorious defense, such as to justify Civil Rule 60(b) relief?

## STATEMENT OF THE CASE

### A. General Factual and Procedural Background.

The factual context for this case arose from the efforts of the City and Borough of Yakutat ("CBY") to collect sales taxes from Alaskan Adventure Tours, Inc. ("AAT"). AAT was required to collect sales taxes from its 2007 big game hunting clients in the Borough and to pay the taxes over to CBY. In 2008, CBY filed an action against AAT relating to the unpaid taxes, and obtained a final judgment in the amount of \$95,808.46 for unpaid taxes, penalties and interest. Exc.366-67. AAT was then represented as being 100% owned by Kimberly Byler, though the company's letterhead referred to it as "Darren Byler's Alaska Adventure Tours, Inc". Exc. 365.<sup>1</sup>

Thereafter, in April, 2009, CBY filed a supplemental complaint [Exc.368-70], alleging that AAT and its principal, Kimberly Byler, had, in late 2007 and early 2008, engaged in fraudulent conveyance to avoid payment of the taxes, by transferring all of AAT's vessels, its funds and other assets to Ms. Byler personally. Cby alleged that she then retransferred those assets to a new entity, also wholly owned by her, ABC Leasing, LLC. AAT and co-defendant Kimberly Byler defended on grounds that they had no notice that CBY had been pursuing AAT for collection of sales taxes at the time these asset transfers were made.

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<sup>1</sup> Kimberly Byler is married to Darren Byler, who was AAT's general manager and head guide. Ms. Byler variously uses the names "Kimberley Riedel-Byler, Kimberly C. Riedel, K. Christina Riedel" as well as Kimberly Byler, so the supplemental complaint was brought against all four names. For simplicity, she is referred to as "Kimberly Byler" in this brief.



After a February, 2010 trial over which Superior Court Judge Patricia Collins presided, the jury found that AAT and Ms. Byler had fraudulently conveyed AAT's assets to Ms. Byler and ABC Leasing, LLC, and that Kimberly Byler had otherwise concealed assets of AAT, in violation of a Superior Court Order prohibiting such transfer or concealment. Exc.371-73. In an advisory verdict sought by the trial judge, the jury also found that Ms. Byler had testified untruthfully at a judgment debtor examination regarding the existence or value of assets of AAT and as to the availability of business records of AAT. Exc.372-73.

On the basis of these verdicts, Judge Collins entered a Civil Contempt Order detailing the false testimony and the violation of a court order upon which the contempt was based. Exc.376-79. The court also awarded 80% of actual reasonable attorneys fees to CBY, on the basis of the defendant's intentional lies under oath, transfer of assets in direct violation of court orders and other bad faith actions, as well as on the basis of the contempt order. Exc.380-82. Judgment was thereafter entered. Exc.366-67. Following this, as outlined below, the Judgment was amended several times, ultimately resulting in a Third Amended Judgment on Fraudulent Conveyance. Exc.392-94.

On the heels of the February 16, 2010 verdict, but prior to entry of the first, March 18, 2010 Judgment on Fraudulent Conveyance, Darren Byler, acting as personal representative for the Estate of Jerry Byler, his father, brought a federal maritime *in rem* action [Exc. 59, 384] against the M/V ALASKA LEADER and sought to arrest his wife's

company's vessel on the basis of a wrongful death claim.<sup>2</sup> [Exc. 384.] Jerry Byler had been aboard the vessel during 2007, in an uncertain employment status, when he drowned on May 14, 2007 in Icy Bay, a remote area within the City and Borough of Yakutat. Exc. 190. Though CBY was not notified of the wrongful death action by either AAT or Mr. Byler, the Federal Magistrate Judge, in what amounted to an uncontested (AAT did not oppose it), *ex parte* proceeding, denied relief.

After failing to obtain relief in the federal district court, the Bylers then filed a bankruptcy petition on behalf of AAT. This Chapter 11 bankruptcy filing by AAT [Exc. 67], which temporarily stayed entry of judgment against AAT, was later dismissed by the Bankruptcy Court as a bad faith filing [Exc.382-391], removing the stay and resulting in entry of the Third Amended Judgment now on appeal.<sup>3</sup>

CBY thereafter intervened in the federal action, and contested Mr. Byler's claim on behalf of the Jerry Byler Estate, on grounds that the action had been brought purely to frustrate CBY's state court judgment collection efforts through an artificial, preferential maritime injury lien. CBY asserted that Jerry Byler's death was not the product of

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<sup>2</sup> The Estate's claim against AAT's vessels was also based upon a purported \$2.5 million "settlement" between Mr. Byler, on behalf of the Estate, and his wife, Ms. Byler, on behalf of AAT, but AAT's insurance carrier did not honor this settlement. Exc. 60, 384.

<sup>3</sup> In reviewing various elements of bad faith, the bankruptcy court concluded that

[T]he Byler's 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.

Exc. 389. Although the bankruptcy court later declined to award CBY actual attorney fees, it did not reverse its bad faith dismissal order.

unseaworthiness of the M/V ALASKAN LEADER, as supported by audio recorded statements made by Kimberly Byler in a death investigation interview conducted by CBY Police Chief John Nichols, at the request of the Alaska State Troopers, the morning after Jerry Byler's death. Exc. 107-08, 110, 114-15.

After the Bankruptcy Court had dismissed AAT's Chapter 11 Petition, and while the wrongful death action based upon alleged unseaworthiness was being vigorously litigated between the Estate of Byler and intervenor CBY in Federal Court, AAT then filed, in the state court action, a March 18, 2011 Civil Rule 60(b)(3) Motion for Relief from Judgment based upon alleged fraud and misconduct. Exc. 70.<sup>4</sup> After full briefing and hearing, trial court Judge Collins denied the motion. Thereafter, AAT brought a Motion for Reconsideration which, after briefing, was denied by Superior Court Judge Niesje Steinkruger.<sup>5</sup> Exc. 312.

## B. Facts Directly Related To Issues On Appeal.

### 1. General factual background

The primary issue at the fraudulent conveyance trial was whether AAT and Kimberly Byler had notice that Yakutat was seeking collection of sales taxes at the time all of AAT's assets, including several vessels, were transferred by Ms. Byler to herself, and then on to her wholly-owned LLC ABC Leasing, in early 2008. In its Rule 60(b)

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<sup>4</sup> AAT's filing was exactly 1 year after the initial Judgment on Fraudulent Conveyance [Exc.374-75], the absolute deadline for bringing such a motion under Rule 60(b)(3).

<sup>5</sup> Judge Patricia Collins retired from the bench before the Motion For Reconsideration was brought. Judge Steinkruger ruled that "even if the alleged 'new evidence' is considered, the plaintiff has not established by clear and convincing evidence that the verdict was obtained by fraud." Exc. 310-11.

motion, AAT alleged that the fraudulent conveyance verdict was procured by CBY's fraud. Specifically, AAT alleged that CBY Police Chief John Nichols falsely testified that he had a conversation with Kimberly Byler in May, 2007, in which she demonstrated awareness of the Borough's efforts to seek payment of the sales tax by her business, stating that AAT was not responsible for payment of these taxes. Exc. 315-16. Chief Nichols testified that this conversation occurred in the police car when he was transporting Ms. Byler back from the Yakutat police station to the Yakutat airport, after he had completed interviews he conducted during the death investigation on May 15, 2007, the day after her father-in-law drowned. Exc. 41, 314-15. At trial, Ms. Byler testified that she did not have the conversation because Chief Nichols did not drive her to the airport. Exc. 330. The focus of AAT's allegations of fraud appear to center on this contention, that Chief Nichols could not have had the conversation about taxes with Ms. Byler, because AAT asserts that he did not drive her to the Yakutat Airport.

Prior to discussing this conflicting testimony herein, it is noteworthy that Chief Nichols' testimony was only a small part of CBY's trial evidence showing that AAT had notice of its sales tax collection efforts. Eight different letters from CBY's tax and license clerk or from CBY's borough attorney were sent to AAT or its general manager, Darren Byler, advising them of the obligation to pay CBY's sales taxes when doing business in the borough. Exc. 342-44, 346-47, 350-51, 356-64. A responsive letter [Exc. 345] was admitted at trial, demonstrating that Mr. Byler had written back to CBY in 2005, stating that he did not plan to operate a business in the borough. CBY attorney Sara Heideman testified that Darren Byler responded to her April 27, 2007 letter [Exc. 347], by calling

her on a satellite telephone on May 31, 2007, disputing AAT's liability for the sales taxes. Exc. 480-82. Ms. Heideman's testimony was backed up by her contemporaneous attorney notes [Exc. 352, 484-86], her attorney's time sheet [Exc. 353, 482-83] and by AAT's satellite telephone billing statement [Exc. 355, 487-91] procured in discovery. This statement confirmed Mr. Byler's 7 minute, May 31 call to Ms. Heideman at her Anchorage office number, (907) 279-5528.

CBY tax and license clerk Ladonna James also testified that, following CBY's transmittal of a February 21, 2007 letter advising it of its sales tax obligations, Kimberly Byler called Ms. James to inquire as to AAT's obligations to pay borough sales and bed taxes, and did not argue with Ms. James' explanation as to why such taxes would be owing on AAT's business activities with its hunting clients within the borough. Exc. 473-75.

In a summary of this testimony, contained in Judge Collins' Order [Exc. 381] awarding enhanced prevailing party attorneys fees, Judge Collins' touched upon AAT's assertion, which is now the basis for this appeal, that CBY Police Chief Nichols was lying:

Testimony by Ms. Riedel-Byler and Mr. Byler at trial was plainly rejected by the jury as untrue, including denial of receipt of 7 separate letters from Yakutat regarding their taxes over a 10-month period, allegations that the Chief of Police, the Borough Clerk and the Borough Attorney were all lying under oath when they testified to discussions with the Bylers about their taxes, allegations that an Alaska State Trooper lied about his evidence logs/return and lied about a face-to-face discussion with Ms. Riedel-Byler. At best, these claims stretch credibility and resulted in a far more lengthy trial that [sic] might otherwise have been necessary. Many of

the claims and the defenses by the Bylers in this case were patently unreasonable and bordered on bad faith.

(Emphasis in original.)

Chief Nichols' May 2007 discussion of AAT's tax obligation with Ms. Byler, the essence of his later trial testimony, had been previously detailed in an affidavit filed by CBY in the fraudulent conveyance case, in support of a pretrial motion to restrain AAT from disposition of its assets. The Affidavit of John Nichols was dated March 27, 2009 and was filed and served on AAT's counsel on April 4, 2009, some 10 months before the jury trial. Exc. 40-41. The affidavit of Mr. Nichols stated, in part:

While I was transporting Ms. Riedel-Byler back from the police station to the airport, she stated that she felt that everybody in Yakutat was against her and her business or words to that effect. In this context, I brought up the pending issue as to the non-payment by her business, AAT, of the Borough sales and "bed" taxes. Ms. Riedel-Byler stated that they were not obligated or responsible for payment of these taxes. Her response demonstrated to me that she was already aware of the Borough's effort to seek payment of the tax by her business.

Exc. 41.

Chief Nichols' Affidavit was not contested by AAT in the 2009 motion matter. AAT did not take Chief Nichols' deposition nor seek any other discovery prior to trial regarding either his conversation with Ms. Byler, the timing of his trip to the airport with her, or as to the other factual grounds now asserted in this appeal. In the February, 2010 trial, AAT's counsel twice cross examined Chief Nichols [Exc. 317-24, 337-40] in an effort to discredit his testimony that he had transported Ms. Byler to the Yakutat airport. AAT also called other witnesses to challenge Chief Nichols' testimony.

Most of the evidence now relied upon by AAT was developed after the entry of final judgment herein, by Darren Byler in the Byler Estate's federal wrongful death action against AAT, in which AAT played a passive role, not even opposing the Estate's motion to arrest its vessels. Some of this discovery was pursued in furtherance of the Estate's effort to prove alleged computer tampering with the audio recording of Ms. Byler's interview by Chief Nichols, because the audio recording was very damaging to the Estate's allegation that unseaworthiness caused the drowning. cf. Exc. 102-08, 110, 114-15. Other discovery was pursued by the Estate in a transparent effort to assist AAT in setting aside the State Court Judgment now on appeal.

AAT's essential argument herein is that Chief Nichols could not have taken Ms. Byler to the airport; however, as is discussed in further detail below, it is not clear how some of AAT's current factual assertions even relate to the question it has raised.

2. Summary of conflicting assertions regarding Kimberly Byler's transportation from police station to airport.

The central basis for AAT's assertion that Chief Nichols did not transport Kimberly Byler to the Yakutat Airport, after he completed his investigation at the police station, is that Ms. Byler was taken to the airport by others (AAT employees Pamela Girdwood, Eddy MacDonald and Brian Barton) and not by Chief Nichols. However, as discussed below, Ms. Byler took *two trips* from the police station to the airport on that day. The first trip was with Chief Nichols, in her failed effort to catch the mid-day northbound flight so that she could transport the decedent's body to Anchorage for transshipment to Arkansas. Her second trip to the airport was after she had returned back

to the police station, when she left with the remainder of the AAT employees who had arrived in Yakutat later, acquired a vehicle, and arrived at the police station. The AAT employees then transported Ms. Byler back to the airport so that she could catch the late afternoon southbound flight to transport the body through Juneau.

3. Chronology of events surrounding conversation between Ms. Byler and Chief Nichols.

A straightforward chronology of the events of May 14-15, 2007 is necessary, to place AAT's assertions of inconsistencies into context.

On the evening of the May 14, 2007 Jerry Byler drowning, Alaska State Trooper Sergeant Robert Cox contacted Kimberly Byler by telephone from Juneau; Ms. Byler was using a satellite telephone on AAT's vessel in Icy Bay. Exc. 434-35. Sgt. Cox obtained the essential information from Ms. Byler regarding the drowning, including the involvement of a helicopter in locating the missing body. Exc. 435-36, 348. Sgt. Cox understood from Kimberly Byler that she was going to be flying the body into Yakutat the next morning, in order to catch the northbound flight to Anchorage. Exc. 439. Because this was the same flight Sgt. Cox expected to be taking from Juneau to arrive in Yakutat, he realized he would not have much time, if any, to interview her. Id. He therefore arranged for CBY Chief Nichols to conduct the interview. Id. Sgt. Cox called Chief Nichols the next morning (May 15) at 8:30 a.m., from Juneau. Exc. 438. Chief Nichol's was already aware of the drowning and some of the surrounding facts. Exc. 440-41. Sgt. Cox briefed him on the telephone so that Chief Nichols could intelligently



question the witnesses; the discussion included the involvement of a private helicopter in searching for and locating the body. Exc. 441-42.

Kimberly Byler arrived in Yakutat by an air taxi flight from Icy Bay with the body in the morning, and was surprised to be met there, at 10:31 a.m. [Exc. 128], by Chief Nichols, rather than the State Trooper. Exc. 95-96. Chief Nichols and a deputy transported her and the deceased's body to the Yakutat police station, so that she could be interviewed and the body could be photographed and examined. Exc. 96-99. She was accompanied by AAT assistant guide Brian Barton, who was also interviewed, shortly after Ms. Byler. Exc. 96, 100. The Kimberly Byler interview ended at 11:10 a.m., according to a statement contemporaneously made on the audio recording by Chief Nichols. Exc. 118.<sup>6</sup> The Brian Barton interview ended at 11:26 a.m., again according to Chief Nichols' contemporaneous statement on the audio recording. Exc. 235.

Sometime after these interviews were completed, Kimberly Byler, who was seeking to ship the body through Anchorage [Exc. 117, 439] to relatives in Arkansas, sought to have the body transported back to the airport in an effort to catch the northbound flight to Anchorage, which was arriving late into Yakutat. Police personnel transported the body to the airport in this effort, and it was at this time that CBY Police Chief Nichols separately drove Ms. Byler to the airport. Exc. 335, 425. However, this effort proved unsuccessful as they arrived too late to ship the body on the northbound

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<sup>6</sup> The date/time stamping on Chief Nichols' desktop computer, transferred to the police department's server, indicated that the recording ended at 11:07:32. Exc. 405.

flight, and as such it would be necessary for Ms. Byler to instead accompany the body southbound to Juneau on the 5:30 p.m. flight.

Sgt. Cox arrived at the Yakutat airport on the northbound flight, [Exc. 421] which landed at 11:56 a.m. Exc. 139. After disembarking and walking through the terminal, he located Chief Nichols who was waiting in his vehicle in the airport parking lot. Exc. 421. Sgt. Cox testified in deposition that he did not know if Ms. Byler was at the airport or not. Exc. 444-45.<sup>7</sup> He learned from Chief Nichols, however, that Nichols had already interviewed Ms. Byler and the assistant guide who had accompanied her. Exc. 423.

The Yakutat police station is approximately five minutes from the airport. Exc. 422. Five to ten minutes after Sgt. Cox arrived at the police station, Ms. Byler and the man with her (Brian Barton, who had also been previously interviewed) arrived. Exc. 424, 446. Shortly thereafter, two other AAT employees, Pamela Girdwood and Eddy MacDonald, who had arrived from Icy Bay on a later air taxi flight than Ms. Byler and Mr. Barton [Exc. 258, 260-61], arrived at the police station. Exc. 424, 426. This group had their own vehicle. Exc. 258, 424, 432, 447. Sgt. Cox was clear that Kimberly Byler had arrived at the police station after he did, because she came through the same front door of the station he had come through a short time before, not then seeing her. Exc. 454-55.

Sgt. Cox spoke with Ms. Byler, but did not conduct a formal interview, because she had already been interviewed by Chief Nichols. Exc. 427, 447. Moreover, she acted

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<sup>7</sup> Sgt. Cox did not know what Kimberly Byler looked like [Exc. 444], and had in any case expected, correctly, that Chief Nichols had already interviewed her. Exc. 423.

“guarded” because she had already talked with the CBY police, and felt that she should not have to repeat it.<sup>8</sup> Exc. 448-49. After Sgt. Cox had finished questioning the other witnesses, Ms. Byler and the others left in their own vehicle [Exc. 447, 258], and she subsequently went to the airport, and traveled with the decedent’s body on the southbound flight to Juneau. (Cox depo, p. 75, Exc. 259.)

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<sup>8</sup> Sgt. Cox testified that Darren and Kimberly Byler had a reputation for being untruthful in their contacts with law enforcement. Exc. 453a. In support of AAT’s Motion For Relief From Judgment herein, Darren Byler filed a sworn declaration regarding “several communications” he claimed to have had with Sgt. Cox. Exc. 395-96. However, Sgt. Cox testified that he had never spoken with Mr. Byler, and had in fact left several messages with Kimberly Byler in which he was seeking to talk with Darren Byler, who had not come into Yakutat with the decedent’s body, despite being the decedent’s son. Sgt. Cox testified that he was never able to speak with Mr. Byler. Exc. 451-53.

## ARGUMENT

### I. The Trial Court Applied the Correct Standard in Denying AAT's Motion for Relief from Judgment.

Relief from judgment under Rule 60(b)(3) for alleged fraud or misconduct, including alleged perjury, is to be granted only where it is demonstrated by clear and convincing evidence that an innocent party was thereby prevented from "fully and fairly presenting his or her case." 12 Moore's Federal Practice (3<sup>rd</sup> Ed. 2003) at §60.43[1][c], p. 60-132. This was the standard applied by the Alaska Supreme Court in McCall v. Coats, 777 P.2d 655, 658 (Alaska 1989) and Babinec v. Yabuki, 799 P.2d 1325, 1333-34 (Alaska 1990). In Babinec, the trial court's denial of a Rule 60(b)(3) motion was upheld even though the court did not explicitly address the question of whether the defendant was prevented from presenting a full and fair defense by the misconduct of the plaintiff, because the trial court's statements were sufficiently detailed to indicate that it would have decided that the defendant was not prevented by the plaintiff's misconduct from presenting a full and fair defense. The trial court had pointed out that the defense had known sufficient facts, but had not pursued them:

But those things were in fact known to the defense. Certain judgments were made, and they have to live by them....There was sufficient knowledge available and the mechanism available for defendants to have pursued, had they opted to do so.

Id. at 1334, n. 10.

Here, the trial court below correctly applied the standard that a party seeking relief from judgment on the basis of fraud must prove fraud by clear and convincing evidence, stating as follows:

The Bylers were also aware of Chief Nichols' statements many months before trial. They could have examined these issues at or long before trial. At best, the instant attack on the jury verdict involves claims of an imperfect recollection about a largely inconsequential event to the ultimate decisions made by the jury and this court. There is not clear and convincing evidence of fraud.

Exc. 286.<sup>9</sup>

II. Even Had Chief Nichols' Testimony Been False, AAT was not Thereby Deprived of a Full and Fair Opportunity to Present its Defense.

Chief Nichols' trial testimony as to what AAT now identifies as the critical issue -  
- Ms. Byler's statements to Chief Nichols exhibiting her awareness of CBY's imposition of a sales collection obligation upon AAT while she was a passenger in Chief Nichols' vehicle -- was set out in an affidavit filed by CBY in a pretrial motion. Chief Nichols' affidavit was served on AAT's counsel on April 6, 2009 [Exc. 40] and provided full detail as to the testimony he gave ten months later at trial. His affidavit included his statement that while he was transporting Ms. Byler from the police station to the Yakutat

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<sup>9</sup> Distinctions between intentional and unintentional misconduct which result in shifting of the burden to prove non-interference with full and fair presentation of the case (see Babinec v. Yabuki, *supra.* at 1333) are of no consequence where, as here, affirmative evidence demonstrates that, even had AAT proven fraud by clear and convincing evidence, AAT could not have been surprised by Chief Nichols' previously disclosed testimony, and was not thereby deprived of a full and fair opportunity to present its defense.

Airport, she made statements disclosing her awareness of CBY's effort to seek AAT's payment of sales taxes. Ms. Byler was identified as the maker of these statements; if Chief Nichols' affidavit was then known to her to be untrue, AAT could have pursued the discovery it now claims to lack. Because she would have known then, in April, 2009, that the Chief's testimony was false, she and her company, AAT, cannot claim that they were so surprised by Chief Nichols' testimony at trial that they were deprived of a full and fair opportunity to pursue pre-trial discovery as to the evidence of fraud or perjury they now seek to cobble together. All of the so-called "evidence" of fraud or misconduct now relied upon by AAT could have been, but was not, the subject of investigation and discovery prior to the February, 2010 trial.

In its brief (p. 28), AAT asks, "[h]ow can a party be tasked with unearthing fraud, when the very nature of fraud is that it be kept hidden?" Under this standard, allegations of "fraud" would always, automatically, be grounds for Rule 60(b)(3) relief; but it is not. The party seeking relief must prove that it has been deprived by the alleged fraud from fully and fairly presenting its case. Moreover, in this case, the alleged "fraud"—Chief Nichols' alleged perjury as to his conversation with Ms. Byler—was *not* "kept hidden." If his statement was perjurious, Ms. Byler and her company, AAT knew of this when his affidavit was filed, ten months before trial. Yet AAT pursued no discovery before trial, and instead wants to conduct such discovery now, years after verdict and judgment.

Civil Rule 60(b)(3) was not intended to countenance such dilatory practice:

[T]he very purpose of a trial is to test the truthfulness of testimony and other evidence proffered by the parties. Examining the possibly 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. 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.

12 Moore's Federal Practice, supra. at p. 60-132. Here, AAT had more than ample opportunity -- ten months of pretrial investigation and discovery to scrutinize Chief Nichols' known testimony as to his conversation with Ms. Byler.

AAT complains that only after the trial was over and discovery was conducted in the federal case did the "evidence" it now relies upon "come to light". This is patently ridiculous. AAT knew long before trial of the police chief's sworn statement which Kimberly Byler claims to be false.<sup>10</sup> Rather than conduct depositions or other discovery regarding this, including the discovery later undertaken by the Estate of Byler in the federal court case or the discovery now sought by AAT, AAT was then content to cross-examine Chief Nichols at trial and call other witnesses to attempt to dispute his testimony, and after that seek to overturn the jury verdict a year after final judgment.

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<sup>10</sup> The fact that AAT did not pursue discovery regarding Chief Nichols' statement, particularly given the importance AAT now ascribes to his testimony, suggests that Ms. Byler and AAT knew that the Chief's testimony was, in fact, accurate.

In summary, even if AAT could now prove by clear and convincing evidence that Chief Nichols' testimony was false, it cannot show that AAT was thereby deprived from a full and fair opportunity to present its defense.

Moreover, the trial court's discussion of the ample evidence admitted at trial as to AAT's notice of the tax claim, independent from Chief Nichols' testimony, was relevant to the Rule 60(b)(3) determination. In McCall, supra, this Court held that a defendant seeking relief from judgment under any of the provisions of Rule 60(b) must make a showing that it has a "meritorious defense". Id. at 658, n.6. In that case, evidence was not disclosed until after trial that the plaintiff employers had assigned their claims and concealed the assignment. The Court held that this "...had little bearing on the merits of the case", concluding that disclosure of the assignment "...would not have probably changed the result on a new trial." Id., at 658.

III. AAT Failed to Present Clear and Convincing Proof of Fraud or Misconduct.

The trial courts' finding that AAT failed to present clear and convincing evidence of fraud is reviewed under the abuse of discretion standard, and is not to be reversed unless the reviewing court is left with the definite and firm conviction that the lower court has made a mistake. Williams v. Williams, 252 P.3d 998, 1004 (Alaska 2011). AAT has identified 13 different grounds for claiming fraud, which individually and collectively do not remotely approach "clear and convincing" evidence of fraud, and the trial court was well within the bounds of its discretion to deny AAT's motion for relief from judgment.



AAT's factual allegations are addressed in the order presented in its brief.

1. Allegation: Ms. Byler was at the police station at the time Chief Nichols said he had taken her to the airport.

Chief Nichols was questioned by AAT's counsel, during the February 2010 trial, as to the precise sequence of several relatively inconsequential events which had occurred nearly 3 years earlier, on May 15, 2007, following completion of his formal investigation of the death of Jerry Byler on that date. The CBY death investigation file featured audio recorded statements, to show the precise time (11:26 a.m.) that he completed his last interview, which was of Brian Barton. Exc. 235. However, it does not show the precise time Chief Nichols thereafter departed the police station to bring Ms. Byler to the airport. In response to cross examination, he testified that he transported her "...somewhere around that time, after 11:30." Exc. 340.

To prove an irreconcilable conflict, AAT relies upon Chief Nichols' response to the question "...what did you do next?", which was "[T]hen I gave Ms. Bylers [sic] a ride out to the airport." Exc. 334. CBY telephone billing records<sup>11</sup> show that Kimberly Byler was allowed to make several telephone calls from the Yakutat Police Station to two different Arkansas numbers, starting at 11:11 a.m. with the last call ending at 12:18 p.m. AAT erroneously claims this contradicts Chief Nichols' testimony that he took her to the airport after the conclusion of his interviews. Three years after the fact, it is understandable that Nichols' general recollection was that sometime after the conclusion

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<sup>11</sup> The telephone billing statements included in Exc. 146-150 do not include the 5 telephone calls referenced in AAT's brief or in Ms. Byler's Declaration [Exc. 143], and are not in the appellate record. Notwithstanding this omission, CBY does not contest the existence of such telephone billing record.

of his interviews, he transported Ms. Byler to the airport.<sup>12</sup> On a matter which was of absolutely no significance to his formal investigation, it is of little import that he did not affirmatively volunteer in his 2010 trial testimony that he did not transport Ms. Byler to the airport until approximately 50 minutes after he had completed his interviews, while she made telephone calls from the station. The fact that he did not immediately transport Ms. Byler to the airport is corroborated by the fact that, as AAT itself argues, (pp. 14, 33, appellants' brief, citing to Exc. 281), Chief Nichols was still downloading Brian Barton's photos onto his desktop computer until 11:59 a.m.<sup>13</sup>

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<sup>12</sup> In deposition, taken nearly four years after the fact, Chief Nichols testified that after interviewing Mr. Barton, he could not recall "...what my activity was after that, what I did." Exc. 100.

<sup>13</sup> Ms. Byler's need to make telephone calls at that time would be consistent with her uncertain expectations as to when the body would be shipped out of Yakutat, in that the unexpected investigation by CBY police had disrupted her plan to immediately depart with the body on the mid-day northbound flight. She needed to use the police station's telephone, offered to her by Chief Nichols, because there was no cellular telephone coverage in Yakutat. Exc. 118. Her plan to reroute via the later southbound flight may have been further confused by the fact that the northbound flight was late in arriving in Yakutat, such as to offer some new hope of still catching it, after she completed her telephone calls. (The northbound flight to Anchorage was expected to depart Yakutat at 11:40 am [Exc. 128], but did not actually even arrive in Yakutat from Juneau until 11:56 a.m.). In any case, her desire to go to the airport after completing her telephone calls may have been a product of either (1) belated recognition that it might still be possible to catch the northbound flight or (2) her desire to complete necessary airline freights office forms and other arrangements to process Alaska Airlines' transporting of the body out of Yakutat, either north to Anchorage or south to Juneau. It appears that while making calls from the police station, Ms. Byler was still hopeful of bringing the body northbound to Anchorage. One of the calls was to Cal Wilson, a friend in Anchorage, and she told him that she might be coming to Anchorage that night and that, if she did, she wanted to stay at his place. Exc. 152.

In any case, it is uncontested that the decedent's body was returned to the airport by deputy police officer Rose Gordon, prior to Sgt. Cox arriving from Juneau on the northbound flight. Exc. 335, Cox Depo, p. 21. It would not be surprising, but rather would be expected, that Ms. Byler would want to travel to the airport in this time frame, to accompany the handling of her deceased father-in-law's body at the airport, rather than to simply wait at the police station until the late afternoon southbound flight.

Chief Nichols' testimony that he took Kimberly Byler to the airport "...somewhere around that time, after 11:30" is not inconsistent with the timing of Ms. Byler's calls from the police station.

2. Allegation: Chief Nichols downloaded the photographs from Mr. Barton's camera at 11:59 a.m.

As discussed above, CBY does not contend that Chief Nichols departed the station instantly for the airport with Ms. Byler, after completing his interviews of Ms. Byler and Mr. Barton. As shown by computer data and conceded by AAT, he downloaded some of the photographs in Mr. Barton's camera to his desktop computer at 11:59 a.m. Exc. 281. Less than 20 minutes after initiating this task, and after Kimberly Byler completed her telephone calls from the station, Chief Nichols took her to the airport.

AAT also alleges that Chief Nichols downloaded the photos from Mr. Barton's camera midway through his interview of Mr. Barton, which is not true. AAT cites Exc. 230-31, an excerpt of the Barton interview transcript, but this only indicates an intention to download pictures from Barton's camera to the computer, and the method for doing

this; it does not indicate that the downloading was done during the interview, which continued forward. Exc. 231.

3. Allegation: Chief Nichols saw Sergeant Cox at the airport but did not introduce him to Ms. Byler.

Sgt. Cox testified that he met Chief Nichols at the airport, consistent with Chief Nichols having departed for the airport sometime after downloading Barton's photographs to his computer at 11:59 a.m. and after conclusion of Ms. Byler's last telephone call at 12:18 p.m. Sgt. Cox did not testify that Chief Nichols met him as soon as he got off the plane; rather, Sgt. Cox came out of the terminal and met Chief Nichols in the parking lot, in his vehicle, some time after Sgt. Cox had arrived. Exc. 421.<sup>14</sup> Kimberly Byler was not in the vehicle, but this is consistent with her getting out of the police vehicle and going into the air freight terminal, where her father-in-law's body had just been transported by a police deputy by separate vehicle.

Sgt. Cox was not expecting to meet Kimberly Byler at the airport, did not know what she looked like, and therefore does not know whether or not she was in the airport when he arrived. Exc. 444-45. He had already arranged for Chief Nichols to interview her, confirmed that Nichols had done so and, when Sgt. Cox did later see Kimberly Byler at the police station, did not need to conduct a formal interview because one had already been done. Chief Nichols transported Sgt. Cox directly to the police station, to review the forensics and photographs of the body which had already been taken there by police staff, and to conduct interviews of the other AAT personnel scheduled to arrive later from Icy

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<sup>14</sup> Sgt. Cox did not testify that he met Chief Nichols immediately upon his arrival at the Yakutat Airport

Bay, before Sgt. Cox was to return to Juneau on the early evening flight. Moreover, as Sgt. Cox later learned after meeting Ms. Byler back at the police station, she was, on her part, distrustful of law enforcement officers and was resistant to the idea of being questioned again by the State Trooper after Chief Nichols had already interviewed her. Exc. 448-50. Given her attitude, it is unsurprising that she did not linger in the police vehicle with Chief Nichols at the airport, nor did she go out of her way to meet Sgt. Cox there.

Sgt. Cox' testimony as to meeting Ms. Byler at the police station in the early afternoon is consistent with her having already been taken to the airport by Chief Nichols, and returning thereafter. When Sgt. Cox arrived at the station, she was not there, but arrived five to ten minutes later. Exc. 446. She came through the same front door as he had, and Sgt. Cox stated that she had not simply been waiting outside the door. Exc. 454-55.

4. Allegation: Other witnesses confirm that Chief Nichols did not take Ms. Byler to the airport.

AAT contends that after Ms. Byler was first interviewed by Chief Nichols and made her telephone calls from the police station, she remained at the police station through most of the afternoon, until she departed with the three AAT employees in their rented van to get lunch and then went to the airport. AAT's primary evidence supporting this is testimony from Kimberly Byler, generally found to be a non-credible witness.<sup>15</sup>

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<sup>15</sup> Ms. Byler's credibility was evaluated in a week-long trial by a judge and jury, both of whom concluded that she lied under oath. Exc. 372-73, 377-79.

AAT also relies upon CBY telephone records, but these only indicate that Ms. Byler's telephone calls finished by 12:18 p.m., allowing ample time for her trip to the airport and return to the station, after Chief Nichols had met Sgt. Cox at the airport and brought him to the station, with another five to ten minutes transpiring thereafter before Ms. Byler returned to the station.

AAT also purports to rely upon Brian Barton's testimony, which does not appear in the record. AAT cites to Exc. 281-82, but this consists of an opposition memorandum authored by AAT Attorney Kevin Fitzgerald, which purports to characterize Mr. Barton's testimony.<sup>16</sup> In any case, the purported Barton testimony, even as summarized in Attorney Fitzgerald's memorandum, does *not* assert that Ms. Byler remained at the police station and did not go out to the airport with Chief Nichols, which is what AAT is now claiming. Exc. 281-82.

AAT additionally relies upon the Declaration of Pamela Girdwood, [Exc. 155-56], an AAT employee who came into Yakutat from Icy Bay on a later air taxi flight, arriving at the police station some time *after* State Trooper Sgt. Cox had arrived on the northbound flight from Juneau and had already gone to the police station. Exc. 426. This was long after Ms. Byler had already been interviewed by Chief Nichols, was transported by him to the airport, and returned to the police station, just prior to the arrival there of Ms. Girdwood and assistant guide Eddy MacDonald. The Dept. of Public Safety Report prepared by Sgt. Cox showed that his interview of Ms. Girdwood did not commence until

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<sup>16</sup> AAT's untimely motion to supplement the record with Barton's actual deposition testimony, after oral argument had already been held on the motion for relief from judgment, was denied by the trial court.

1:10 p.m. Exc. 349. Ms. Girdwood's declaration that Chief Nichols did not transport Kimberly Byler to the airport after Ms. Byler's interview is clearly inadmissible, on the fundamental basis that Ms. Girdwood was *not present* at the station when these earlier events had occurred, and her statement therefore lacks foundation and is either inadmissible speculation or hearsay.<sup>17</sup>

Finally, AAT relies upon a March 2011 Declaration of George Davis [Exc. 157-58] to the effect that Chief Nichols arrived at the airport alone to pick up Sgt. Cox, and that Davis did not see Ms. Byler at the airport. Mr. Davis was a friend and business associate of Mr. Byler who testified at the fraudulent conveyance trial. Though Chief Nichols testified at trial as to his conversation concerning taxes with Ms. Byler while he was transporting her to the airport, Mr. Davis did not *then* testify that he had seen Chief Nichols arrive at the airport without Ms. Byler. This testimony, if true, would presumably have been elicited by AAT and offered by Mr. Davis at trial, to directly rebut Chief Nichols' prior testimony.

5. Allegation: Chief Nichols testified unequivocally that he took Ms. Byler to the airport to catch the 5:30 p.m. flight to Juneau, not the 12:30 p.m. flight to Anchorage.

Nearly three years after the events of May 15, 2007, when Chief Nichols was asked why he was transporting Ms. Byler from the station to the airport at mid-day when she did not leave until the 5:30 p.m. flight to Juneau, he did not recall that she still had

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<sup>17</sup> It is quite possible that due to Ms. Girdwood's later arrival, she was not aware, when her declaration was obtained by AAT nearly four years later, that Ms. Byler had already completed her interview at the station, been transported to the airport and returned to the station prior to Ms. Girdwood's own arrival there.

had hopes of catching the earlier northbound trip to Anchorage. He did recall, however, that he transported her to the airport so that she could make arrangements to have the body flown out of Yakutat, because the body had to be released there [Exc. 340], meaning released to the airline's freight office consistent with its forms and procedures for handling of a deceased's remains.

Ms. Byler, who initially expected to be able to take the earlier, northbound flight to Anchorage, was still holding out hope for this when she was interviewed by Chief Nichols [Exc. 117] and when she later spoke with her Anchorage friend, Cal Wilson, in late morning [Exc. 152], and the decedent's body was in fact transported back to the airport at mid-day, prior to departure of the northbound flight. While Chief Nichols did not, three years later, remember that Ms. Byler had still hoped to catch the northbound flight, his recollection of transporting Ms. Byler to the airport at mid-day so that she could make arrangements for transporting the body is consistent with undisputed evidence that the body was, in fact, transported back to the airport prior to departure of the northbound flight to Anchorage.<sup>18</sup> It is also consistent with the fact that, because she would not be able to depart Yakutat with the body until the later, early evening flight, she

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<sup>18</sup> There was no contradiction between Ms. Byler's decision to "hang around" the station to make a series of telephone calls, and then still attempting to go to the airport to catch the northbound flight. Telephone calls to relatives, for purposes of timing of arrangements to receive the body in Arkansas, were presumably important to her, necessitating use of the police station telephones due to lack of cell phone coverage in Yakutat. Word that the northbound Alaska Airlines flight would be arriving late may well have motivated her to make an effort to catch this flight. Whatever be the case, the decedent's body was in fact separately transported from the station to the airport at this time, and it would be expected that Ms. Byler would want to be at the airport to arrange for the airline freight department's handling of the body and its shipment to Arkansas for burial.



chose to return to the police station, where other AAT employees were to be interviewed and where Ms. Byler would have access to police department telephones, rather than to simply wait out the entire afternoon at the airport. This is also consistent with Ms. Byler not being at the police station when Sgt. Cox arrived, and her not arriving there until 5-10 minutes later.

6. Allegation: Alaska Air cargo service is closed from 30 minutes before each flight until 30 minutes after each flight.

AAT relies upon an unsworn memorandum [Exc. 139] from "Julie" of Alaska Airlines regarding airline policy to close its cargo office just before and after a flight. Assuming the statement is correct, this does not mean that this policy was known to Ms. Byler when she made a belated effort to have the body shipped north. Even if she knew the policy, she may still have been motivated to request an airline exception from its policy, based upon her delay in delivering the body to the airline because of the police department's need to do a forensic examination of it. In any case, she knew that, even if she were unable to put the body on the northbound flight, she was going to have to make the same arrangements with the airlines freight department for the southbound flight to Juneau, later that day.<sup>19</sup> She may also have preferred to have the body removed from the

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<sup>19</sup> The fact that she did not sign the Alaska Airlines' airway bill for shipment of the body until 4:10 p.m. [Exc. 252] does not demonstrate that she did not first visit, or attempt to visit the Alaska Air freight office at the Yakutat Airport around 12:30. She may have hoped to complete the form at this early time, but was unable to because freight office personnel would not process this matter while the northbound plane was still on the ground in Yakutat; or she may have attended to other arrangements for shipping and handling of the body, knowing by then that she would be unable to make the northbound flight and that she could later sign the airbill when she returned to the airport before the early evening southbound flight to Juneau.

Yakutat Police Department, as soon as it completed its investigation. As it turned out, Ms. Byler was unable to ship the body north, but was able to arrange for its southbound shipment later that day.

7. Allegation: Chief Nichols described events in his interview with Ms. Byler that he could only have learned from Mr. Barton.

The relevance of this argument is difficult to perceive. Evidently, AAT asserts that Chief Nichols' interview of Brian Barton must have occurred prior to his interview of Kimberly Byler, during the morning of May 15, 2007, contrary to the date/time stamps on the computer audio files, discussed infra. at pp. 33-34 and 36-37. CBY will leave to AAT an explanation as to how this, even if it were established, relates to AAT's assertion that Ms. Byler never traveled to the airport with Chief Nichols.

In any case, Chief Nichols had two independent sources of the basic details of the drowning and search for the body, prior to interviewing Ms. Byler; he did not have to interview Mr. Barton first.

The first source was the Incident Card [Exc. 190] prepared by CBY police officer Lawless on the prior evening of May 14, 2007, the day of the drowning. The report stated that a civilian helicopter enroute from Yakutat to Cordova was enlisted to help in the search, and that the body was recovered at approximately at 2130 hours.<sup>20</sup> The second

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<sup>20</sup>AAT appears to assert that the Incident Card was also fraudulently prepared after the fact, claiming that CBY could not have heard of the accident within 12 minutes of its being reported to the Coast Guard. There is absolutely nothing to support this allegation, and the Incident Report time, 1933 (7:33 p.m.), is completely consistent with the report of the civilian helicopter pilot George Hook, who heard the public Coast Guard broadcast of a Pan-Pan alert over the Channel 16 VHF marine radio band at about this same time. Exc.

source was Chief Nichols' telephone conversation with Alaska State Trooper Sgt. Cox at 8:33 a.m. on May 15, the morning after the drowning, prior to Nichols' meeting and interviewing Ms. Byler and Mr. Barton. Exc. 438-42. Sgt. Cox had obtained salient information involving the helicopter search and location of the body from Kimberly Byler the evening before, and this information is contained in his report. Exc. 348-49. He related all of this information to Chief Nichols in his 8:30 a.m. telephone call, including information regarding the civilian helicopter's involvement. Exc. 440. Sgt. Cox had the impression that Chief Nichols already knew much of this information before this conversation. Exc. 440-41.<sup>21</sup>

8. Allegation: Ms. Byler's phone call to Cal Wilson shows that Mr. Barton was interviewed before Ms. Byler.

The 11:16 a.m. telephone call from Kimberly Byler to her Anchorage friend, Cal Wilson, is consistent with Chief Nichols' audio recording statement and computer time-stamped audio file showing that his interview with Ms. Byler ended at about 11:10 a.m. [Exc. 333-34, 405.], with Nichols thereafter interviewing Brian Barton. Exc. 334, 406. Again, AAT claims, for uncertain purpose, that Mr. Barton was interviewed before Ms. Byler and, for this purpose, AAT relies upon Cal Wilson's statement that Ms. Byler told

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227. The Coast Guard Marine Safety radio alerts can be heard all over this maritime region, including Yakutat.

<sup>21</sup> The actual transcript of Chief Nichols' interview of Kimberly Byler shows that he had many questions regarding the details of the search, though he knew the basic facts of the helicopter's involvement. Exc. 112-113. When he asked "...did you guys jump in the skiff or something?" [Exc. 113], it was a natural assumption that a skiff had been used to recover the body to bring it out to the anchored AAT vessel, after the helicopter pilot landed and told them that the body was located a few feet off the beach.

him that she had "very little time to talk, as she was getting ready to be interviewed by the police." There are a number of credible explanations for his characterization of Ms. Byler's statement to him: (1) his 3-year-old recollection of what she told him may be hazy, and may have been influenced by his litigant friend's suggestion as to what his recollection should be, (2) perhaps he misunderstood her hasty explanation for her need to get off the telephone or (3) perhaps she gave Wilson this explanation as a non-rude mode for quickly getting off the telephone after she had called him to ask him for a place to stay in Anchorage that evening. In any event, such inadmissible hearsay is a poor basis for rebutting computer-stored date/time stamp information showing that Ms. Byler's interview was completed before Mr. Barton's.

9. Allegation: Other witnesses confirm that Mr. Barton's interview took place before Ms. Byler's.

Once again, the significance of this assertion to AAT's denial of Ms. Byler's tax conversation with Chief Nichols is unexplained by AAT. In any case, AAT relies upon its attorney's characterization of Mr. Barton's testimony, which is not itself in evidence. Mr. Barton's testimony, even if a transcript were in the record, would have been given a full four years after the event in question, which would be unreliable in comparison to contemporaneous, recorded statements of Chief Nichols on the audio recordings, as to when the recordings began and ended, and in comparison to date stamps ingrained in the computer data as to the precise time the audio files started and ended.

AAT also relies upon its trial court attorney's characterization of Eddy MacDonald's testimony [Exc. 283], which characterization is demonstrably false. Mr.

MacDonald did not arrive at the police station until after Sgt. Cox arrived there in the early afternoon, long after Chief Nichols' morning interviews with Ms. Byler and Mr. Barton. Exc. 426, 430, 433.<sup>22</sup> Contrary to the characterization by AAT's trial attorney [Exc. 283] and in AAT's brief (p. 40), Mr. MacDonald did not testify that he witnessed Kimberly Byler still "...being interviewed by Chief Nichols." MacDonald testified unequivocally that he observed Ms. Byler being questioned by the State Trooper, not the earlier interview of Ms. Byler by Chief Nichols, of which he was unaware. Exc. 262. He knew the difference between the uniforms of the State Troopers and the CBY police department, and was definite that what he observed was Ms. Byler being questioned by the trooper, not by Chief Nichols. Id. State Trooper Sgt. Cox did briefly question Ms. Byler after he arrived at the station, to confirm that the facts that had been related to him from Chief Nichols' prior interview of her were correct. Exc. 447.

10. Allegation: The CBY police log for May 15, 2007 is conspicuously empty between the hours of 10:00 a.m. and 2:00 p.m.

Again, the nexus between this allegation and AAT's claim of perjury is not shown.

The absence of dispatcher records during this time period is explained by the fact that the entire on-duty staff of this small local police force was then completely occupied with (1) two vehicles traveling to the airport to pick up Ms. Byler, Mr. Barton and the deceased's body and transporting them to the police station, [Exc. 96] (2) interviews being conducted by Chief Nichols of Ms. Byler and Mr. Barton while, simultaneously,

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<sup>22</sup> Like Ms. Girdwood, Mr. MacDonald was not present for Ms. Byler's morning interview, and may not have been aware that she had already gone to the airport with Chief Nichols and then returned to the police station, before MacDonald first arrived there. Exc. 255-264.

deputy officer Rose Gordon and staffer Angel Blazina were examining and photographing the deceased's body [Exc. 97-98, 398-99] and (3) Chief Nichols delivering Ms. Byler back to the airport while another officer transported the deceased's body to the airport. Exc. 334-35. It is understandable that, during this busy time during an unusual day for the small CBY Public Safety office, no one was making entries in the dispatch log.

11. Allegation: CBY's computer records show that Mr. Barton's interview was conducted before Ms. Byler's.

Again, even if the Barton interview had occurred before the Byler interview, this would not be in derogation of Chief Nichols later giving Ms. Byler a ride to the airport.

In any case, analysis of CBY's computer data by Matt Joy, CBY's computer consultant who has qualified as an expert in numerous Alaska State Court cases, conclusively establishes the precise time at which the Kimberly Byler interview was conducted. Exc. 401-07. Mr. Joy notes that the interview was initially conducted on a portable digital audio recorder, and was downloaded from the recorder onto Chief Nichols' desktop computer and backed up on the department's computer server. Date and time stamps exist for both the audio recording and the computer file system external to the actual recording. Exc. 402-03. While many copies of these recordings were later made for various purposes, the original date/time stamps were preserved, demonstrating that the interview of Kimberly Byler was completed at 11:07:32 on May 15, 2007, [Exc. 404-06], within a few minutes of the time reported by Chief Nichols on the recording, as terminating at 11:10 a.m.. Exc. 334. The 11:07:32 a.m. time stamp on Chief Nichols'

desktop computer and on the computer server's backup was also identical to the "screenshot" of the "properties" of the original CD which was simultaneously burned from the computer and placed into evidence. Exc. 405. Although the focus of the issue at the time of Mr. Joy's affidavit was alleged tampering or alteration of the recording of Ms. Byler's interview, Mr. Joy also compared the completion times for the interviews of Kim Byler and of Bryan Barton, as shown by both the backup server data and the properties of the CDs burned from the computer for each of these interviews. These confirmed that the interview of Mr. Barton did not occur until after completion of the interview of Ms. Byler. Exc. 406.

Because the Estate of Byler's allegation in the federal case was that Ms. Byler's recorded interview had been altered, Mr. Joy compared the "hash code" which accompanied the initial, May 15, 2007 recording with the hash codes on the later audio files containing copies of the recording. This revealed that all the audio files contained precisely identical content, in unaltered form. Exc. 404-06. Mr. Joy concluded that the audio file had not been altered or edited since the time it was originally recorded and downloaded onto Chief Nichols' desktop computer at 11:07 a.m. on May 15, 2007. Exc. 406.

The Estate of Byler, in the federal case, retained two computer experts to analyze the "alteration" issue. Consultant Alfred L. Johnson could offer only a criticism for Mr. Joy's methodology, coupled with speculation that alterations still might have occurred. Exc. 237-240. Similarly, Byler Estate consultant Douglas S. Lacey, after stating his understanding that the Estate was claiming that the recording of the Kim Byler interview

had been altered or edited, concluded only that "at present, that possibility could not be ruled out, without further information...." Exc. 123.

12. Allegation: CBY computer data reveals only four photos were downloaded from Mr. Barton's computer.

Again, AAT does not explain the relevance of this assertion to the perjury issue it raises on appeal.

In any case, AAT again relies upon its own attorney's characterization as to Mr. Barton's testimony [Exc. 281], rather than on Mr. Barton's actual deposition testimony. As shown by an excerpt from the actual transcript of the deposition which *is* in the record, Mr. Barton testified that there were probably at least 100 photos in his camera, but that he did not know how many of these Chief Nichols downloaded to his desktop computer. Mr. Barton's recollection was that Chief Nichols just picked out certain pictures, and that he was primarily interested in the pictures of the boats. Exc. 456. Because Barton's extraneous photos were not downloaded to Chief Nichols' computer, they do not appear in the list of files found therein. Chief Nichols' selective downloading of pictures from Barton's camera, using only those relevant to his investigation, is not evidence of fraud.



13. Allegation: Computer records show that the “second interview”<sup>23</sup> of Ms. Byler was downloaded to Chief Nichols’ computer on May 24, 2009, just days before he signed the affidavit in which he first described the ride to the airport.

Again, the relevance of this issue to AAT’s claim that Kimberly Byler did not travel to the airport with Chief Nichols is not explained.

While there was a downloading of this audio file in 2009, it was an identical copy of the original audio file which was first downloaded onto the computer on May 15, 2007, on the morning of the interview. The Estate of Byler’s computer expert, Douglas Lacey was plainly in error in stating [Exc. 122-23] that what AAT now refers as the “second interview of Ms. Byler” was not first downloaded to Chief Nichols’ computer until March 24, 2009, two years after the interview. As previously stated, the most that Estate consultant Lacey could conclude was that “at present, that possibility [that the “Interview Kim Byler” recording had been altered or edited since it was first recorded] cannot be ruled out.” Exc. 123.

CBY’s computer expert, Matthew Joy, laboriously compared the backup data stored on the Yakutat Police Department server, and found that the recording in question, the “07-0438-0043 Interview with Kim Byler wma” audio file was first stored onto Chief Nichols’ desktop computer on May 15, 2007, identified by a date/time stamp of 11:07:32

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<sup>23</sup> Chief Nichols recorded two conversations with Ms. Byler on May 15, 2007. The first was labeled “First Contact Kim Byler”, and resulted from the Chief activating his portable recorder when he first met Ms. Byler at the airport and transported her to the police station. Exc. 398. The second recording, labeled “Interview Kim Byler” was the formal investigation interview Chief Nichols had with Ms. Byler in his office at the Yakutat Police Station. Exc. 402. They are contained in one ‘audio file’. What AAT refers to as the “second interview” was actually the formal interview at the police station.

on May 15 [Exc. 402-05], corresponding nearly precisely with the time stated by Chief Nichols contemporaneously with making the recording.

Mr. Joy completely refuted the contention that the later, March 24, 2009 copy of the audio file represented an alteration or modification of the original, May 15, 2007 audio file. He determined that both files contained exactly 9,169,644 bytes, meaning that they contained precisely the same quantity of data. Exc. 404, 410, 412. He also compared the "hash codes" for both the May 15, 2007 in March 24, 2009 dates on the Interview with Kim Byler audio file. The hash code for each date, 839ec2afedf1b8d45cf1c3a815652b4a, is identical, demonstrating that both the 2007 and 2009 audio files contained precisely identical content. Exc. 404, 413, 415. Another Estate of Byler computer expert, Alfred Johnson, once again does not dispute the accuracy of this comparison; he only expresses dissatisfaction with the scope of Mr. Joy's work, complaining that it should have included "a review of unallocated or deleted space on the hard drives" [Exc. 238], and that the software used by Mr. Joy to compare the identical hash code value "is not customarily relied on by forensic examiners for this for this type of work." Exc. 239. This weak assertion was AAT's jumping off point for demanding that the trial court, over a year after the jury trial, reopen the case to allow AAT to engage in further discovery. The trial court declined to do so, holding that "[d]iscovery could have and should have occurred before trial in this case." Exc. 286.

Prior to the state court's denial of the motion for relief from judgment and denial of further discovery, the Federal District Court Magistrate Judge, in the case in which the Estate of Byler had already conducted extensive discovery into CBY's alleged fraud,

perjury and alteration of audio recording, denied the Estate's motion to extend the time for further such discovery in that action. Exc. 457-464. After reviewing the declaration of the Estate's computer experts and the Estate's other extensive filings, along with the affidavit and attachments of CBY computer consultant Joy, the court noted that there was

...little chance [AAT] will find evidence that Chief Nichols either altered the audio recordings or perjured himself on the stand in the original tax case between AAT and CBY.

Exc. 460.

The court noted that the Estate of Byler's expert's declaration was only that the possibility of alteration or editing of the recording "cannot be ruled out", and that he made no affirmative findings of fraud. Exc. 461. The court found that CBY computer expert Joy's analysis ruling out the assertion of alteration or editing was credible. (Id.) The court also noted that, in response to the Bylers' complaint, the State of Alaska looked into allegations of possible wrongdoing by Chief Nichols and determined there was no evidence of fraud. Exc. 461-62. Lastly, the court noted that CBY made electronic discovery reasonably available to the Estate. The court ruled that it would not tolerate "endless discovery fishing expeditions", denying the Estate's motion to extend the discovery deadline in its federal case to further pursue its fraud theory. Exc. 462-63.

14. Summary of AAT's evidence of fraud.

As correctly characterized by the trial court, AAT has hinged its appeal upon a witness's "imperfect recollection about a largely inconsequential event" [Exc.286], three years after the fact. AAT seizes upon Chief Nichols' recollection that he brought Ms. Byler to the airport "somewhere around that time, after 11:30" as demonstrating that he

could not have brought Ms. Byler to the airport after 12:18, once Ms. Byler completed her telephone calls from the police station. AAT seeks to magnify this minor difference in time, while ignoring independent evidence that Ms. Byler did travel to the airport before again returning to the station.<sup>24</sup> The trial herein was three years after the occurrences in question; it is now five years after Mr. Byler's drowning and the following day's investigation. No party, including CBY, can pretend to know the precise timing of the movements and actions of persons on that day. However, the patchwork of AAT's unsupported accusations, directly rebutted suppositions and outright speculation do not constitute clear and convincing evidence that an experienced law enforcement officer engaged in perjury or misconduct. This is particularly the case where the allegations of perjury and fraud are largely sourced in the statements of AAT's principal, Kimberly Byler, who was found by a jury to have engaged in fraudulent conduct and intentionally testified falsely, and was held by the trial judge to be in contempt for lying and disregarding court orders.

The trial court did not abuse its discretion in denying AAT's motion for relief from judgment.

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<sup>24</sup> This includes (1) the fact that her father-in-law's body was transported from the police station to the airport prior to the northbound flight, logically suggesting that Ms. Byler would want to accompany it to make arrangements; (2) the fact that she was not at the police station when Sgt. Cox arrived there in the early afternoon, but arrived there 5 to 10 minutes later, corresponding to the time it takes to travel from the airport to the police station; (3) her statement to her Anchorage friend Cal Wilson that she might be coming to Anchorage that day, which would have required that she take that mid-day northbound flight from Yakutat; and (4) the fact that Ms. Byler would in any event need to travel to the airport to make arrangements with the Alaska Airlines freight office to ship the body out of Yakutat, either to Anchorage or Juneau.

IV. The Trial Court Did Not Abuse its Discretion by not Permitting Additional Discovery.

The trial court did not abuse its discretion in denying AAT the extraordinary relief of new discovery over a year after the jury verdict and final judgment. AAT appears to argue that it should have been granted such relief because the federal court, in a pending action which had not yet gone to trial, denied further discovery to the Estate of Byler to pursue the Estate of Byler's same strained theory of alteration of computer audio files--a theory which was not persuasive to the federal court, to Superior Court Judge Collins nor to Superior Court Judge Steinkruger on AAT's motion for reconsideration. The trial court's denial of the extraordinary relief of post-judgment discovery was well within its discretion.

V. The Trial Court Did Not Abuse its Discretion in Awarding Enhanced Attorney Fees to CBY.

The trial court's award of enhanced attorney fees was not based solely upon its reasonable determination that AAT had engaged in vexatious and/or bad faith conduct.<sup>25</sup> The order was also based upon the prior entry of an order holding Ms. Byler and AAT in contempt of court for intentionally lying under oath regarding AAT's assets, for intentionally testifying untruthfully regarding the availability of AAT business records, for intentionally concealing and transferring AAT property to Ms. Byler, and for acting

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<sup>25</sup> CBY had sought an award of 100% of actual attorneys fees from the trial court, based upon AAT's (1) fraudulent conveyance to avoid payment of taxes, (2) concealment of assets in judgment debtor exams, (3) denial of access to AAT business records evidencing its assets, (4) concealment and transfer of assets to avoid payment of a judgment, in direct violation of a court order and (5) bad faith and vexation litigation designed to frustrate and delay payment of its taxes and penalties.

in violation of a court order prohibiting such concealment and transfer. The trial court based its enhanced award of attorney fees in part upon the authority of the contempt statute, A.S. 09.50.010 et. seq. A.S. 09.50.040 provides for indemnification by the party held in contempt for loss or injury to a party to an action caused by the contempt.

AAT's bad faith actions to avoid payment of both the original tax judgment and the subsequent fraudulent conveyance judgment have been continued post-judgment, by its bad faith bankruptcy filing and the ex parte effort by Ms. Byler's husband on behalf of the Estate of Byler, in collusion with AAT, to seize AAT's vessel assets to frustrate CBY's state court judgment collection efforts. Exc. 387.

AAT's practice of vexatious litigation continues through this appeal. The trial courts' award of enhanced attorney fees was well within its discretion, and CBY now seeks an award of enhanced attorneys fees in this appeal.

## CONCLUSION

The trial court's denial of AAT's Rule 60(b)(3) motion for relief from judgment should be upheld, because the trial court's findings support a conclusion that AAT wholly failed to meet the standard for relief under this section -- that it was prevented from a full and fair opportunity to defend. The trial court's finding is supported by evidence demonstrating that Chief Nichols' testimony was clearly stated in an affidavit filed and served upon AAT ten months prior to trial. Because Chief Nichols' affidavit and later testimony related to a conversation he had with a defendant, Kimberly Byler, the alleged falsity of the statement would have been known to her long prior to trial, such that AAT could have developed the evidence it now seeks, in pre-trial discovery or at trial. AAT was not deprived of the opportunity to "fully and fairly present" its case.

Moreover, AAT has failed to present clear and convincing evidence of fraud or misconduct, as required by Rule 60(b)(3). Its collection of suppositions and accusations are based upon outright inaccuracies in portrayal of the record, and upon the inability of witnesses, three years and more after the fact, to have perfect recollections as to the precise timing regarding matters which were inconsequential to the investigation then at hand, and were inconsequential to the ultimate trial question as to whether the Bylers knew of CBY's effort to collect taxes, at the time AAT fraudulently conveyed assets.

Kimberly and Darren Byler have engaged here on a five year course of bad faith actions and vexatious litigation. When they lost a straightforward sales tax case, they tried to avoid paying that judgment by fraudulently conveying assets and lying about it under oath on several occasions. They also initiated a federal maritime action to have

Darren Byler arrest Kimberly Byler's vessel, to create a lien preferential to CBY's, based upon a \$2.5 million "settlement" between them. After these efforts failed to prevent execution on AAT's assets, they filed a bad faith petition in bankruptcy. One year after the jury verdict in the fraudulent conveyance case, they filed a Rule 60(b) motion in the lower court, baselessly and without a shred of hard evidence accusing the Police Chief and other CBY municipal officials of lying and fraud. In short, they have drawn CBY, a small borough of some 650 residents which was simply attempting to uniformly enforce its tax code, into a multi-year, multi-court, seemingly endless miasma of litigation, and caused it to incur substantial and unnecessary attorney fees.<sup>26</sup>

CBY respectfully requests that the trial courts' denial of Rule 60(b) relief be upheld, and this matter be finally concluded.

DATED this 23rd day of April, 2012.

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Kakutat

  
James T. Brennan, ABA No. 7610080

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<sup>26</sup> Actual attorney fees may be awarded to a party in this Court, under Appellate Rule 508(e), for frivolous appeals.