

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 C
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

BRIEF OF APPELLANTS

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By: Beth A. Pechota
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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:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (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;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

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). A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis and audita querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[. . .]

Rule 77. Motions.

[. . .]

(k) **Motions for Reconsideration.** A motion to reconsider the ruling must be made within ten days after the date of notice of the ruling as defined in Civil Rule 58.1(c) unless good cause is shown why a later filing should be accepted. In no event shall a motion to reconsider a ruling be made more than ten days after the date of notice of the final judgment in the case.

(1) A party may move the court to reconsider a ruling previously decided if, in reaching its decision:

(i) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or

(ii) The court has overlooked or misconceived some material fact or proposition of law; or

(iii) The court has overlooked or misconceived a material question in the case; or

(iv) The law applied in the ruling has been subsequently changed by court decision or statute.

(2) The motion for reconsideration shall specifically state which of the grounds for reconsideration specified in the prior subparagraph exists, and shall specifically designate that portion of the ruling, the memorandum, or the record, or that particular authority, which the movant wishes the court to consider. The motion for reconsideration and supporting memorandum shall not exceed five pages.

(3) No response shall be made to a motion for reconsideration unless requested by the court, but a motion for reconsideration will ordinarily not be granted in the absence of such a request.

(4) The motion for reconsideration shall be decided by the court without oral argument. If the motion for reconsideration has not been ruled upon by the court within 30 days from the date of the filing of the motion, or within 30 days of the date of filing of a response requested by the court, whichever is later, the motion shall be taken as denied.

(5) The court, on its own motion, may reconsider a ruling at any time not later than 10 days from the date of notice of the final judgment in the case.

[. . .]

I. JURISDICTIONAL STATEMENT

Following a jury trial, final judgment was entered in this case on March 18, 2010, fully disposing of all claims by all parties.

On June 1, 2011, the Superior Court, First Judicial District at Juneau, entered an order denying AAT's Motion for Relief from Judgment pursuant to Civil Rule 60(b)(3). Also on June 1, 2011, the Superior Court issued an order awarding attorney fees to appellee the City and Borough of Yakutat (hereinafter "CBY").

AAT sought reconsideration of the June 1, 2011 order, which was denied by Order dated August 31, 2011. This Court has authority to consider this appeal under AS 22.05.010(b) and Appellate Rule 204.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred in requiring a showing that AAT would have prevailed at trial but for the fraudulent testimony, as this is not the correct legal standard to be applied to a motion for relief from judgment under CR 60(b)(3).

2. Whether the Superior Court erred in denying AAT's Motion for Relief from Judgment under CR 60(b)(3) in light of

the evidence presented by AAT demonstrating fraudulent testimony by the City and Borough of Yakutat Police Chief John Nichols.

3. Whether the Superior Court erred and/or abused its discretion in denying AAT's request for additional discovery regarding fraudulent testimony and spoliation of evidence.

4. Whether the Superior Court erred in awarding attorney fees to the City and Borough of Yakutat as the prevailing party on the Motion for Relief from Judgment and in enhancing the fee award based upon its finding that AAT's CR 60(b)(3) motion was unreasonable.

III. STATEMENT OF THE CASE

A. Relevant Factual Background.

AAT first operated a commercial guide business leading tours in and around Icy Bay in Southeast Alaska in 2007. Appellant Kimberly Byler ("Ms. Byler") was the owner and president of the company, and her husband Darren Byler was the company's operations manager and head guide. Darren Byler's father, Jerry Byler, also worked for the business as a guide. Jerry Byler died when he fell overboard into Icy Bay from one of AAT's vessels on May 14, 2007. Exc. 60. AAT sought insurance coverage for his accidental drowning, but coverage was denied.

Id.

The day after Jerry Byler's death, Ms. Byler flew to Yakutat with the body. She expected to meet there with a State Trooper, Sergeant Robert Cox, who was assigned to investigate the death. She arrived before Sergeant Cox, and was instead interviewed by CBY Chief of Police John Nichols. Exc. 314. The events of that day following the traumatic death of Jerry Byler would prove pivotal in the subsequent tax battle between AAT and CBY.

Several months later, on January 1, 2008, in connection with a change from a hunting to a guiding business, Ms. Byler transferred the assets of AAT to herself, and then to a newly formed company, ABC Leasing LLC ("ABC"). Exc. 38; 325.

Darren Byler was appointed personal representative for Jerry Byler's estate in Alaska (the "Estate") on June 25, 2008. Exc. 60. ABC and the Estate subsequently entered into an agreement whereby the Estate's wrongful death claims were settled for \$2,500,000. Exc. 60-61. To secure its obligations under the settlement agreement, ABC granted the Estate a preferred marine mortgage on the Vessel on September 5, 2008. Exc. 61.

B. District Court Proceedings.

This litigation started as a dispute over taxes. CBY filed suit against AAT in District Court in the First Judicial

District at Juneau on February 19, 2008, seeking to foreclose a lien for unpaid taxes. CBY alleged that AAT had conducted fishing, hunting and guiding operations in the Icy Bay area during 2007 which subjected it to payment of the Borough's sales and transient accommodations or "bed" taxes, and that the taxes had not been paid. Exc. 1-4. CBY sought to collect a total of \$35,383.04 in unpaid taxes, interest and penalties. Exc. 2-3.

AAT contested the complaint, arguing its operations were not subject to the Borough's sales or "bed" tax. Exc. 6-7.

CBY moved for summary judgment as to liability on its tax lien claim, which was granted, and final judgment in favor of CBY was then entered on December 2, 2008. Exc. 8-22; 23-24.

Ms. Byler was questioned by CBY's attorney at a judgment debtor examination on February 23, 2009. She testified that she had not received notice from CBY that it sought taxes from AAT prior to the time she had transferred AAT's assets to herself and ultimately to ABC. Exc. 31-32. CBY countered with an affidavit from Chief Nichols. Exc. 40-41. Chief Nichols swore that he had discussed the matter of AAT's liability for CBY taxes with Ms. Byler while driving her to the airport on May 15, 2007. *Id.* It bears noting that at the time of this alleged

conversation, no tax report was due until July 31, more than two months in the future.¹

CBY asserted first by motion and ultimately by supplemental complaint that Ms. Byler's transfer of AAT assets to ABC was a fraudulent conveyance made to avoid paying the judgment to CBY and should therefore be declared void. Exc. 44-45. Ms. Byler requested a jury trial on the fraudulent conveyance claim and the matter was transferred to Superior Court for trial. Exc. 55.

C. Superior Court Trial.

The fraudulent conveyance claim was tried before a jury in Superior Court in Juneau from February 9 through 13, 2010. During the trial, the issue of AAT's notice of CBY's tax claims was addressed because the question of when AAT had notice was relevant to determining if the transfer of assets to ABC was made with intent to evade AAT's tax obligations.

CBY called Chief Nichols to testify at trial. On direct examination, he testified that he picked Ms. Byler up at the airport on the morning of May 15, 2007, and that he brought up the issue of taxes while driving her back to the airport after interviewing her about her father-in-law's death at the police

¹ CBY only sought to impose the sales and "bed" taxes against AAT for the all of the second and part of the third quarter of 2007. Exc. 2. Thus, the report of taxes due would not have been due and owing until June 30, 2007.

station. Exc. 314-315. Chief Nichols testified on cross examination that he recorded his initial conversation with Ms. Byler while he was driving her to the police station, and recorded the interview of her that he conducted at the police station, but did not record the alleged conversation about taxes that supposedly occurred during the ride back to the airport. Exc. 321-322. He also admitted that there was no mention of this alleged tax conversation in the report he prepared on May 16, 2007, summarizing his preliminary investigation into Jerry Byler's death. Exc. 322-323. Rather, he acknowledged that the first mention of this conversation was nearly two years later, after the issue of notice was raised, in his March 27, 2009 affidavit. Exc. 323.

In addition, Chief Nichols testified that he interviewed AAT employee Brian Barton regarding Jerry Byler's death after he had finished interviewing Ms. Byler. Exc. 319.

Ms. Byler testified at trial that not only did she not have a conversation with Chief Nichols about taxes, but that he also did not give her a ride back to the airport. Exc. 329-330. Instead, after completing her interview, she made some telephone calls at the police station regarding arrangements for Mr. Byler's body and waited for AAT employees Eddie McDonald and Pam Girdwood to be interviewed. Exc. 329-330. When they had all

been interviewed, they rode together in a van that Mr. McDonald had rented to get lunch, and then they drove Ms. Byler to the airport to take the late afternoon flight to Juneau. *Id.* Contrary to Chief Nichols' testimony, Ms. Byler also testified that Mr. Barton was interviewed before her. Exc. 328.

Chief Nichols testified again in rebuttal. He stated that he first picked up Ms. Byler from the airport at 10:31 a.m. Exc. 322. This is supported by the transcript of his secret recording of the conversation, on which the Chief is heard to state the time as 10:31 at the beginning of the recording. Exc. 128. He also testified that he was expecting the arrival of Alaska State Trooper Sergeant Robert Cox later that day on Alaska Airlines Flight 61. Exc. 332-333.

Chief Nichols went on to testify that after he brought Ms. Byler to the Yakutat police station, he conducted another recorded interview of her that was 19 minutes and 51 seconds long, ending at 11:10 a.m. Exc. 333. The Chief's own words on the recording also indicate that this second interview ended at 11:10 a.m. Exc. 118. He stated that shortly after completing Ms. Byler's interview, he began his interview of Brian Barton at 11:15, and that interview lasted until 11:26 a.m. Exc. 339.

Following the conclusion of Mr. Barton's interview, Chief Nichols testified that he gave Ms. Byler a ride to the airport

at 11:30 a.m. Exc. 339-340. It is undisputed that the drive from the Yakutat police station to the airport takes approximately five minutes. It was during this five minute drive that Chief Nichols asserted he had spoken to Ms. Byler about AAT's taxes. Exc. 315.

When asked about the timing of Ms. Byler's flight, Chief Nichols testified unequivocally that the flight Ms. Byler intended to take that day was Flight 61 southbound to Juneau, which normally leaves at about 5:30 p.m. Exc. 338-340. After affirming that he had driven her to the airport at approximately 11:30 a.m. for a 5:30 p.m. flight, Chief Nichols surmised that the reason for this large time gap was to give Ms. Byler ample time to make arrangements to have Jerry Byler's body transported on the flight. Exc. 340.

Chief Nichols further testified on rebuttal that while he was at the airport dropping off Ms. Byler, he saw Sergeant Cox, who had just arrived as anticipated on northbound Flight 61. Exc. 335. Chief Nichols did not introduce Ms. Byler to Sergeant Cox at that time, despite the fact that she was key to the investigation of Jerry Byler's death, which Sergeant Cox had flown into Yakutat to conduct. Chief Nichols testified that he saw both Sergeant Cox and Ms. Byler at the police station later that afternoon. Exc. 336.

What AAT didn't know, and therefore what the jury didn't know, was the following: CBY telephone records establish that Ms. Byler made calls from the police station at 11:57 a.m., 12:02 p.m., and 12:10 p.m., with the last call ending at 12:18 p.m., almost 40 minutes after the time Chief Nichols said he had taken her to the airport.

CBY has also contradicted Chief Nichols' testimony about taking Ms. Byler to the airport to catch the later southbound flight. In its post-trial pleadings, CBY claimed that Chief Nichols instead took Ms. Byler to the airport to catch the earlier northbound flight.

What was likewise unknown at the time of trial was that CBY's computer records contain details that both contradict Chief Nichols' story and suggest that those records have been altered or deleted. For example, the CBY computer records reveal that Chief Nichols downloaded photos from Brian Barton's camera at 11:59 a.m., yet he testified that he was out of the office at that time. Other examples are detailed below.

Without the benefit of this damning evidence, the jury ultimately found in favor of CBY on the fraudulent conveyance issue, and judgment was entered upon the verdict on March 18, 2010. Exc. 56-57.

D. Federal Court Proceedings.

On March 16, 2010, the Estate filed an admiralty action in Federal District Court seeking to arrest the vessels now owned by ABC and foreclose on the preferred marine mortgage granted to it by ABC to secure the settlement of the Estate's wrongful death claims, or in the alternative, to recover for wrongful death. Exc. 59-64. CBY intervened in that case, asserting that as a judgment creditor of AAT it had an interest in the Vessel as well. Exc. 65-66. CBY contested the Estate's claims, attacking them with allegations based on Ms. Byler's tape recorded statements to Chief Nichols. Exc. 87.

In the course of litigating the separate but related federal district court action, evidence came to light that called into question the truth of Chief Nichols' testimony and provided the basis for AAT's Rule 60(b)(3) motion.

E. Post-Trial Motion Practice.

On March 18, 2011, AAT filed a Motion for Relief from Judgment, pursuant to Rule 60(b)(3), asserting that CBY had obtained the judgment through fraud and misconduct. In support of the motion, AAT put forth evidence showing that Chief Nichols' testimony about having given Ms. Byler notice of the tax claims during a ride to the airport was patently false and

that spoliation of evidence had likely occurred with respect to the tape recordings of Chief Nichols' interviews of Ms. Byler.

Chief Nichols was deposed in the federal district court action on February 24, 2011. He testified that he downloaded the digital recording of his interviews of Ms. Byler and Mr. Barton to his office computer shortly after completing them. Exc. 93.

In response to a discovery request from the Estate in the federal district court action, CBY produced a disc containing the interview recordings taken directly from Chief Nichols' computer. The Estate retained audio expert Douglas S. Lacey to evaluate the recordings. Mr. Lacey determined that the recording of Chief Nichols' first interview with Ms. Byler was downloaded to his office computer on May 17, 2007. The recording of his interview with Mr. Barton was downloaded to the computer on May 15, 2007. The recording of his second interview with Ms. Byler was placed on the office computer on March 24, 2009. Exc. 122-123.

While Chief Nichols testified at deposition that the interviews had been downloaded after they were taken, Mr. Lacey's analysis revealed that the second interview was downloaded to the office computer almost two years later, on

March 24, 2009,² just three days before Chief Nichols signed the aforementioned affidavit, submitted in the Juneau district court action, in which he asserted for the first time that he took Ms. Byler to the airport and brought up the issue of taxes, which undermined the validity of Chief Nichols' testimony about having given Ms. Byler notice of the tax claim.

AAT submitted additional evidence that undermined Chief Nichols' account of the events of May 15, 2007. For instance, the Estate subpoenaed flight records from Alaska Airlines that showed that Sergeant Cox's flight to Yakutat arrived at 11:56 a.m. that day. Exc. 139. The Estate also obtained the aforementioned telephone records from the Yakutat police station, which showed that Ms. Byler made telephone calls at the station at 11:11 a.m., 11:12 a.m., 11:17 a.m., 11:57 a.m., 12:02 p.m., and 12:10 p.m. on May 15, 2007, with the last call ending at approximately 12:18 p.m. Exc. 146-150. This information proved that Chief Nichols could not have seen Sergeant Cox when he transported Ms. Byler to the airport, as he testified at trial, because at the exact time Sergeant Cox's flight arrived, Ms. Byler was still at the police station making a phone call,

² Mr. Lacey indicated in his declaration that the date on which the digital recordings were downloaded to the computer is difficult to manipulate, and that such manipulation would require specialized software and experience to accomplish. Exc. 123.

and had been on and off the phone three times after he said he took her to the airport at 11:30.

Other witnesses also confirmed that Chief Nichols did not transport Ms. Byler to the airport, as he testified at trial. Exc. 156 (Declaration of Pamela Girdwood stating that Ms. Byler was taken to the airport late in the afternoon on May 15, 2007, by a group of AAT employees in a rented van, not by Chief Nichols); Exc. 158 (Declaration of George Davis stating that he saw Chief Nichols arrive at the Yakutat airport alone around noon and that Chief Nichols picked up a uniformed trooper who had arrived on the flight from Juneau).

Finally, AAT contended in its motion that additional information obtained by the Estate indicated that Chief Nichols had interviewed Mr. Barton before he interviewed Ms. Byler, the opposite of what the Chief testified to at trial, and that this was further evidence that Chief Nichols' testimony had been untruthful, the interview recordings had been altered, or both.

In particular, during Ms. Byler's second interview, Chief Nichols showed photos to Ms. Byler and told her it was his understanding that Jerry Byler's body had been discovered by a helicopter, and that the crew had gone in a skiff to meet the helicopter at the location of the body. Exc. 105; 112-113. Ms. Byler had not shared this information with Chief Nichols during

their ride from the airport, and he had no other way of knowing it except through his interview of Mr. Barton.

As for the photos, Ms. Byler had no photos with her at the time of her interview, nor did she have a camera, but Mr. Barton did have a camera. Exc. 141. Chief Nichols testified at his deposition that he downloaded only four photographs from Mr. Barton's camera, but Mr. Barton later testified at deposition in the federal action that the Chief downloaded 100 photos at the time of his interview, and Ms. Byler testified that she reviewed photos with Chief Nichols during her second interview. Exc. 287; 141.

The transcript of the Barton interview reveals that the photos on Mr. Barton's camera were downloaded approximately midway through the interview, which Chief Nichols testified lasted from 11:15 to 11:26 a.m. Exc. 230-231. Yet records obtained by the Estate revealed that those photos were downloaded at 11:59 a.m., long after Chief Nichols claimed the Barton interview had concluded, and, even more significantly, at a time when Chief Nichols testified he was at the airport. This glaring discrepancy further undermines the credibility of Chief Nichols' testimony and suggests the computer evidence, either the recordings or the photo downloads, were tampered with.

In addition, phone records revealed that at 11:16 a.m., Ms. Byler telephoned her friend Cal Wilson from the police station, and he stated that during that conversation, she told him she had not yet been interviewed.³ Exc. 148; 152-153. These facts supported AAT's assertion that the Barton interview had actually been conducted before Ms. Byler's second interview, and that the recordings had been altered to show otherwise so as to be consistent with Chief Nichols' story about the ride to the airport.

In its opposition to AAT's motion, CBY offered yet another version of the events of May 15, 2007, one that directly contradicted Chief Nichols' trial testimony. Chief Nichols had testified unequivocally that he drove Ms. Byler to the airport at 11:30 a.m. that day, right after Mr. Barton's interview ended at 11:26 a.m., so that she could make arrangements for transportation of Jerry Byler's body and then take the late afternoon flight to Juneau. Exc. 340.

When confronted with the phone records, CBY was forced to concede that Ms. Byler had stayed at the police station until 12:18 making phone calls. In light of this concession, CBY offered a new version of events in which Chief Nichols rushed

³ Ms. Byler did not consider her conversation with Chief Nichols during the ride from the airport to be an interview, as she was not aware at the time that it was being recorded.

Ms. Byler to the airport at 12:18 p.m. so that she could catch the north-bound flight to Anchorage which left that day at 12:27 p.m. Exc. 168.⁴ This not only contradicts Chief Nichols' testimony, but also stands in stark contrast to other evidence showing Ms. Byler's intent to take the later flight to Juneau. For instance, during Ms. Byler's second interview with Chief Nichols, he explained to her that the timing was such that she could take the body on that day's flight to Juneau, but would not be able to make the Anchorage flight in time. Exc. 117-118. In addition, when Sergeant Cox arrived in Yakutat at noon that day, Chief Nichols told him that Ms. Byler would be at the station when they got there, and that she was taking the later flight to Juneau. Exc. 272(a)-272(c).

As AAT pointed out, it would have been futile for Chief Nichols to drive Ms. Byler to the airport for purposes of arranging to have Jerry Byler's body shipped at either 11:30 or 12:18 because the air cargo office at the Yakutat airport is closed from 30 minutes before a flight arrives until 30 minutes after it leaves. Exc. 250. Given the noon arrival of Flight 61, this means there was no cargo service available between

⁴ Curiously, while the Yakutat police maintained logs with very detailed entries for May 16 and 17, 2007, the police log for May 15 is mostly blank or incomplete for the period between 10:00 a.m. and 2:00 p.m., precisely the period in question. Exc. 242-248.

11:30 a.m. and 12:30 p.m., so there was no way Ms. Byler could have gotten Jerry Byler's body aboard the northbound flight to Anchorage. In fact, the waybill tracking report from Alaska Airlines shows that the body was accepted for shipping at 4:10 p.m. on May 15, 2007. Exc. 252-253.

In opposing the Motion for Relief from Judgment, CBY also relied upon an affidavit from the Borough's information technology provider Matthew Joy.⁵ Exc. 191-197. As AAT's computer expert later pointed out, Mr. Joy's review of Chief Nichols' computer did not include many of the standard practices for forensic reviews. Exc. 238. With respect to Mr. Barton's interview occurring before rather than after Ms. Byler's, Mr. Joy simply concluded - without providing any actual information - that his review of the data confirmed that Mr. Barton was interviewed after Ms. Byler. Exc. 196. In addition, Mr. Joy's review of Chief Nichols' computer showed only four photographs related to the Byler investigation (numbered 11, 12, 13, and 14) had been downloaded. Exc. 197(f)-197(g).

Finally, CBY produced for the first time with its opposition an "incident card" purportedly documenting a 911 call

⁵ As AAT pointed out to the trial court, Mr. Joy had the opportunity to examine CBY's computers, while its experts did not, due to the Borough's recalcitrance about producing them in response to repeated discovery requests in the federal action.

from the Coast Guard to CBY at 7:33 p.m. on May 14, 2007. Exc. 190. This incident card was never produced at trial, nor was it produced in discovery in the federal action, despite the fact that all records relating to the death of Jerry Byler had been requested and supposedly produced. Exc. 221. More importantly, CBY's own records showed no 911 call was received that night, and there was no mention of such a call in the Coast Guard's very detailed records of Jerry Byler's drowning. Exc. 221-222; 242-243. The incident card also contained information about the drowning that CBY could not possibly have known at the time it was supposedly filled out, as outlined in greater detail herein.

In response to Mr. Joy's affidavit, AAT submitted a declaration from forensic computer expert Alfred L. Johnson. Mr. Johnson pointed out that Mr. Joy's review did not follow customary and accepted protocol for forensic computer examinations. Exc. 238. In particular, he noted that Mr. Joy did not review the unallocated or deleted space on the hard drives. *Id.* Of greater significance is Mr. Johnson's opinion regarding the timing of the downloads of the interview recordings. Mr. Joy asserted that the recording of the second interview of Ms. Byler had been downloaded on May 15, 2007, and that the file downloaded on March 24, 2009 was merely an identical copy. Exc. 193-194. However, Mr. Johnson stated that

it is "quite simple" for someone to preserve a file creation date. Exc. 238. He went on to state that the type of review done by Mr. Joy is not sufficient to prove that the recordings had not been altered or tampered with, and that a complete forensic review, including a review of the unallocated and deleted spaces, would be necessary to draw such a conclusion. Exc. 238-239.

Finally, Mr. Johnson pointed out that when files are downloaded from a device such as a digital audio recorder like Chief Nichols used, the files are customarily downloaded to the computer in the order in which they were first created on the device, unless steps are taken to override this default procedure. Exc. 239-240. Mr. Joy's report indicates that the files appear on the computer in the following order: First Contact Kim Byler, Interview Brian Barton, Interview Kim Byler. Exc. 239; 197(a), 197(e), 197(f). In the absence of other evidence or explanation by Mr. Joy, this suggests that the interview recordings would have been on the digital recorder in this order, further supporting the assertion that Mr. Barton's interview took place before Ms. Byler's.

Oral argument on AAT's Motion for Relief from Judgment was held before Judge Collins on May 11, 2011. At oral argument, Judge Collins permitted CBY to supplement its opposition to the

motion by submitting the deposition testimony of Trooper Cox, and she gave AAT one week to file a supplemental response. Exc. 341-342.

At his deposition, Trooper Cox testified that Chief Nichols picked him up at the Yakutat airport on May 15, 2007, after his arrival at around noon, and that there was no one with the Chief at that time, which contradicted Chief Nichols' earlier testimony that he took Ms. Byler to the airport. Sergeant Cox also testified that Chief Nichols took him back to the airport later that day. Exc. 268-269. Amazingly, Chief Nichols made no mention of driving Sergeant Cox to or from the airport at trial. The reason is simple. If he had met Cox there, he would have introduced Cox to Ms. Byler at the airport.

In response to the filing of Mr. Cox's deposition transcript, AAT submitted an affidavit from Ms. Byler, which CBY moved to strike. Exc. 275-279. AAT opposed the motion to strike and simultaneously moved to supplement the record with additional evidence that had been obtained in the federal court action since oral argument on the CR 60 motion. Exc. 280-284. In particular, AAT informed the trial court that Mr. Barton had testified at deposition that Chief Nichols had downloaded approximately 100 photos from his computer at the time of his interview, contrary to Chief Nichols' testimony that he only

downloaded four photos, and contrary to Mr. Joy's review of Chief Nichols' computer, which also found only four photos. Exc. 281. In addition, the transcript of the Barton interview indicates that Chief Nichols discussed the downloading of the photos in the early part of the interview, which supposedly began at 11:15 a.m. and ended at 11:26 a.m. Exc. 230-231. Yet the photos were not downloaded to the computer until 11:59 a.m., more than half an hour after the interview supposedly ended, and at the time when Chief Nichols was at the airport, either dropping off Ms. Byler or picking up Sergeant Cox, depending on the various versions of the story.

Mr. Barton also testified initially at his deposition that he was interviewed before Ms. Byler, but later stated he could not remember the order of the interviews. Exc. 282. However, he did recall that 15-20 minutes passed between the time they arrived at the police station and the time either of them were interviewed. *Id.* Mr. Barton also remembered observing Ms. Byler using the phone at the police station before she was interviewed. *Id.*

In addition, Mr. McDonald testified at his deposition that when he arrived at the police station that day, he saw Mr. Barton standing outside smoking and learned he had already been

interviewed. Exc. 283. Upon entering the station, Mr. McDonald saw Ms. Byler being interviewed by Chief Nichols. *Id.*

Given these developments, and given that CBY had been granted permission to supplement the record with Sergeant Cox's testimony, AAT sought permission to further develop relevant evidence and submit the Barton and McDonald depositions. Exc. 283-284.

While Ms. Byler's affidavit was ultimately admitted over CBY's objections, AAT's request to supplement the record was denied as moot when the court issued its order denying AAT's Motion for Relief from Judgment. Exc. 286. In denying the motion, the court stated, "There is absolutely no reason to believe that the verdict would have been different had Chief Nichol's [sic] testimony not been presented." Exc. 285. The court also found that the claims asserted in the Rule 60 motion were "not supported by significant evidence beyond [the Byler's] own testimony." Exc. 285-286. Finally, the court found that AAT could and should have conducted additional discovery and cross examined Chief Nichols on the issues raised by the CR 60 motion at or before trial. Exc. 286. The court concluded there was no clear and convincing evidence of fraud, and denied AAT's motion.

AAT filed a timely motion for reconsideration of the trial court's June 6, 2011 order. Exc. 294-300. AAT challenged both the legal standard used by the trial court in evaluating the CR 60 motion, and its failure to consider material facts warranting that the judgment on the fraudulent conveyance claim be set aside. *Id.*

By order dated August 31, 2011, the trial court denied AAT's Motion for Reconsideration. Exc. 309-311. It did so on both procedural and substantive grounds, asserting that the motion sought to augment arguments previously made with regard to the CR 60 motion, and that even if AAT's additional evidence were considered, it still had not established by clear and convincing evidence that the jury's verdict was fraudulently obtained. *Id.*

F. Attorney's Fees.

CBY first asserted it was entitled to attorney's fees in connection with AAT's CR 60 motion in its opposition thereto. Exc. 183-189. Then, on June 6, 2011, CBY filed a Motion for Attorney's Fees, asserting that it was entitled to fees as the prevailing party under CR 82. Exc. 287. CBY alleged that it has incurred fees of \$8,695.50 in opposing the motion (based upon what it termed a reasonable rate of \$150.00 per hour). Furthermore, CBY argued that it was entitled to recover the

entire amount of its fees pursuant to CR 82(b)(3)(g) because by bringing the CR 60 motion, AAT had engaged in "vexatious bad conduct or bad faith." Exc. 290-292.

In response, AAT did not take issue with the amount of time spent by CBY in opposing the motion or with the hourly rate it sought. Exc. 301. However, AAT did argue that awarding the full amount of fees sought was inappropriate because its CR 60 motion was brought in good faith and based on substantial evidence, and was not vexatious. Exc. 302-303. AAT therefore maintained that a standard award of 30% of actual reasonable fees under CR 82(b)(2) was more appropriate. Exc. 302.

By order dated August 31, 2011, the trial court found that CBY was the prevailing party and was entitled to attorney's fees. Exc. 312. The court further found that the claims raised by AAT were "not reasonable" under CR 60, and that CBY was therefore entitled to an enhanced award of 50% of the fees it sought, resulting in a fee award of \$4,347.75. Exc. 312-313.

This timely appeal followed.

IV. STANDARD OF REVIEW

Discussion of the applicable standard of review is provided at the beginning of each section of the argument. Appellate Rule 212(c)(1)(H).

V. ARGUMENT

A. The Trial Court Applied the Wrong Standard in Evaluating AAT's Motion for Relief from Judgment.

A trial court's ruling on a Rule 60(b) motion is generally reviewed for abuse of discretion. *Williams v. Williams*, 252 P.3d 998, 1004 (Alaska 2011). However, whether the trial court applied the correct legal standard is a question of law that is reviewed de novo. *Rego v. Rego*, 259 P.3d 447, 452 (Alaska 2011).

Here, the trial court stated explicitly in its order denying AAT's Motion for Relief from Judgment that there was "absolutely no reason to believe the verdict would have been different" had Chief Nichols' false testimony not been presented at trial, citing to other indirect evidence in the record regarding CBY's attempts to give notice of the tax claim to AAT. Exc. 285-286. The trial court also stated in its order that AAT could have examined the discrepancies in Chief Nichols' testimony before trial or during cross examination. *Id.* Both of these statements demonstrate that the trial court did not apply the proper legal standard in evaluating AAT's CR 60 motion.

A party seeking relief from judgment pursuant to CR 60 need not prove that it would have been prevailed but for the alleged fraud or misconduct. 12 Moore's Federal Practice, § 60.43[1][d]

(Matthew Bender 3d ed.) (collecting cases construing analogous federal rule and stating "The rule is an escape valve to protect the fairness and integrity of litigation in federal courts. Therefore, the moving party does not have to prove that he or she would prevail in a retrial in order to secure relief from judgment on the basis of fraud of an adverse party.")

A party seeking relief from judgment on the basis of fraud, misrepresentation or misconduct must make a showing of such fraud or misconduct by clear and convincing evidence. *Babinec v. Yabuki*, 799 P.2d 1325, 1333 (Alaska 1990). As this Court has stated, "This subsection of the rule [CR 60(b)(3)] is aimed at judgments which were unfairly obtained, not at those that are factually incorrect." *McCall v. Coats*, 777 P.2d 655, 658 (Alaska 1989) (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978)).

Regarding the moving party's obligation to exercise the sort of due diligence implied by the court's order in conducting discovery and cross examination below, the test of Rule 60(b) is clear:

(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 text of section (3) 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 it employed due diligence to uncover the fraud before trial.

This interpretation has been widely followed by numerous courts. See *Arnold v. ADT Sec. Servs.*, 627 F.3d 716, 722 (8th Cir. 2010) (discussing elements of both 60(b)(2) and (b)(3) and not requiring due diligence for latter); *Cedar Hill Hardware & Constr. Supply v. Ins. Corp. of Hannover*, 563 F.3d 329, 354 (8th Cir. 2009) (same); *Cox Nuclear Pharm. Inc. v. CTI 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 (1st 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 testified falsely or otherwise acted 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 witness who has given false testimony is if there is physical evidence that contradicts the testimony. That is exactly what AAT discovered here. Only after the trial was over and through discovery in the related federal court action did this evidence come to light, demonstrating willful misconduct by CBY and providing concrete evidence contradicting Chief Nichols' story about giving Ms. Byler a ride to the airport.

The fact that this evidence was only discovered after judgment was entered does not preclude setting aside the judgment. 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. Cryovac*, 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 moving party's ability to fully and fairly prepare for and proceed at trial. *Id.* In the *Cryovac* case, the First Circuit drew a distinction between intentional and unintentional misconduct in the context of a CR 60(b)(3) motion. The court held that where the evidence is concealed or other misconduct is done knowingly and deliberately, a presumption arises that the misconduct has substantially interfered with the moving party's ability to get a full and fair trial. 862 F.2d at 925. Such a presumption may be rebutted only by clear and convincing evidence that the withheld or untruthful evidence was inconsequential. *Id.* Where the conduct was unintentional, no such presumption arises, and the moving party must establish

that the malfeasance prevented it from obtaining a full and fair trial. *Id.*; see also 12 Moore's Federal Practice, § 60.43[4][b]; *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (citing with approval to *Cryovac* and its articulation of standard to be applied to Rule 60(b)(3) motion and adopting same presumption and burden shifting analysis in context of Fed. R. Civ. P. 59).

AAT was not required to satisfy the due diligence standard set forth in CR 60(b)(2) in bringing its motion for relief from judgment under CR 60(b)(3). Rather, in order to prevail on its CR 60(b)(3) motion, AAT only needed to show that Chief Nichols' fraudulent testimony and conduct was intentional. Having shown that, AAT was entitled to a presumption that this fraud and misconduct substantially interfered with its ability to fully and fairly proceed at trial.

Because of Chief Nichols' position as a law enforcement officer - the head law enforcement officer in Yakutat - his testimony carried with it a presumption of honesty and integrity that no doubt influenced the jury and prevented AAT from obtaining a fair trial. Because the trial court applied incorrect standards in evaluating AAT's CR 60 motion, its order denying the motion should be vacated.

B. The Trial Court Abused Its Discretion in Denying AAT's Motion for Relief from Judgment in Light of the Evidence Produced Regarding Chief Nichols' Fraudulent Testimony and Evidence Tampering.

As noted above, a trial court's ruling on a Rule 60(b) motion is reviewed for abuse of discretion, and will not be disturbed unless the reviewing court is left with the "definite and firm conviction on the whole record that the judge has[s] made a mistake." *Williams*, 252 P.3d at 1004. Denial of a motion for reconsideration is likewise reviewed under an abuse of discretion standard. *Smith v. Groleske*, 196 P.3d 1102, 1105 (Alaska 2008). Because the denial of AAT's Motion for Relief from Judgment and Motion for Reconsideration involve the same substantive issues and are reviewed under the same standard of review, they are treated together under this heading.

As outlined above, the legal standard the trial court applied to AAT's CR 60 motion was incorrect. Viewing all of the evidence presented to the trial court in light of the proper legal standard, it is readily apparent that the court made a mistake in denying the motion, and that its decision should be reversed.

AAT put forth a great deal of evidence showing that CBY had obtained its judgment on the fraudulent conveyance claim through its own fraud and misconduct. On review, this Court is required

to review the record as a whole to determine whether the trial court abused its discretion in denying the motion and subsequently denying AAT's motion for reconsideration as well. Taken together, the following facts constituted clear and convincing evidence of fraudulent conduct on the part of CBY sufficient to warrant relief from judgment, none of which was before the jury.

1. **Ms. Byler was at the police station at the time Chief Nichols said he had taken her to the airport.** Chief Nichols testified that he picked up Ms. Byler at the airport that morning at 10:31 a.m.; drove her to the police station, during which time he recorded their conversation as an initial contact interview; then conducted a second interview of her at the station, which ended at 11:10 a.m. Exc. 332-333. He further testified that he then interviewed Mr. Barton from 11:15 a.m. to 11:26 a.m., and following the conclusion of that interview, drove Ms. Byler to the airport at approximately 11:30 a.m. for the late afternoon flight to Juneau, allowing plenty of time for her to make arrangements to transport Jerry Byler's body to Juneau. Exc. 338-340.

However, telephone records obtained by AAT showed that Ms. Byler made a number of telephone calls at the police station at 11:11 a.m., 11:12 a.m., 11:17 a.m., 11:57 a.m., 12:02 p.m., and

12:10 p.m. on May 15, 2007, with the last call ending at approximately 12:18 p.m. Exc. 146-150. If Chief Nichols had taken Ms. Byler to the airport at 11:30 and not brought her back to the police station, she could not have been there making calls at 11:57. As these records show, Ms. Byler did not go to the airport with Chief Nichols, but instead stayed at the police station making phone calls until 12:18 p.m., nearly 40 minutes after the time he claimed to have taken her to the airport.

2. **Chief Nichols downloaded the photographs from Mr. Barton's camera at 11:59 a.m.** Chief Nichols testified that after he brought Ms. Byler to the police station, he conducted another recorded interview of her that was 19 minutes and 51 seconds long, and ended at 11:10 a.m. Exc. 333. The Chief's own words on the recording also indicate that this second interview ended at 11:10 a.m. Exc. 118. He stated that shortly after completing Ms. Byler's interview, he began his interview of Brian Barton at 11:15, and that interview lasted until 11:26 a.m. Exc. 339. After that interview was completed, he allegedly drove Ms. Byler to the airport at 11:30 a.m. Exc. 338-340.

The transcript of Mr. Barton's interview indicates that Chief Nichols downloaded photos from Mr. Barton's camera midway through the interview, which Chief Nichols testified lasted from

11:15 a.m. to 11:26 a.m. Exc. 230-231. Yet computer data produced by CBY reveals that Chief Nichols downloaded photos from Mr. Barton's camera to his office computer at 11:59 a.m. on that day, one half hour after Chief Nichols was supposedly on his way to the airport with Ms. Byler. Exc. 281. Either the recording times are false or the download time for the photos has been changed.

3. Chief Nichols saw Sergeant Cox at the airport but did not introduce him to Ms. Byler. Sergeant Cox arrived in Yakutat at 11:56 a.m. on the north-bound flight. Exc. Chief Nichols testified in rebuttal that he saw Sergeant Cox at the airport when he dropped off Ms. Byler. Exc. 335. It strains credulity that Chief Nichols would not have introduced the state trooper assigned to the death investigation of Jerry Byler to the primary witness, Jerry's daughter-in-law and employer. Moreover, Sergeant Cox testified at deposition that he saw only Chief Nichols at the airport, and did not see Ms. Byler until later, when he saw her at the police station, which further disproves Chief Nichols' testimony about taking Ms. Byler to the airport. Exc. 268; 272.

4. Other witnesses confirm that Chief Nichols did not take Ms. Byler to the airport. Evidence introduced by AAT established that Ms. Byler remained at the police station

throughout the time period at issue, and did not leave there until later that afternoon when she left with several other AAT employees in a rented van to get lunch and then go to the airport for the late afternoon flight. This is confirmed not only by Ms. Byler's own testimony, but also by the telephone records, by Mr. Barton's testimony, and by Ms. Girdwood's testimony. Exc. 329-330; 146-150; 281-282; 156.

In addition, both George Davis and Sergeant Cox testified that Chief Nichols arrived at the Yakutat airport, alone, shortly after noon on May 15, 2007, and that he picked up Sergeant Cox. Exc. 158; 268-269. This directly contradicts Chief Nichols' own testimony.

5. **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 flight to Anchorage.** Chief Nichols testified in rebuttal that the flight Ms. Byler intended to take when he supposedly drove her to the airport was the south-bound flight to Juneau, which normally leaves at about 5:30 p.m. Exc. 338-340. After affirming that he had driven her to the airport at approximately 11:30 a.m. for a 5:30 p.m. flight, Chief Nichols surmised that the reason for this large time gap was to give Ms. Byler ample time to make arrangements to have Jerry Byler's body transported on the flight. Exc. 340.

A year later, in response to AAT's CR 60 motion, CBY contends that Chief Nichols took Ms. Byler to the airport in a "last ditch" attempt to catch the north-bound flight to Anchorage, which left at 12:30 p.m. Exc. 168. This version of events so contradicts Chief Nichols' testimony, the transcript of Ms. Byler's interview, and the other evidence amassed by AAT that its only purpose is to serve as further indication of the Borough's willingness to go to great lengths to hide the truth. If Chief Nichols had rushed Ms. Byler to the airport for the Anchorage flight, he would not have told Sergeant Cox that Ms. Byler would be at the police station or that she was taking the later flight to Juneau, as he did.

If this were actually the case, Chief Nichols would have said so in his trial testimony. Instead, Chief Nichols confirmed that his testimony at trial regarding the timing and order of the events of that day was based upon his review of his records, referring to the audio recordings of the interviews. Exc. 332.

Furthermore, this new version of events offered by CBY in its opposition is internally inconsistent. CBY conceded that Ms. Byler was "hanging around" at the police station making phone calls until 12:18 p.m., but simultaneously claimed that she and Chief Nichols then tried to "rush" to the airport to

make the flight to Anchorage. Exc. 168; 176. Even ignoring the inherently contradictory nature of this argument, whether Ms. Byler was "hanging around" or in a "rush," neither description bears any resemblance to Chief Nichols' actual testimony at trial.

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

Information from Alaska Airlines confirms that the air cargo office at the Yakutat airport is closed for 30 minutes prior to and subsequent to each flight. Exc. 250. Thus, the cargo office was closed between approximately 11:30 and 12:30 on May 15, 2007, meaning that Ms. Byler could not have made arrangements to transport the body at 11:30, when Chief Nichols claims to have dropped her off. Nor could she have made arrangements to get the remains on the north-bound flight leaving at 12:30, even if Chief Nichols had rushed her to the airport at 12:18, as CBY later contended.

7. Chief Nichols described events in his interview with Ms. Byler that he could only have learned from Mr. Barton. In particular, during his second interview with Ms. Byler, Chief Nichols mentioned the fact that Jerry Byler's body was discovered by a helicopter and that the crew had taken a skiff

to meet the helicopter once the body had been located. Exc. 112-113.

CBY attempted to discredit this assertion by producing for the first time an "incident card" from May 14, the night Jerry Byler drowned. Exc. 190. The card states that "a civilian helicopter en route from Yakutat to Cordova was enlisted to help search," and CBY argued that it was from this that Chief Nichols learned about the helicopter. *Id.*

The incident card purports to detail a call from the Coast Guard at 1933 (7:33 p.m. local time) to "911" concerning a missing person who fell from the vessel Alaskan Leader. *Id.* The Coast Guard timeline of events clearly proves the falsity of this record. That timeline states that the first contact from AAT to the Coast Guard occurred at 150321Z, which is 3:21 a.m. GST on May 15, or 7:21 p.m. local time on May 14, only 12 minutes before the incident card reports the Coast Guard 911 call. Exc. 221-222.

In fact, the Coast Guard never called CBY. The Coast Guard record reveals that 35 minutes after the initial contact from AAT, at 7:56 p.m. local time, "CDR Pollock requested the Command Center Call the State Troopers." *Id.* This is 23 minutes after the incident card states CBY was contacted, yet there was no mention of any such contact with CBY at this or any other time

anywhere in the very detailed Coast Guard records of the incident. Moreover, CBY's own records demonstrate that no 911 call was received that night, as there is no record of any such call in the police log for May 14. Exc. 242-243.

The incident card also refers to the missing individual having been on the vessel Alaskan Leader. However, this information was unknown to anyone until the following day, when witnesses were interviewed in Yakutat. Prior to that time, the Coast Guard records mention only the North Pacific, another vessel in AAT's fleet at the time. No one besides AAT employees and the helicopter pilot who found the body knew this detail at the time the incident card was purportedly made.

CBY's other explanation for Chief Nichols' knowledge about the helicopter was that this was "the type of local news that travels fast in a small community" such as Yakutat. Exc. 172-173. But the helicopter was dispatched out of Ketchikan, and though it stopped to refuel in Yakutat, the pilot spoke with no one there and only learned about the man overboard from the Coast Guard after leaving Yakutat. Exc. 226-228.

In reality, the only way Chief Nichols could have learned these details was by interviewing Mr. Barton before Ms. Byler. His knowledge of these facts shows his testimony about the

order of the interviews was false, and that the recording files were altered.

8. Ms. Byler's phone call to Cal Wilson shows that Mr. Barton was interviewed before Ms. Byler. Telephone records showed that Ms. Byler called her friend Cal Wilson at 11:16 a.m. and told him she had not yet been interviewed. Exc. 148. Mr. Wilson's declaration confirms this. Exc. 152-153. This further contradicts Chief Nichols' testimony about the timing and order of the interviews.

9. Other witnesses confirm that Mr. Barton's interview took place before Ms. Byler's. Mr. Barton recalled that some 15-20 minutes passed before Chief Nichols began the interviews at the police station, and that he saw Ms. Byler using the phone at the police station before she was interviewed. Exc. 282. Also, Eddie McDonald testified that when he arrived at the station, Mr. Barton had finished his interview and was standing outside smoking, while Ms. Byler was still inside being interviewed by Chief Nichols. Exc. 283.

10. The CBY police log for May 15, 2007 is conspicuously empty between the hours of 10:00 a.m. and 2:00 p.m. While the Yakutat police maintained logs with very detailed entries for May 16 and 17, 2007, the police log for May 15 is mostly blank or incomplete for the period between 10:00 a.m. and 2:00 p.m.,

precisely the time period when the activities of Chief Nichols are in question. Exc. 242-248.

11. **CBY's computer records show that Mr. Barton's interview was conducted before Ms. Byler's.** Mr. Joy's report indicates that the files appear on the computer in the following order: First Contact Kim Byler, Interview Brian Barton, Interview Kim Byler. Exc. 238. Mr. Joy did not explain or even address this in his affidavit. Instead, he simply offered a conclusory statement that the Barton interview was conducted after the Byler interview without providing any forensic evidence to support that conclusion.

AAT's expert Mr. Johnson pointed out that when files are downloaded from a device such as a digital audio recorder like Chief Nichols used, the files are customarily downloaded to the computer in the order in which they were first created on the device, unless steps are taken to override this default procedure. Exc. 239-240. In the absence of other evidence or explanation by Mr. Joy, this suggests that the interview recordings would have been on the digital recorder in this order, which supports the assertion that Mr. Barton's interview took place before Ms. Byler's.

12. **CBY computer data reveals only four photos were downloaded from Mr. Barton's camera.** Mr. Barton testified

that Chief Nichols downloaded 100 photos from his camera during his interview, and Ms. Byler testified that she viewed photos with Chief Nichols during her second interview, though she herself had not brought a camera or any photos. Exc. 281; 141. Yet the information provided by CBY showed that only four photos had been downloaded to Chief Nichols' computer from Mr. Barton's camera, numbered 11, 12, 13 and 14. This numbering sequence was assigned by the computer automatically at the time of the download. Numbers 1 through 10 are missing, as are the other 76.

As noted by Mr. Johnson, if the Barton photos were downloaded to the computer as Chief Nichols testified, and as the interview transcript indicates they were, they should appear in the list of files found on Chief Nichols' computer, but Mr. Joy's review produced only the four photos referenced above.

13. Computer records show that the second interview 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. In his deposition testimony, taken in conjunction with the federal court action brought by the Estate, Chief Nichols testified that he downloaded the recordings of his interviews with Ms. Byler and Barton soon after the interviews took place. Exc. 93.

Expert evidence regarding the audio recordings also disproved Chief Nichols' assertion that he had downloaded the interview recordings soon after they were made. AAT's audio expert Mr. Lacey determined that while the Barton interview was downloaded on May 15, 2007, and the first Byler interview was downloaded on May 17, 2007, the second interview of Ms. Byler was downloaded March 24, 2009, some two years later, in direct contradiction of Chief Nichols' deposition testimony.

CBY offered an affidavit from its IT consultant, Mr. Joy, to rebut this assertion. Mr. Joy stated that his review of Chief Nichols' computer showed that the second Byler interview had been downloaded to the computer on May 15, 2007, and that the file downloaded on March 24, 2009 was merely an exact copy of the same file, thereby proving that the recording had not been tampered with.

But Mr. Joy's "review" proves nothing of the sort. As AAT's forensic computer expert pointed out, Mr. Joy's review did not include an examination of the deleted or unallocated space on the hard drive. Exc. 238. Mr. Johnson stated that it would be "quite simple" to preserve a file creation time, and that the fact that the two files had the same number of bytes and even identical hash tags did not prove that the files had not been altered or tampered with. *Id.* Only a complete forensic review

of the computer would establish that, which is why AAT asked the trial court to allow additional discovery.

The foregoing facts establish that Chief Nichols' trial testimony was false, and that computer evidence was altered or tampered with. Fraudulent testimony and spoliation of evidence such as this is clear and convincing evidence of fraud, establishing that the jury's verdict was based upon tainted evidence and should have been vacated.

Neither CBY's own creative re-telling of the events of May 15, 2007, nor the "analysis" performed by Mr. Joy were sufficient to dispute all of the evidence outlined above that AAT put forth in support of its request for a new trial, one where the jury is informed of Chief Nichols' untruths and CBY's misdeeds. The trial court abused its discretion in denying AAT's request in light of the foregoing evidence of fraudulent conduct, and its denial of AAT's CR 60 motion should be reversed.

C. The Trial Court Abused Its Discretion by Not Permitting Additional Discovery.

Discovery orders are reviewed for abuse of discretion. *Kay v. Danbar, Inc.*, 132 P.3d 262, 273 (Alaska 2006). Under this standard, a discovery order will only be reversed only when the reviewing court is left with "a definite and firm conviction after reviewing the record that the trial court erred." *Id.*

In its initial Motion for Relief from Judgment, AAT made clear to the trial court that while it had obtained evidence demonstrating that Chief Nichols' testimony at trial had been false, discovery was ongoing in the federal court action and was expected to yield additional evidence relevant to the validity of the trial court's March 18, 2010 judgment. In particular, AAT noted that the Estate had made a request for production of Chief Nichols' computer, which had not been produced at the time the CR 60 motion was due and filed, but was expected to provide further information about the timing of Chief Nichols' interviews of Ms. Byler and Mr. Barton and other details that would support or disprove the Chief's testimony about driving Ms. Byler to the airport. Exc. 87. AAT therefore asked that its motion to vacate be granted, or in the alternative, that it be held in abeyance and discovery be re-opened. Exc. 85.

At oral argument on the CR 60 motion, CBY requested and was granted permission to file the deposition transcript of Sergeant Cox to supplement its opposition to the motion. Exc. 341. AAT filed an affidavit from Ms. Byler responding to Sergeant Cox's testimony, which CBY objected to via a motion to strike. Exc. 275-279.

AAT filed a motion to further supplement the record in conjunction with its opposition to the motion to strike. Exc.

280-284. AAT sought to admit the deposition testimony of Brian Barton and Eddie McDonald, along with evidence regarding the photos Chief Nichols downloaded from Mr. Barton's camera that CBY had only recently produced. *Id.* As AAT made clear in its motion to supplement, the testimony of Mr. Barton and Mr. McDonald further contradicted Chief Nichols' account of the events of May 15, 2007, by demonstrating that Chief Nichols had downloaded the photos to his office computer at 11:59 a.m., the time at which he claimed to have taken Ms. Byler to the airport, and the time at which Sergeant Cox testified that Chief Nichols picked him up at the airport. Exc. 281.

Chief Nichols testified that the ride to the airport immediately followed the interviews. The last interview, according to Chief Nichols, ended at 11:26 a.m. The fact that Ms. Byler hadn't left by 12:18 pm and he downloaded photos at 11:59 am proves that his testimony is false.

In addition, Mr. Barton's deposition testimony further supported AAT's assertion that Mr. Barton was interviewed before Ms. Byler, not after, which was again inconsistent with Chief Nichols' testimony. Mr. Barton recalled that 15-20 minutes passed between the time he and Ms. Byler arrived at the police station and the time either of them was interviewed. Exc. 282. He also recalled seeing Ms. Byler using the telephone at the

station prior to her interview. *Id.* This testimony was further proof that Chief Nichols' testimony was false and that the recordings had been altered.

Finally, Mr. McDonald testified at deposition that he had seen Mr. Barton outside the police station when he arrived, and that he learned Mr. Barton had already been interviewed. Exc. 283. When he entered the building, he saw Ms. Byler being interviewed by Chief Nichols, thereby providing further evidence that the order of the interviews was not as Chief Nichols had claimed, nor as the recordings had purportedly shown.

In light of these facts, AAT sought permission to supplement the record with the foregoing evidence, and to conduct further discovery, including the opportunity to examine CBY computers and have them analyzed by an expert.

The trial court denied these requests in its June 1, 2011 order, stating only that it was denied "for the reasons advanced by Yakutat" and that "Discovery could have and should have occurred before trial in this case." Exc. 286. As outlined above, the court's suggestion that discovery should have occurred earlier evidenced its application of the incorrect legal standard for a CR 60(b)(3) motion, and should therefore be disregarded.

The court's only other rationale for denying the request to supplement and conduct additional discovery was its reliance on "the reasons advanced by Yakutat." It is impossible to know what the court was referring to with this comment, as CBY advanced numerous grounds for opposing both the CR 60 motion and the requests for additional discovery. Without more, it is impossible for this Court to ascertain on review whether the court's denial of the discovery request was proper in light of the facts. AAT maintains that under the circumstances, AAT had given the court a more than ample reason to allow further discovery, given the many pieces of evidence it had so far obtained that pointed to both false testimony and evidence tampering. As such, it was manifest error for the trial court to deny AAT's requests to supplement the record and conduct additional discovery.

D. The Trial Court Abused Its Discretion in Awarding Enhanced Attorney's Fees to CBY.

The Alaska Supreme Court exercises its independent judgment in reviewing whether a trial court has applied the appropriate legal standard in making its prevailing party determination. But the Court reviews a superior court's determination of prevailing party status and attorney's fees for abuse of discretion and will overturn such determinations only if they are manifestly unreasonable. The decision to award enhanced fees

is also reviewed for abuse of discretion. *State v. Jacob*, 214 P.3d 353, 358 (Alaska 2009).

As outlined above, CBY sought payment in full of its attorney's fees for opposing AAT's CR 60 Motion, on the grounds of vexatious and/or bad faith conduct. Exc. 290-292. The court found that the claims put forth by AAT in its CR 60 motion were both complex and "not reasonable," and awarded an enhanced attorney fee award of 50 percent of the amount sought. Exc. 312-313.

The trial court abused its discretion in making such an award. The trial court found no evidence of vexatious or bad faith conduct on the part of AAT. Indeed, there was no basis for such a finding. AAT's efforts to have the judgment set aside were made in good faith and based upon substantial evidence showing that Chief Nichols' testimony was false. AAT put forth testimonial evidence from several witnesses, as well as physical evidence in the form of expert analysis of the recordings and computer data, that called into question the veracity of Chief Nichols' testimony, and did not rely - as the trial court mistakenly asserted in its order - on nothing more than the Byler's own testimony.

AAT maintains that it did not prevail on its Motion for Relief from Judgment due the trial court's use of the improper

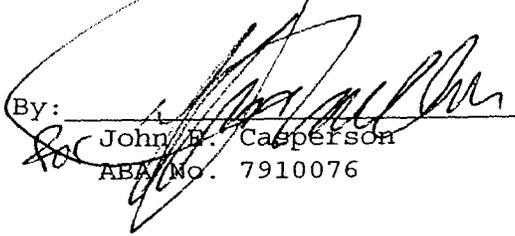
legal standard and its abuse of discretion in evaluating and weighing the evidence presented, all as set forth herein. However, even if it were the case that AAT failed to produce sufficient evidence of fraud and/or misconduct to warrant setting aside the judgment, that does not mean AAT should have been punished for bringing additional evidence to the court's attention and seeking a full and fair trial. As such, the trial court abused its discretion in finding AAT's claims to be unreasonable and awarding an enhanced attorney's fee award to CBY. AAT therefore urges that in the event that this Court reverses the trial court's denial of the CR 60 motion, that it also vacate the attorney's fee award, as CBY would no longer be the prevailing party. Alternatively, even if this Court does not reverse on the CR 60 issues, AAT respectfully requests that it vacate the attorney's fee order and remand with an instruction that no enhancement to the award is warranted.

VI. CONCLUSION

For the foregoing reasons, AAT respectfully requests that the trial court's order denying its Motion for Relief from Judgment be reversed, and that the trial court's judgment be vacated, or alternatively, that this matter be remanded to the trial court for a new trial, and that the attorney's fee award be vacated or modified as set forth above.

Dated at Anchorage, Alaska March 21, 2012.

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FILED
STATE OF ALASKA
APPELLATE COURT

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BY: _____
DEPUTY CLERK

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of March, 2012, a copy of the foregoing was sent to the following via:

- U.S. Mail, First Class, Postage Prepaid
- Hand-Delivery
- Fax
- Federal Express

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