

IN THE SUPREME COURT OF THE STATE OF ALASKA

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

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

CORRECTED REPLY BRIEF OF APPELLANTS

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State of Alaska, this 10 day of
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Marilyn May, Clerk of the Appellate Court

By: Booth A. Pechota
Deputy Clerk

TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	1
A. AAT Met Its Burden under the Applicable Legal Standard for Relief from Judgment under Rule 60(b)(3)	1
B. CBY's Ever-Changing Explanations and Speculations Do Not Disprove the Clear and Convincing Evidence of Fraud Produced by AAT.	6
C. CBY Was Not Entitled to Enhanced Attorney's Fees for Work Related to the Rule 60 Motion and Is Not Entitled to Fees on Appeal.	19
II. CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

<i>Anderson v. Cryovac</i> , 862 F.2d 910 (1 st Cir. 1988)	1, 3
<i>Babinec v. Yabuki</i> , 799 P.2d 1325 (Alaska 1990)	1, 2, 3, 4
<i>Bethel v. McAllister Brothers, Inc.</i> , 1194 U.S. Dist. LEXIS 9177 (E.D. Pa. 1994)	2
<i>Harris v. Westfall</i> , 90 P.3d 167 (Alaska 2004)	3
<i>Krock v. Electric Motor & Repair Co.</i> , 339 F.2d 73 (1st Cir. 1964)	2
<i>McCall v. Coats</i> , 777 P.2d 655 (Alaska 1989)	5

Rules

Civil Rule 60(b)	5, 20
Civil Rule 60(b)(2)	1, 2
Civil Rule 60(b)(3)	passim

Treatises

12 Moore's Federal Practice, § 60.43[1][d] (Matthew Bender 3d ed.)	6
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I. ARGUMENT

A. AAT Met Its Burden under the Applicable Legal Standard for Relief from Judgment under Rule 60(b)(3).

The parties agree that relief from judgment under Rule 60(b)(3) for fraud or misconduct requires clear and convincing evidence of the alleged wrongdoing, and a showing that the conduct complained of prevented the moving party from fully and fairly presenting its case or defense. *Babinec v. Yabuki*, 799 P.2d 1325, 1333 (Alaska 1990); *Anderson v. Cryovac*, 862 F.2d 910, 924 (1st Cir. 1988).

Throughout its brief, CBY asserts that AAT is not entitled to relief—even if Chief Nichols' testimony was perjured—because AAT did not exercise sufficient diligence in uncovering evidence of CBY's fraud and misconduct prior to trial. The trial court similarly found when it denied AAT's Rule 60 motion that AAT could have examined the discrepancies in Chief Nichols' testimony at or before trial. But this is not the proper legal standard to be applied to a Rule 60(b)(3) motion.

There is no due diligence requirement in Rule 60(b)(3). While due diligence is a required element when a party seeks to set aside a judgment on the grounds of newly discovered evidence under Rule 60(b)(2), the plain language of the rule makes clear that it is not a requirement where the party seeks relief based on fraud or misconduct. Compare Rule 60(b)(2) with Rule

60(b)(3); see *Babinec*, 799 P.2d at 1333-34 (which discussed due diligence requirement under CR 60(b)(2) but applied no such requirement under CR 60(b)(3); see Appellants' Opening Brief at pp. 27-28.

CBY offers no legal authority whatsoever that contradicts the numerous cases cited by AAT on this point. Much as CBY might wish there were a due diligence requirement where a party seeks relief from judgment based on fraud or misconduct, there is not.

It is, of course, true that the federal pre-trial discovery procedures are available for use, and conceivably in some particular case--we express no opinion in this one--failure to pursue them would be negligence on the part of counsel. But to determine, as the court apparently did, that neglect gives the other party carte blanche to introduce testimony that is mistaken or worse, insulated from any further proceedings, would be to accept an evil far graver than waste of the court's or litigant's time.

Krock v. Electric Motor & Repair Co., 339 F.2d 73, 74 (1st Cir. 1964), quoted in *Bethel v. McAllister Brothers, Inc.*, 1194 U.S. Dist. LEXIS 9177 (E.D. Pa. 1994) ("[D]efense counsel's trial strategy decisions, good or bad, should never make his client fair game for perjury.").

CBY attempts to graft a due diligence requirement into the requirement that a party seeking relief under Rule 60(b)(3) show that it was prevented from fully and fairly presenting its case.

CBY asserts that AAT could not possibly have been prevented from fully and fairly presenting its case because there was no unfair "surprise," given Chief Nichols' April 6, 2009 affidavit. Yet this ignores the case law, adopted by this Court, that creates a presumption of interference with a party's ability to fully and fairly present its case where the alleged fraud or misconduct was intentional.

AAT laid out this legal framework in detail in its opening brief. If there is an intent to deceive, a presumption of interference arises, and the burden shifts to the non-moving party to prove that the misconduct did not interfere with the moving party's full and fair presentation of its case. See, e.g., *Babinec*, 799 P.2d at 1333; *Cryovac*, 862 F.2d at 925. The presumption may only be rebutted by clear and convincing evidence that the withheld or untruthful evidence was "inconsequential." *Cryovac*, 862 F.2d at 925 (noting "We are keenly aware of the stringency of this standard, yet we believe it to be an appropriate antidote for deliberate misconduct.")

The distinction was made clear by this Court in *Harris v. Westfall*, 90 P.3d 167 (Alaska 2004):

Rule 60(b)(3) permits relief from judgment entered as a result of misrepresentations. We have held that negligent misrepresentations suffice. But to obtain relief under Rule 60(b)(3) for negligent misrepresentation, a party must establish that the misrepresentation was

material, i.e., that the misrepresentation prevented the party from fully and fairly presenting her case or defense. The standard is clear and convincing evidence. On the other hand, if a party establishes that the other party made misrepresentations with an intent to deceive, the burden may shift to the other party to establish that the misconduct did not interfere with the full and fair presentation of the case.

Id. at 173. CBY has failed to carry its burden.

CBY relies on *Babinec*, emphasizing that in that case, the defense was aware of certain facts, had an opportunity to explore them further in discovery, and made a tactical decision not to, and that as such, the defendant was not prevented from fully and fairly presenting its case. Yet CBY ignores the fact that in *Babinec*, the trial court explicitly found that the plaintiff's alleged misconduct was not intentional, and on appeal this Court found support for that conclusion in the record. 799 P.2d at 1333. *Babinec* is therefore distinguishable from this case because the presumption and burden shifting outlined above was never invoked.

Rather than addressing the proper legal standard, CBY ducks the issue by dismissing the entire legal framework as "of no consequence" in a footnote in its brief. Yet it is clear that the trial court failed to apply the proper legal standard, and that CBY failed to meet that standard.

CBY also argues for the first time on appeal that AAT's

motion to vacate the judgment was properly denied because AAT did not establish that it had a "meritorious defense" to the fraudulent conveyance claims. However, a meritorious defense is not an additional required element under Rule 60(b)(3). The case cited by CBY, *McCall v. Coats*, does not adopt an additional meritorious defense requirement, but instead equates the showing of interference with a full and fair presentation of one's case required under Rule 60(b)(3) with the meritorious defense showing required under other subsections of Rule 60(b). 777 P.2d 655, 658 (Alaska 1989). Even if a showing of meritorious defense were required under Rule 60(b)(3), AAT has made such a showing with its defense to the notice element of the fraudulent conveyance claim.

CBY argues that Chief Nichols' testimony, even if false, was not critical to the outcome of the fraudulent conveyance trial, and that CBY would have prevailed regardless of the Chief's testimony because there was other evidence of notice introduced at trial. Brief of Appellee at 18. CBY mistakenly asserts, as did the trial court, that AAT was required to show the outcome of the trial would have been different if not for Chief Nichols' perjured testimony. But as AAT outlined in its opening brief, there is an abundance of case law that establishes no such showing is required under Rule 60(b)(3). See 12 Moore's Federal Practice, § 60.43[1][d] (Matthew Bender

3d ed.) and cases collected therein.

Even if such a showing were required, it is likely that the outcome of the trial would have been different without Chief Nichols' false testimony, given that none of the other evidence offered by CBY successfully established that the Bylers had notice of the Borough's tax claim at the time the assets in question were transferred. Though CBY has disavowed the importance of Chief Nichols' testimony since the evidence showing it to be false has come to light, the fact remains that this was the single most important piece of evidence CBY relied on to prove notice. It described a conversation on the exact point in issue between CBY and the owner of AAT. There was no more compelling evidence on that point, coming from the Chief of Police, a witness that was naturally granted a presumption of credibility. CBY called Chief Nichols to testify at trial not once but twice, and has gone to great lengths in post-trial practice to bolster that testimony. CBY has not shown by clear and convincing evidence that the Chief's testimony was inconsequential.

B. CBY's Ever-Changing Explanations and Speculations Do Not Disprove the Clear and Convincing Evidence of Fraud Produced by AAT.

Also for the first time on appeal, CBY offers yet another version of the events of May 15, 2007, the date on which Chief Nichols claimed to have driven Ms. Byler to the airport. While

AAT could - and does - rightly object that it is much too late for CBY to be offering new theories of the case, this latest attempt to explain away irrefutable evidence again demonstrates the lengths to which CBY will go to perpetuate its pattern of fraud and misconduct.

A summary of the widely diverging descriptions of the events of May 15, 2007 that CBY has offered over the course of this litigation illustrates this point:

At trial, on February 13, 2010, Chief Nichols testified that he drove Mr. Byler to the airport following the conclusion of Mr. Barton's interview, which he said ended at 11:26 a.m. Exc. 339-40. He testified unequivocally that he took Ms. Byler to the airport at approximately 11:30 a.m. to catch the 5:30 p.m. flight to Juneau.¹ Exc. 338-40. This is consistent with the conversation between Chief Nichols and Ms. Byler at the conclusion of her interview, at which time she expressed a desire to fly to Anchorage, but Chief Nichols explained that she was too late for the midday flight to Anchorage, and would have to take the late afternoon flight to Juneau. Ms. Byler conceded

¹ AAT obviously disputes Chief Nichols' version of events, and Ms. Byler has maintained consistently at trial and in subsequent proceedings that Chief Nichols never drove her to the airport and never discussed the issue of unpaid taxes with her. AAT offers Chief Nichols' testimony here only to show that CBY's various stories about the events of May 15 contradict the testimony of its own witness, upon whose testimony they relied

at the close of the interview that she would fly south, not north. Exc. 117-18.

Telephone records later obtained by AAT contradicted Chief Nichols' testimony because they showed that Ms. Byler remained at the police station following Mr. Barton's interview and her own interview and made a series of telephone calls, the last of which ended at 12:18 p.m.² When faced with this hard evidence disproving Chief Nichols' assertion that he took Ms. Byler to the airport at 11:30, CBY came up with a new version of the story, in which Ms. Byler insisted on taking the midday flight to Anchorage and Chief Nichols rushed Ms. Byler to the airport as soon as her call ended at 12:18, in a "last ditch effort" to make that flight. Exc. 168.

CBY has now come up with still another version of events, claiming this time that there was no rush to the airport at all. Instead, CBY now asserts that Chief Nichols took Ms. Byler to the airport sometime after he she completed her telephone calls at 12:18 solely for the purpose of making arrangements to transport Jerry Byler's body on the later flight to Juneau; that she then returned to the police station just a few minutes after

to establish the requisite notice element of the fraudulent conveyance claim.

² CBY correctly points out that the particular phone records documenting these calls were not included in appellant's excerpts, but does not dispute that they were in the record below.

Sergeant Cox arrived; and that she later made a second trip to the airport with the other AAT employees to catch the 5:30 p.m. flight to Juneau.

CBY attempts to explain the change in timing by offering that Chief Nichols' memory was faulty when he testified at trial, and that it was "of little import" that he "did not affirmatively volunteer" at trial that he drove Ms. Byler to the airport nearly an hour later than he testified that he did because this matter was "of absolutely no significance" to his formal investigation. Brief of Appellee at p. 20. Yet the fact that Chief Nichols drove Ms. Byler to the airport and discussed with her the taxes owed by AAT was of great significance to the fraudulent conveyance claim, for if that conversation did not take place, AAT did not have the requisite notice for its asset transfers to be considered fraudulent. More importantly, Chief Nichols did not express equivocation or concern about the quality of his memory at the time of his trial testimony. Instead, he stated that he took Ms. Byler to the airport after the conclusion of the last interview at 11:26, which was at about 11:30 a.m. Exc. 339-40. Chief Nichols testified he knew this to be true because he had checked his notes or records. Exc. 332. Thus Chief Nichols' own testimony completely contradicts CBY's versions of events created after the fact.

Both of these stories are just that, stories, as there is

no support for either of these versions of events in the record. To the contrary, there is clear and convincing evidence showing that Ms. Byler did not go the airport with Chief Nichols, thereby proving that his testimony in the fraudulent conveyance trial was perjured and that evidence produced at trial had been fabricated and/or spoliated.

CBY's contentions and so-called "independent evidence" about the supposed ride to the airport are disproved by the following:

a. Sergeant Cox testified that when Chief Nichols picked him up at the airport, Chief Nichols told him that Ms. Byler was at the station and would be taking the later flight to Juneau. Supp. Exc. 522. Apart from the impossibilities of timing outlined above, if Chief Nichols had just taken Ms. Byler to the airport for purposes of making arrangements to transport Jerry Byler's body, why would he tell Sergeant Cox that she was back at the station? And if he did take her to the airport at midday, how did she get back to the station just minutes after Chief Nichols arrived there with Sergeant Cox?³ CBY offers no

³ CBY acknowledges that Ms. Byler was at the station later that afternoon, meaning that if Chief Nichols did take her to the airport at midday, and did not bring her back, she would have had to find her own transportation back to the station. If Ms. Byler did not get along well with law enforcement, why would she have gone to the trouble of finding her own way back to the police station, rather than simply staying at the airport or going into town until it was time for the flight to Juneau?

account of Ms. Byler's return trip to the station.

b. Sergeant Cox testified that after he arrived on the flight from Juneau, he met with Chief Nichols, who was in the parking lot and had just arrived, and Chief Nichols drove him to the police station. Exc. 268. He testified that they went straight to the police station from the airport. Exc. 519(b). It is undisputed that the trip from the airport to the police station takes 5-7 minutes. This means that Chief Nichols and Sergeant Cox likely arrived at the police station before 12:18 p.m., the time CBY now says Chief Nichols left to take Ms. Byler to the airport and pick up Sergeant Cox. Sergeant Cox did not linger at the airport for more than 30 minutes after his arrival; instead, he testified that he went directly to the parking lot and met Chief Nichols at his vehicle. Chief Nichols could not have picked him up shortly after noon if he was still at the station downloading photos, and did not leave there until after 12:18 p.m.

Amazingly, Chief Nichols didn't remember what he did after seeing Trooper Cox at the airport. He certainly didn't remember taking him to the station.

A: When I was out at the airport, actually, Sergeant Cox from Alaska State Troopers had just arrived.

Q: He had just arrived? I'm sorry. We're having trouble hearing you.

A: I'm sorry. Had just arrived, yes. In Yakutat.

Q: All right. And did you go back? What did you do next?

A: Shortly after that I returned to the station. I returned to town. I can't honestly say if I went directly to the station but I left the airport."

Exc. 335.

It makes no sense that Chief Nichols would see Sergeant Cox at the airport but not give him a ride to the station, particularly when the Yakutat police force had given rides to others involved in the investigation. The only explanation for these omissions is that Chief Nichols was loathe to bring up Sergeant Cox and his trip from the airport to the station because to do so would be to invite rebuttal testimony from Sergeant Cox, which would include Sergeant Cox's testimony that Chief Nichols told him that Ms. Byler was at the police station - not the airport - at the time Sergeant Cox arrived in Yakutat.

c. Sergeant Cox testified that within a few minutes of his arrival at the police station with Chief Nichols, a man and woman whom he believed to be Mr. Barton and Ms. Byler arrived at the station. Exc. 424. CBY relies on this to show that Ms. Byler did leave the station at midday, although even if true this would not establish that she went to the airport with Chief Nichols during that time. But this is not true, because Ms. Byler did not leave the station until she departed with the

other AAT employees later that afternoon when they all left for the airport for the Juneau flight. Supp. Exc. 524-25; 529.⁴

Sergeant Cox's testimony about Ms. Byler "arriving" at the police station is easily explained by other facts in evidence. Sergeant Cox testified that he had never met or seen Ms. Byler prior to that day, and did not know what she looked like. Exc. 445. He also testified that shortly after the first man and woman arrived at the station, a second man and woman arrived, whom he had also never met before but later believed to be Pam Girdwood and Eddie McDonald. Exc. 424.

The police telephone records establish conclusively that Ms. Byler was at the police station making phone calls until 12:18 p.m. Ms. Byler was making these calls in the DMV office, which is located in the same building as the police station, directly off the police lobby/waiting area through an interior door. Chief Nichols had offered her the use of this telephone

⁴ Ms. Byler testified at trial and reiterated in a later-filed declaration that she did not leave the police station until later that afternoon when she left with the other AAT employees. Exc. 329-30; Supp. Exc. 529. Her testimony is corroborated by that of Mr. Barton. Supp. Exc. 524-25. CBY relies on excerpts of Mr. Barton's deposition transcript elsewhere in its brief, despite the fact that the transcript was never filed with the trial court, saying that those excerpts were actually in the record because they were referred to by CBY in its Motion to Strike Ms. Byler's declaration. Because Ms. Byler likewise referred to Mr. Barton's deposition testimony in her declaration, which was accepted by the trial court, the same logic applies, justifying AAT's inclusion of additional excerpts of Mr. Barton's testimony.

in the DMV office to give her privacy, as indicated on the transcript of his interview with Ms. Byler. Exc. 118.

As outlined above, given Sergeant Cox's arrival time and the short drive to the police station, he likely arrived there before 12:18 p.m. He testified that Ms. Byler arrived shortly thereafter. Exc. 424; 446. After completing her phone calls at 12:18 p.m., Ms. Byler returned to the waiting area of the police station, and Sergeant Cox no doubt took her entry into the lobby shortly thereafter to be an arrival.⁵ While he may have assumed that she had earlier left the premises, the only knowledge he actually had regarding her whereabouts was what Chief Nichols told him, which was that Ms. Byler was at the police station when he arrived at the airport. Indeed she was, making phone calls in the private DMV office, where Sergeant Cox would not have seen her upon his arrival. The fact that she "arrived" shortly after he did does not in any way prove that Chief Nichols took her to the airport at midday, but is instead consistent with the other evidence that establishes she never left the station with Chief Nichols.⁶

⁵ Under CBY's newest theory, if Chief Nichols had taken Ms. Byler to the airport after she finished her last phone call at 12:18 p.m., there is obviously no way she could have been back at the police station just minutes later, when Sergeant Cox testified he saw her come into the waiting area.

⁶ It could also be the case that Sergeant Cox mistook Ms. Byler and Mr. Barton for Ms. Girdwood and Mr. McDonald, given that he had never met any of them before and did not know what they

d. The Alaska Airlines freight office at the Yakutat airport was closed for 30 minutes before and after each flight. Exc. If Chief Nichols had taken Ms. Byler to the airport shortly after her 12:18 p.m. phone call to make arrangements for the body, she would have been unable to do so since the office was closed. Moreover, the waybill for the body showed that it was not received until 4:10 p.m. CBY contends that AAT has no proof Ms. Byler did not make arrangements earlier, but CBY has no proof that she did make earlier arrangements, which is not surprising, given that the office was closed at the time.

e. Near the end of her second interview with Chief Nichols, Ms. Byler expressed a desire to go to Anchorage, but Chief Nichols explained to her that it would not be possible to make the midday flight. Exc. 117-18. The fact that it was Chief Nichols himself who made it clear to Ms. Byler that she would not be able to make that flight makes it highly unlikely that he would have simply forgotten that was the case, as CBY now asserts.

looked like, and that Ms. Girdwood and Mr. McDonald arrived from the airport shortly after Sergeant Cox, at approximately the same time that Ms. Byler finished her phone calls and returned from the DMV office. Exc. 424. This is supported by the fact that Sergeant Cox testified that the first pair who arrived at the station after he got there came in their own vehicle. *Id.* It is undisputed that neither Ms. Byler nor Mr. Barton had their own vehicle while in Yakutat, and that Mr. McDonald and Ms. Girdwood did rent their own vehicle after arriving in Yakutat. Supp. Exc. 529; Exc. 261.

CBY clings to the notion that Ms. Byler "was still holding out hope" for making the midday flight to Anchorage, and cites as evidence for this her telephone conversation with her friend Cal Wilson. Ms. Byler called Mr. Wilson from the Yakutat police station at 11:16 a.m. Exc. 152. Mr. Wilson stated in his declaration that Ms. Byler told him at that time that "she might be coming to Anchorage." *Id.*

Ms. Byler's conversation with Mr. Wilson at 11:16 a.m. is consistent with what AAT and Ms. Byler have maintained all along. At that time, an hour before her last phone call at the police station and well before the flight from Juneau was supposed to arrive, she still hoped to fly north to Anchorage. Later, after her interview with Chief Nichols, she resigned herself to going south instead.

f. The record contained ample evidence - apart from just Ms. Byler's own testimony⁷ - that Ms. Byler never left the police

⁷ CBY makes broad assertions in its brief about Ms. Byler's character and credibility, and about her reputation and that of her husband, Darren Byler. One of the things CBY relies on to malign the Bylers is language from a memorandum decision of the Bankruptcy Court finding that the Bylers were not "honest debtors" and dismissing AAT's bankruptcy action for bad faith. What CBY fails to mention is the Bankruptcy Court's later decision denying sanctions and finding no improper purpose or frivolity in AAT's bankruptcy filing, in which the judge stated, "My June 17th memorandum also considered the debtor's and its principals' prepetition conduct at length. That conduct played a large part in my conclusion that the debtor was continuing, through the bankruptcy, its efforts to deter and harass CBY. My perspective has changed, however. It can now be seen that in

station with Chief Nichols. Mr. Barton testified that Ms. Byler never left the station until the AAT employees all went to lunch together later that afternoon, and that she did not ride with a police officer to the airport. Supp. Exc. 524-25. Pam Girdwood and Eddie McDonald also testified that Ms. Byler did not leave the police station until they all left together later that afternoon. Exc. 156; 263.

CBY argues that the testimony of Ms. Girdwood and Mr. McDonald is irrelevant on this point because they both arrived at the station after Ms. Byler had been interviewed, and would not have known if Chief Nichols had taken Ms. Byler to the airport and she had somehow returned to the station prior to their arrival. Again, this sequence of events makes no sense in light of the other evidence. According to CBY's own latest version of events, Chief Nichols did not take Ms. Byler to the airport until after she finished her phone calls at 12:18 p.m. But Sergeant Cox arrived at the station shortly before 12:18 p.m., and testified that Ms. Girdwood and Mr. McDonald arrived a

fact the debtor was making substantial and good faith efforts on behalf of the estate which continued past the point of conditional dismissal. [. . .] I conclude that the filing of the petition was not made for any improper purpose or harassment within the meaning of Rule 9011(b)(1). Rather, it was made for the legitimate purpose of reorganizing the debtor's business affairs." Supp. Exc. 512-14.

few minutes later.⁸ Exc. 424. Therefore, there is no way Chief Nichols could have left for the airport with Ms. Byler at 12:18 p.m. and that she could have returned - again, with no explanation as to how she got back - only moments later.

g. CBY asserts that there is no question that the body of Jerry Byler was transported to the Yakutat airport at midday, and characterizes this disputed fact as "independent evidence" proving that Chief Nichols drove Ms. Byler to the airport. Even if it were true that the body was transported to the airport at that time (which AAT does not concede), this proves nothing about whether Chief Nichols did or did not drive Ms. Byler to the airport at or around the same time. CBY's only basis for such an assertion is that it would be "expected" that Ms. Byler would want to accompany the body there to make the arrangements for transport. This is pure speculation, not evidence.

CBY's other assertion in this regard is that Ms. Byler would have gone to the airport with Chief Nichols because she needed to make the arrangements to transport the body regardless of when she herself would be flying out of Yakutat. It is true

⁸ This is supported by the fact that after taking Ms. Byler and Mr. Barton to Yakutat at 10:30, the plane returned to the vessels and brought Ms. Girdwood and Mr. McDonald to Yakutat. The flight was approximately 20 minutes each way, and Mr. McDonald testified that upon arriving, he and Ms. Girdwood went directly to the rental car counter, rented a vehicle and drove to the police station. Exc. 261. He and Ms. Girdwood therefore would certainly have arrived at the station before 12:18.

that Ms. Byler did need to make such arrangements, but that does not prove she would have made a separate trip to the airport with Chief Nichols at midday solely for that purpose. On the contrary, it is unlikely she would have made a separate trip just for that purpose, given that she had already decided to take the later flight to Juneau and would have ample time later in the afternoon to make such arrangements.

h. CBY feigns confusion over the relevance of AAT's contention that Mr. Barton was interviewed before Ms. Byler. The evidence supporting this order of the interviews, including data documenting the downloading of audio and photographs and expert computer evidence regarding the same, was outlined in detail in AAT's opening brief. The order of the interviews is relevant because it shows that evidence was altered to support Chief Nichols' version of events of May 15.

C. CBY Was Not Entitled to Enhanced Attorney's Fees for Work Related to the Rule 60 Motion and Is Not Entitled to Fees on Appeal.

CBY argues that the enhanced attorney fee award was justified because it was based not only on AAT's conduct with respect to the motion to vacate, but also on the trial court's earlier contempt finding against Ms. Byler. CBY also contends that the enhanced award was merited because of AAT's "bad faith" actions outside of this litigation, including its bankruptcy filing and the federal action brought by the Estate of Jerry

Byler.

AAT takes issue with CBY's characterization of its conduct, noting again that apart from the earlier contempt order, no court has found the Bylers have acted in bad faith in their efforts to legitimately challenge AAT's tax liability to CBY. More importantly, the award of attorney's fees following the Rule 60(b) motion was for work performed solely in response to the Rule 60(b) motion, not for work performed during the earlier trial or in any of the other venues in which these issues have been litigated. As such, the basis for the fee award, and any enhancement thereto, must be limited to the Bylers' conduct in bringing the Rule 60(b) motion. The court's earlier contempt finding has no bearing on the Rule 60(b) motion fees, as CBY was already compensated by the trial court for its work at trial, and the contempt order was taken into account in making that award. That conduct is not at issue in the present case, and with regard to the Bylers' conduct in bringing the Rule 60(b) motion, the court found only that it was "not reasonable," not that it was vexatious or brought in bad faith. As such, the court abused its discretion in awarding enhanced fees, and the fee award should be vacated and remanded, regardless of this Court's decision on the appeal of the CR 60(b)(3) motion itself.

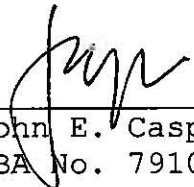
II. CONCLUSION

CBY laments the cost this litigation has imposed on the people of Yakutat. AAT and the Bylers have incurred enormous costs, both personal and financial, in their attempts to prove that CBY's judgment against them was obtained fraudulently. They made the required showing under CR 60(b)(3), and CBY failed to meet its burden to show that Chief Nichols' perjured testimony was inconsequential to the outcome of the fraudulent conveyance trial. As such, the trial court's denial of AAT's motion should be vacated, as should the award of enhanced attorney's fees to CBY. At the very least, this matter should be remanded for additional discovery, given that AAT has shown the trial court abused its discretion in denying further discovery where there was evidence showing it was clearly warranted.

Dated at Anchorage, Alaska, June 20, 2012.

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CERTIFICATE OF SERVICE

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

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