IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

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| The City and Borough of Yakutat,<br><br>Plaintiff,<br><br>v.<br><br>Alaskan Adventure Tours, Inc.,<br><br>Defendant. | Filed in Chambers<br>STATE OF ALASKA<br>FIRST JUDICIAL DISTRICT<br>AT JUNEAU<br>By TKay on 6-1-11 |
| The City and Borough of Yakutat,<br><br>Supplemental Complaint Plaintiff,<br><br>v.<br><br>ABC Leasing, LLC and Kimberly Riedel-Byler, aka Kimberly C. Riedel, K. Christina Riedel and/or Kimberly Byler,<br><br>Supplemental Complaint Defendant. | RECEIVED<br>Ingaldson, Maassen & Fitzgerald, PC<br><br>JUN 06 2011<br><br>File No. 2044-3 Cal:<br>Approved for File:<br><br>1JU-08-00434CI |

**ORDER**

Alaskan Adventure Tours' ("AAT") motion for Civil Rule 60 relief from the jury decision against it is denied for the reasons advanced by the City and Borough of Yakutat ("Yakutat") and supplemental exhibits submitted by Yakutat.

Chief Nichol's testimony was neither a "crucial element" nor a "missing link" to establishing that the Bylers were fully aware of Yakutat's tax claim against them, including evidence of eight letters and the Yakutat's attorney's testimony of a phone call about the delinquency, coupled with phone records. There is absolutely no reason to believe that the verdict would have been different had Chief Nichol's testimony not been presented. Moreover, the current claims, much like most of the testimony given by the

Bylers at trial, is not supported by significant evidence beyond their own testimony – which was clearly rejected by the jury in reaching its verdict and found to be untruthful by the jury and by this court.

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

The motion to strike the affidavit of Kimberly Byler is denied. While it is argumentative and includes inappropriate references to hearsay statements of others, the court considers the affidavit to the extent it is in compliance with the court's May 19, 2011 order.

The motion for additional discovery is also denied for the reasons advanced by Yakutat. Discovery could have and should have occurred before trial in this case.

**DATED** at Juneau, Alaska this 1st day of June, 2011.

PATRICIA A. COLLINS
Superior Court Judge

**CERTIFICATION**

The undersigned hereby certifies that on the 2nd day of June, 2011 a true copy of the foregoing document was served on James Brennan and Kevin Fitzgerald via mail.

Tawna Kay, Judicial Assistant

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

RECEIVED
Ingaldson, Maassen & Fitzgerald, PC
JUN 06 2011
File No. 2044-3 Cal:
Approved for File:

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| The City and Borough of Yakutat,<br><br>Plaintiff,<br>vs.<br><br>Alaskan Adventure Tours, Inc.,<br><br>Defendant. | ) | Case No: 1JU-08-434 CI |
| The City and Borough of Yakutat,<br><br>Supplemental Complaint Plaintiff,<br>vs.<br><br>ABC Leasing, LLC and Kimberly Riedel-Byler, a/k/a Kimberly C. Riedel, K. Christina Riedel and/or Kimberly Byler,<br><br>Supplemental Complaint Defendants. | ) | |

## CBY'S MOTION FOR ATTORNEYS FEES

COMES NOW plaintiff City and Borough of Yakutat ("CBY"), and, pursuant to Rule 82 of the Alaska Rules of Civil Procedure, moves for an award of prevailing party attorneys fees against defendant Alaskan Adventure Tours, Inc. ("AAT") and Kimberly Riedel-Byler arising out of the denial of AAT's motion for Rule 60(b) relief from judgment herein. This motion is based upon the memorandum and affidavit of counsel filed herewith.

DATED this 6th day of June, 2011.

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

James T. Brennan, ABA No. 7610080

CERTIFICATE OF SERVICE
I hereby certify that on this 6th day of June, 2011 a copy of the foregoing was served via Facsimile and U.S. mail on:

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
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**MEMORANDUM IN SUPPORT OF CBY'S MOTION FOR ATTORNEYS FEES**

Plaintiff City and Borough of Yakutat ("CBY") moves for an award of prevailing party attorneys fees against defendants Alaskan Adventure Tours, Inc. ("AAT") and Kimberly Riedel-Byler, reasonably incurred in opposing defendants' Motion for Relief from Judgment, which was denied by the Court's Order dated June 1, 2011. Rule 82 attorneys fees are awardable to a prevailing party in connection with a post-judgment motion for relief under Civil Rule 60(b). Powell v. Powell, 194 P.3d 364, 373 (Alaska 2008) (Rule 82 attorneys fees awarded to party who successfully opposed motion for relief from judgment under Rule 60(b)); McGee v. McGee, 974 P.2d 983, 992 (Alaska 1999) (Rule 82 fees awarded to party who successfully brought motion for

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relief from judgment under Rule 60(b)).

Defendants AAT and Kimberly Byler filed lengthy and detailed memorandums in support of their Motion for Relief from Judgment under Rule 60(b)(3). Their motion was supported by an initial Memorandum of 15 pages plus assorted declarations, exhibits and transcripts comprising 98 pages. They filed a 23-page Reply memorandum, supported by yet an additional set of declarations, exhibits and transcripts totalling 59 pages.

Against serious charges of misconduct and fraud, the CBY was compelled to oppose the defendants' motion in detail, filing a 27-page Opposition supported by voluminous exhibits, in a point-by-point rebuttal to defendants' myriad assertions of facts or alleged facts supporting their claims.

Thereafter, CBY requested and was granted a hearing, because of the volume of defendants' reply memorandum containing new assertions. Further motion matter ensued thereafter, in connection with defendants' filing of an argumentative "affidavit" of Kimberly Byler.

The Court's June 1 order denying defendants' motion was categorical and based upon multiple grounds, including its finding that defendants' claims were not supported by significant evidence beyond their own testimony, which was previously found untruthful by the jury and the court.

As shown by the affidavit of counsel file herewith, defendant CBY incurred attorneys fees of $8,695.50 in opposing defendants' motion for relief of judgment, at the reasonable rate of $150.00 per hour. This did not include much additional attorney's

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time incurred in connection with depositions taken in the federal court action between the Estate of Byler and AAT, in which CBY has intervened, though a primary purpose of these depositions was to support AAT's motion for relief from judgment herein. See attached Order of federal Magistrate Judge Roberts dated May 31, 2011. In his order, the Magistrate Judge noted, at p. 10, the strange interplay between the discovery conducted by the plaintiff, the Estate of Jerry Byler (Darren Byler, Personal Representative) and the defendant, AAT, which was utilizing the federal court discovery in this State court action in its Motion for Relief from Judgment. Order, p. 10. It is also noteworthy that the Magistrate Judge opined, presciently, that "...there is little chance the plaintiff in the State case will find evidence that Chief Nichols either altered the audio recordings or perjured himself in the original tax case between AAT and CBY." Id., at p. 10.

Using Civil Rule 82 as a basis for an award of attorneys fees herein, plaintiff CBY seeks an award of its full, actual attorneys fees because defendants' Motion for Relief from Judgment constituted vexatious or bad faith conduct under Rule 82(b)(3)(g). Where the Superior Court makes a finding of vexatious bad conduct or bad faith, it has the discretion to award full actual attorneys fees under Rule 82. Garrison v. Dickson, 19 P.3d 1229, 1224 (Alaska 2001); Marathon Oil Company Co. V. ARCO Alaska, Inc., 972 P.2d 595, 605 (Alaska 1999); Keen v. Ruddy, 784 P.2d 653, 657 (Alaska 1989).

The defendants' motion has been but the latest in a pattern of vexatious litigation tactics by AAT and Ms. Riedel-Byler, which have been designed in part to price the small CBY (population 685) out of the litigation market by making it too expensive for

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the Borough to take all actions necessary to evenly enforce tax collection from all businesses active in the Borough, and to defend and enforce judgments on such taxes. For the CBY to collect the taxes owed, AAT and Ms. Riedel-Byler have forced the Borough to (1) obtain a tax foreclosure judgment; (2) successfully pursue and obtain a judgment voiding AAT's effort to avoid payment through fraudulent conveyance of all of AAT's assets; (3) weather a Chapter 11 bankruptcy petition by AAT to avoid execution, which petition was later dismissed as having been brought in bad faith; (4) currently defend AAT against a collusive claim for wrongful death brought by the Estate of Jerry Byler (which AAT is not itself actually defending) in an effort to obtain a maritime judgment lien with priority over CBY's prior State Court judgments; and (5) to defend against this belatedly brought motion for relief from judgment, based upon alleged facts which could have been pursued in discovery and trial herein. The tactics of AAT and Ms. Riedel-Byler have caused substantial legal expense to a small municipal government, which must either fully oppose such tactics or abandon its policy of eventually collecting sales taxes from all businesses in the Borough.

Plaintiff CBY therefore respectfully requests that the court award full actual attorneys fees incurred by plaintiff CBY, against AAT and Kimberly Riedel-Byler in connection with these defendants' unsuccessful Motion for Relief from Judgment.

DATED this 6th day of June, 2011.

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

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James T. Brennan, ABA No. 7610080

CERTIFICATE OF SERVICE

I hereby certify this 6th day of June, 2011 a copy of the foregoing was served via Facsimile and U.S. mail on:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

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**MOTION FOR RECONSIDERATION**

Comes now Alaskan Adventure Tours ("AAT") and seeks reconsideration under Civil Rule 77(k)(1)(ii). The court has overlooked or misconceived some material facts in the case. Testimony by the Chief of Police on the element of notice was obviously an important part of CBY's case, he testified twice on the airport ride. Simply deciding whether the other

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evidence was sufficient without considering how the jury may have reacted if it was aware of the misleading testimony of Chief Nichols would have made a substantial impact on the jury's deliberations. Nevertheless, contrary to this court's order, AAT need not prove that the outcome would have been different had the Chief's testimony not been presented. "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 fraud of an adverse party." 12 *Moore's Federal Practice,* Section 60.43[1][d] (2009) (quotations and citations omitted)

Further, there has been substantial new evidence developed in the federal action that further undermines the testimony of Chief Nichols. These facts are set forth in AAT Opposition to Motion to Strike and Motion to Supplement the Record, filed the day after the court entered its order on Ju 1, 2011. As noted by AAT in that opposition and motion, Bria Barton and Eddie McDonald have also been deposed, and CBY has produced original downloads of the photos taken by Mr. Barton The McDonald transcript has not yet been received, but those depositions and the 4 photos have revealed the following:

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1) Brian Barton testified that Chief Nichols downloaded approximately 100 photos directly into his computer during Barton's interview by Nichols on May 15, 2007. In his deposition, Chief Nichols swore that he downloaded only 4 photos during Barton's interview. The default numbers assigned by the computer to the 4 Baron photos produced by CBY are numbers 15, 16, 17 and 18. The computer record search produced by CBY's computer expert Matthew Joy produced no photos from Mr. Barton's camera, let alone 4, 18 or 100. AAT's computer expert has advised that the 100 photos should still be on the computer if it hasn't been altered. Mr. Joy had nothing to say about this omission;

2) the 4 Barton photos were downloaded into the CBY computer at 11:59 am on May 15, 2007. The transcript of the Barton interview, which supposedly began at 11:15 am, sets forth the discussion between Chief Nichols and Mr. Barton concerning the download of the photos in the early part of the interview. The interview supposedly ended at 11:26 am, a full half hour before the photos were downloaded. Either the times on the computer are wrong or Chief Nichols' testimony is wrong;

3). Sgt. Cox testified that he was picked up at the airport by Chief Nichols. His plane arrived at the gate at 11:57 am and it is approximately 5-8 minute ride to return to

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the police station. It would have been impossible for Chief Nichols to download the photos at 11:59 am when he was at the airport to pick up Sgt. Cox. Again, there is an obvious inconsistency between the physical evidence and Chief Nichols' testimony;

4) CBY has had the benefit of access to the CBY hard drives, but AAT has not, so the statements of CBY's expert Matthew Joy have not been tested or confirmed by AAT's computer expert;

5) Brian Barton testified that he was interviewed before Kimberly Byler, but later said he did not remember the order of interviews. However, he does remember that it was 15 or 20 minutes before either he or Ms. Byler were interviewed. Either way, the timeline produced by the interview transcripts which only allowed for two minutes between the end of Ms. Byler's first interview and the start of the second interview is inconsistent with this testimony. Mr. Barton also testified that he observed Ms. Byler on the phone making calls before she was interviewed. This statement is consistent with the CBY phone records and AAT's and assertions of the order of the interviews, but inconsistent with the information contained in the interview recordings;

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6) Mr. McDonald testified in his very recent deposition that his interview was recorded by Alaska State Trooper Robert Cox. He also testified that CBY's counsel called him before his deposition and told him that that Cox's recording device did not have batteries in it during the time of his interview; and

7) Mr. McDonald testified when he arrived at the Yakutat police station that he saw Brian Barton standing outside smoking a cigarette. He learned that Brian Barton had already been interviewed by Chief Nichols. Upon entering the front door to the police station, he witnessed Kimberly Byler still being interviewed by Chief Nichols through the glass wall of his office. This is inconsistent with Chief Nichols' testimony and the interview transcripts.

CBY sought and obtained permission to supplement the record with the testimony of Sergeant Cox. AAT seeks the opportunity to do the same with the recent testimony from the other witnesses.

It is obvious that the evidence on the subject is still being developed. Chief Nichols' testimony was vitally important to CBY's case, but more than that, the jury was allowed to believe that his testimony was accurate, when it was anything but. He testified at trial that he gave Ms. Byler a

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ride at 11:30 am. Not until the telephone records were produced in the federal action months later that revealed th Ms. Byler was still at the police station did CBY's new stor emerge. CBY had no explanation for the obvious inconsistenc between the newly produced phone records and Chief Nichols' testimony until they claimed for the first time in their opposition that the ride happened well after noon. Of cours that new time frame runs contrary to the other facts of the case, including the testimony of Sergeant Cox, Mr. Barton an Mr. McDonald and the declaration of Ms. Girdwood. The jury would have looked at CBY's claims in a very different light it known the truth.

This is much more than an inconsequential event. only direct evidence CBY was able to muster to show notice t AAT was fabricated. This has now been established beyond question by the new evidence revealed in the federal case. Chief Nichols' testimony about a conversation and ride that never happened is not a mere matter of imperfect recollectic Coming as it did from a police chief, one whose credibility carried with it a heavy presumption of veracity, it surely received undue, and in hindsight, inappropriate weight from jury. This was not a fair trial, and that is the point of Civil Rule 60.

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AAT moves the court for reconsideration. It seeks the chance to do further discovery. The CBY computers need to be reviewed and analyzed by an expert to get to the bottom of the story.

Dated at Anchorage, Alaska June 13, 2011.

INGALDSON, MAASSEN &
FITZGERALD, P.C.
Attorneys for Defendants

By: _____
Kevin T. Fitzgerald
ABA No. 8711085

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13 day of June, 20 11, a copy of the foregoing was sent to the following via:

[✓] U.S. Mail, First Class, Postage Prepaid
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City v. Alaskan Adventure
Case 1JU-08-434 CI
Motion



EXC. 300

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

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| The City and Borough of Yakutat,<br><br>Plaintiff,<br><br>vs.<br><br>Alaskan Adventure Tours, Inc.,<br><br>Defendant. | Case No. 1JU-08-434 CI |
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**OPPOSITION TO MOTION FOR ATTORNEY FEES**

Come now Alaskan Adventure Tours, Inc. and Kimberly Riedel-Byler ("Defendants"), by and through counsel, Ingaldson, Maassen & Fitzgerald, P.C., and oppose the motion of the City and Borough of Yakutat ("CBY") for attorney fees.

Defendants have no quarrel with the hours sought nor the rate charged by CBY's counsel. Alaska Rule of

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Civil Procedure 82(b)(2) provides for fees at 30% of actual reasonable fees. CBY seeks actual fees under Civil Rule 82(b)(3)(G) for vexatious or bad faith conduct. CBY complains about actions taken in the related federal case, not by the Defendants, but by the Estate of Jerry Byler, and CBY's small size (population 685). This is not evidence of vexatious or bad faith conduct by these Defendants.

Despite the fact that the court ruled against the Defendants, it is significant to note that the key element of the Rule 60 motion, the veracity of the testimony of Chief Nichols, was seriously undermined by new evidence. Defendants should not be punished for bringing this to the court's attention and seeking relief.

While the court ultimately disagreed with the Defendants regarding the legal import of the evidence, the contentions were made in good faith and were based on substantial evidence that Chief Nichols' testimony was false. The motion was admittedly lengthy, as there was much evidence to be presented to the court to support Defendants' arguments, but was not made for the purposes imputed to Defendants by CBY. Defendants sought the opportunity to obtain a new trial where the jury could hear

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"the rest of the story," and while disappointed with the result, that was the only aim of Defendants' motion.

Dated at Anchorage, Alaska June 15, 2011.

INGALDSON, MAASSEN &
FITZGERALD, P.C.
Attorneys for Defendants

By: _____
Kevin T. Fitzgerald
ABA No. 8711085

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 15 day of June, 2011, a copy of the foregoing was sent to the following via:

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

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

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## CBY'S OPPOSITION TO MOTION FOR RECONSIDERATION

The trial court did not overlook or misconceive material facts, and reconsiderat should be denied.

AAT had itself suggested and continues to suggest that CBY Police Chief Nich testimony was a crucial element or "missing link" in CBY's disproving AAT's defens fraudulent conveyance, that AAT had allegedly lacked any awareness of CBY's tax cl Judge Collins, who presided at the jury trial, correctly referenced numerous C correspondence with the Bylers and other "direct" evidence of AAT's awareness-- CE attorney's testimony as to a telephone conversation with Darren Byler concerning the t owed by AAT, supported by AAT's own telephone billing records documenting Mr. By call to her.

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Most importantly, relief from a judgment under Rule 60(b)(3) for alleged "fraud or misconduct", including alleged perjury, is granted only where it is demonstrated by clear and convincing evidence that the innocent party was thereby prevented from "fully and fairly presenting his or her case". Moore's Federal Practice (3rd Ed. 2003) at §60.43 [1][c], p.60-132 As Judge Collins' June 1 Order points out, the Bylers were fully aware of the substance of Chief Nichol's testimony many months before trial; in fact, his affidavit as to his conversation with Kimberly Byler regarding CBY taxes owed by AAT was filed 10 months before trial. As the Order states, the factual questions AAT now raises, one full year after a jury verdict and judgment, could have been examined in discovery or at trial. Moore's Federal Practice, It notes that

> [T]he very purpose of a trial is to test the truthfulness of testimony and other evidence proffered by the parties. Examining the possibility that testimony is perjurious is one of the principal functions of cross-examination.... Therefore, once the trial process has been completed, the resulting judgment should be given as much finality as possible [citation omitted.] Rule 60(b) should not reward the lazy litigant who did not adequately investigate his or her case, or who did not vigorously cross-examine a witness.
>
> Therefore, when the claim of perjury at trial is raised under Rule 60(b)(3), relief is granted only when it is also shown that the perjury at trial somehow prevented the innocent party from fully and fairly presenting his or her case. Relief has been denied in cases in which the moving party had ample opportunity to uncover the alleged fraud or perjury at trial through cross-examination.

Lack of such a showing by AAT was the central basis for the Order denying reconsideration; neither AAT's motion for relief from judgment nor its motion for reconsideration addresses this point.

Instead, AAT advances a bevy of shoestring factual assertions based upon evidence could have discovered and advanced at trial, along with its current conspiracy theory arguments. These supply no basis for concluding that an experienced senior police of

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recklessly jeopardized his career by committing perjury or altering evidence. AAT's speculative and erroneous arguments are largely based upon discovery most recently performed by the Estate of Jerry Byler, in a wrongful death action in federal court in which AAT is the nominal defendant, working cooperatively with the plaintiff Estate which pursued discovery of the alleged "fraud". AAT's new "evidence" is addressed as follows:

(1) Allegation: Barton testified that Chief Nichols downloaded 100 of his photos, bu Nichols said he downloaded only 4 photos. In fact, Barton testified that there were probably a least 100 photos in his camera but that he did not know how many pictures Chief Nicho downloaded; his recollection was that the Chief just picked out certain pictures, and that he w mainly interested only in the pictures of the boats. See excerpt from Brian Barton depositi dated May 17, 2011 pp. 39-40, Exhibit 1 hereto.

(2) Allegation: The Barton interview ended a half hour before his photos w downloaded onto the CBY computer, though the interview transcript indicates the photos w downloaded during the interview. Not true. The transcript shows that Barton discussed the b pictures with the Chief during the interview and offered to take the chip out of his camera that he Chief could download the pictures, but that the downloading was not done during interview;[1] in fact the pictures were downloaded after completion of the recorded interview.

(3) Allegation: Chief Nichols could not have picked up Sergeant Cox at the airpo he was downloading photos at 11:59 a.m. Sergeant Cox's flight arrived in Yakutat at 1 a.m., but he did not see Chief Nichols until he met him in the airport parking lot sometime l This is not inconsistent with the Chief downloading a few photos at the police station at 1 a.m. and then traveling 5 minutes to the airport to pick up Sergeant Cox.

(4) Allegation: AAT could not rebut CBY's IT contractor Matthew Joy's an

[1] See Exhibit 2 hereto, which was Exhibit 4 to defendant's April 7, 2011 Reply Memorandum.

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demonstrating the audio recordings were not altered, because AAT did not have access to CBY's hard dives. In the federal action, Magistrate Roberts found to be "credible" Mr. Joy's thorough and detailed analysis ruling out any assertions that the audio files had been altered o edited; he also found that CBY's unwillingness to turn over original police computer hard drive to AAT, without certain protective safeguards in place, was justified.[2] Magistrate Robert further found, in advance of Judge Collins' ruling, that "...there is little chance the plaintiff i the State case will find evidence that Chief Nichols either altered the audio recordings perjured himself...."[3]

(5) Allegation: Barton testified that it was 15-20 minutes after they arrived at t police station before Ms. Byler was interviewed, inconsistent with the timeline of the intervi transcript. In fact, the interview transcripts show a 4 minute gap between the end of the fi recording and the start of second, and the audio recording demonstrates that the first record continued recording for many minutes after the Chief actually completed his conversation v Ms. Byler upon her arrival at the station. Barton's initial testimony regarding the time gap "not very long", "probably 5 to 10 minutes",[4] easily consistent with the gap between arriv the station in the first recording and commencement of the second interview, at the station.

(6) Allegation: MacDonald testified that his interview by the trooper was recor but no recording exists. True; CBY also wanted the recording, but State Trooper Cox test that his recorder did not have batteries at the time. CBY was not responsible for this.

(7) Allegation: MacDonald testified that he saw Kimberly Byler still 1

[2] See excerpt from United States District Order dated May 31, 2011, in Estate of Jerry L. Byler v. Alaskan Leader and Alaskan Adventure Tours, Inc., Case No. 3:10-CV-00055-HRH-JDR, Exhibit hereto. CBY furnished full copies of the audio files on computers to Darren Byler's counsel, author inspection of the entire hard drive, but would not turn over possession of originals of hard drives, w contained sensitive information regarding other open police cases and juveniles.

[3] Id., at p.10

[4] Barton deposition transcript, Exhibit 1 hereto at p.48.

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interviewed by Chief Nichols when he arrived at the station in the afternoon. MacDonald's 2011 deposition testimony to this effect was completely discredited by his prior testimony at the Juneau jury trial in February, 2010, in which, according to defendant's own transcript, MacDonald testified that Kimberly Byler was interviewed by the State Trooper only, and not by Chief Nichols, who MacDonald did not even see in the interview room; MacDonald verified a trial that he knew the difference between the State Trooper and CBY police uniforms.[5]

There is no "clear and convincing" evidence of fraud and misconduct; there is n showing that defendant was deprived of an opportunity to fully and fairly present its case to th jury, and defendant's latest round of speculations is too little, too late. Reconsideration shou be denied.

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

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

James T. Brennan, ABA No. 7610080

CERTIFICATE OF SERVICE
I hereby certify that on this 28th day of June, 2011 a copy of the foregoing was served via Facsimile:

KevinFitzgerald
Ingaldson, Maassen & Fitzgerald, P.C.
813 W. 3rd Avenue
Anchorage, Alaska 99501

Caitlyn Gries

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[5] Transcript of testimony of Edward MacDonald of February 9, 2010, at p.8, Exhibit 4 hereto.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

| | |
|---|---|
| THE CITY AND BOROUGH OF YAKUTAT,<br><br>Plaintiff(s),<br><br>vs.<br><br>ALASKA ADVENTURE TOURS, INC.,<br><br>Defendant(s). | ) |
| THE CITY AND BOROUGH OF YAKUTAT,<br><br>Supplemental Complaint Plaintiff,<br><br>vs.<br><br>ABC Leasing, LLC and KIMBERLY RIEDEL-BYLER, aka KIMBERLY C. RIEDEL, K. CHRISTINA RIEDEL AND/OR KIMBERLY BYLER,<br><br>Supplemental Complaint Defendant. | ) |

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SEP 6 2011
File No. 2044-3 Cal:
Approved for File:

Case No. 1JU-08-434 CI

## ORDER DENYING RECONSIDERATION

This matter came before the court on Alaska Adventure Tours, Inc.'s (AAT) motion for reconsideration under Civil Rule 77(k). AAT asserts that Judge Collins "overlooked some material facts" in denying AAT's motion for relief from the jury verdict pursuant to Civil Rule 60(b)(3), fraud.

Summary judgment was granted in this case on December 2, 2008. A judgment foreclosing the tax lien on AAT's property was ordered. In February of 2010 a jury trial was held. The City

and Borough of Yakutat (CBY) alleged Alaska Adventure Tours, Inc. (AAT) had engaged in fraudulent conveyances to avoid the judgment. The jury found for CBY.

On May 18, 2010, ATT filed a Civil Rule 60(b) motion seeking relief from the judgment. Judge Collins ruled on June 1, 2010, making findings that the allegations of AAT were not a "crucial element" or "missing link," when viewed in the light of all the evidence presented at trial. Judge Collins's findings support the conclusion that AAT failed to meet the burden of establishing by clear and convincing evidence that the verdict was obtained through fraud.

The motion for reconsideration is an attempt to bolster the Civil Rule 60(b) motion with more assertions by AAT. It fails to set forth with specificity what material fact the court overlooked in the evidence that was presented in support of the Civil Rule 60(b) motion. AAT continues to assert that because they now have further information to conduct cross examination of a trial witness, it constitutes a fraudulent verdict. As Judge Collins found, the new material for cross examination of Chief Nichols does not come close to clear and convincing evidence of fraud when viewed through the lens of the other overwhelming evidence of AAT's actual notice of the CBY lien, which was presented at trial.

This court has considered the motion for reconsideration and denies it on two grounds:

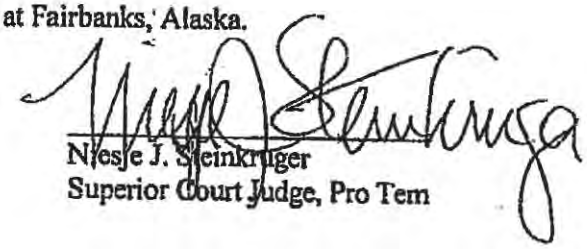
(1) It is denied procedurally in that it seeks to augment arguments which relate to the already ruled on Civil Rule 60(b) motion and reconsideration is "not to be used as a means to seek an extension of time for the presentation of additional evidence on the merits of the claim." *Neal & Co., v. Association of Village Council Presidents*, 895 P.2d 506 (Alaska 1995).

(2) It is denied on the merits in that the undersigned has reviewed this matter, including the 60(b) motion pleadings. The court finds that even if the alleged "new evidence" is considered,

the plaintiff has not established by clear and convincing evidence that the verdict was obtained by fraud.

The motion for reconsideration is DENIED.

Dated this 31 day of August, 2011, at Fairbanks, Alaska.



Niesje J. Steinkruger
Superior Court Judge, Pro Tem

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

| | |
|---|---|
| THE CITY AND BOROUGH OF YAKUTAT,<br><br>Plaintiff(s),<br><br>vs.<br><br>ALASKA ADVENTURE TOURS, INC.,<br><br>Defendant(s). | ) |
| THE CITY AND BOROUGH OF YAKUTAT,<br><br>Supplemental Complaint Plaintiff,<br><br>vs.<br><br>ABC Leasing, LLC and KIMBERLY RIEDEL-BYLER, aka KIMBERLY C. RIEDEL, K. CHRISTINA RIEDEL AND/OR KIMBERLY BYLER,<br><br>Supplemental Complaint Defendant. | ) |

Case No. 1JU-08-434 CI

Ingaldson, Maassen & Fitzgerald, PC

SEP 6 2011

File No. 2044-3

Approved for File:

**ORDER GRANTING ATTORNEY'S FEES**

The City and Borough of Yakutat (CBY) has filed a motion for attorney's fees as the prevailing party to Alaska Adventure Tours, Inc.'s motion for relief from judgment (Rule 60(b)(3)).

This court finds that CBY is the prevailing party and awards attorney's fees.

This court finds that it is a very close question as to whether attorney fees higher than Civil Rule 82 allows should be awarded to CBY. Under Civil Rule 82(b)(3) this court finds that the motion for relief from judgment was complex in that it contained numerous assertions by AAT

regarding the evidence. The court further finds that the claims of AAT are not reasonable given Alaska law regarding Civil Rule 60(b) and the evidence presented at trial. The claims AAT made in the motion for relief from judgment are the kind made in hindsight by litigants when they lose. Litigants may look back at a trial and in hindsight see areas where additional information, sought out and found after the trial, might have been relevant. However, under Alaska law the late sought information must rise to a high standard to constitute fraud such that a jury verdict will be overturned. AAT's assertions should have been measured against Alaska law in deciding to bring the motion. Certainly AAT has the right to bring the motion for relief from judgment but, in doing so they run the risk that Rule 82 variations will be applied when the reasonableness of the claim is considered.

CBY incurred attorney's fees of $8,695.50 in opposing AAT's motion for relief from judgment. Application of Rule 82(b)(2) would grant 20 percent or $1,739.10. This court finds, given the above factors, that an enhanced attorney fee award of 50 percent is appropriate in this matter. Therefore,

IT IS HEREBY ORDERED that CBY is awarded attorney's fees of $4,347.75.

Dated this 31 day of August, 2011, at Fairbanks, Alaska.

Niesje J. Steinkruger
Superior Court Judge, Pro Tem

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1 Q And whose investigation was that?
2 A We did a preliminary investigation due to the fact that
3 the Alaska State Troopers are not stationed in Yakutat.
4 They were coming in from Juneau. That plane did not
5 arrive until around noon. Ms. Bylers and the body
6 arrived in Yakutat prior to the troopers so we did a
7 preliminary investigation on behalf of the troopers.
8 Q And by we, you mean who?
9 A Yakutat Department of Public Safety.
10 Q All right. And what did that investigation consist of,
11 your participation in it?
12 A We -- I interviewed Ms. Bylers and then interviewed an
13 employee of the company who was an assistant guide and
14 then also we are the ones that actually prepared the --
15 the transportation of Jerry Bylers' body out to the
16 airport.
17 Q Where did your interview of Kimberly Byler occur?
18 A That happened at the Yakutat Department of Public Safety.
19 Q And how did she get there?
20 A I had picked her up at Yakutat Coastal and gave her a
21 ride into the station.
22 Q What is Yakutat Coastal?
23 A It's an airlines. They're a small airlines.
24 Q All right. And so you interviewed her at your station?
25 A At the station, yes, I did.

1 Q All right. And what happened after the in -- your
2 interview was completed?
3 A After the interview, Ms. Bylers wanted to go out to the
4 airport because -- to make arrangements to have the body
5 transported of the deceased so I gave her a ride out to
6 the airport.
7 Q In the police car?
8 A Yes, I did.
9 Q All right. Did you have occasion to have any
10 conversation with her during that ride back to the
11 airport?
12 A Yes, I did.
13 Q And was there any time during that conversation that the
14 subject of Yakutat sales taxes and her company, Alaskan
15 Adventure Tours, came up?
16 A Yes, it did.
17 Q How did that subject come up?
18 A Ms. Byers was upset due to the fact that -- she made
19 comments about the people of Yakutat not liking them or
20 their business and at which time when that conversation
21 came up, I mentioned the thing about the sales tax owed.
22 Q And what was it that you mentioned?
23 A I asked Ms. Bylers at that time about the sales tax that
24 they owed the City and Borough of Yakutat.
25 Q And what was her response?

1 A Her response was they were -- they weren't responsible to
2 pay that and, if necessary, the City could sue them.
3 Q I'm sorry, that last part was what?
4 A And the City could sue them.
5 Q All right. She indicated that the City could sue them
6 under what circumstances?
7 A For the sales tax.
8 Q All right. And, by her res -- were you able to determine
9 whether she seemed surprised at all when you indicated
10 that -- let me re-state that question. Was she surprised
11 when you brought the subject up of sales taxes?
12 MR. FITZGERALD: Objection, this is speculation,
13 foundation.
14 THE COURT: You can describe her demeanor, in other words,
15 what she looked like.
16 A Sure. Normal -- I mean, when I mentioned that, there
17 wasn't a thing of surprise or -- or -- or denial or
18 anything like that or her facial features, body just kind
19 of took the comment and -- and went on with it.
20 Q And I -- were you aware at the time that AAT owed sales
21 taxes to the borough?
22 A Yes, I was.
23 Q How were you aware of that?
24 A I had conversations with the city manager, Frank Ryman,
25 about that.

1 Q Yes.
2 A Yeah.
3 Q Okay.
4 A Mis -- Mr. Brennan informed me that -- that that was
5 given to you.
6 Q Okay. And this is the death investigation report that
7 was conducted on May 15th?
8 A Yes, that's correct.
9 Q Okay. And there is references with regard to tapes,
10 taped interviews of Ms. Byler and other folks?
11 A That's correct.
12 Q Okay. And were you told at all with regard to a request
13 for the tape?
14 A Regarding the tapes? No. The report, I was told.
15 Q And did you bring the tapes?
16 A Do -- yes, I have a copy on a CD, yes.
17 Q Okay. And those you brought with you today?
18 A Yes, that's correct.
19 Q Okay. The -- and you prepared a report on May 15th, is
20 that right?
21 A That is correct.
22 Q And when was the report actually prepared? There -- the
23 events that are described in the report are May 14th and
24 May 15th but when was the report actually.....
25 A Oh, it would have been shortly done the same day, either

1 the 15th or 16th given the circumstances involved.
2 Q Okay. And if there's a date indicated down at the bottom
3 of May 16th, '07, that would serve to reflect that that
4 was the date of the.....
5 A That could be the day at the -- the time where the report
6 was finally done. That doesn't mean that -- you can have
7 a draft report and start on the report but when you're
8 actually going to go through the report, you'll see a
9 date on there when it's finally done.
10 Q Now, in your report, you indicated that you picked up Ms.
11 Byler at the Yakutat Coastal, is that right?
12 A That's correct.
13 Q And you indicated that you -- while the transport was
14 occurring, that you interviewed Ms. Byler and you taped
15 that interview.
16 A It was not an -- an -- sensitive interview. It was a
17 contact but, yes, during the transport from the station
18 to that, there was discussion between Ms. Byler and I.
19 Q That was taped?
20 A That was taped.
21 Q Okay. And then you conducted an interview with her at
22 the station?
23 A That is correct.
24 Q And that was taped as well?
25 A That is correct.

1 Q And that's what you brought, the.....
2 A That's -- that's what's on the CD, yes.
3 Q Okay. And then you conducted a tape of a gentleman by
4 the name of Brian Luke Barton?
5 A Yes.
6 Q Okay. And that was your understanding with regard to
7 Brian Luke Barton's relationship with AAT or the Bylers?
8 A He was -- he was an assistant guide with the company.
9 Q In your direct examination, you indicated that there was
10 actually two employees who were flown in. Who was the
11 other employee?
12 A I don't recall the name of that employee. I'm sorry.
13 Q Okay.
14 A It was -- actually, I think there was also a female too.
15 Q Okay.
16 A There was -- there was another male and another female
17 that both worked for Ms. Bylers.
18 Q That came to the station?
19 A Later on, they came to the station, yeah, but at that
20 time, Ms. Bylers, I gave her a ride and Officer Gordon, I
21 believe, gave Brian a ride -- Brian.
22 Q I'm sorry?
23 A Brian. The assistant guide.
24 Q Mr. Barton?
25 A Mr. Barton.

1 Q Okay. And the other two employees were -- they're -- you
2 took some photocopies, did you not?
3 A There's photocopies of their driver's licenses.
4 Q Okay. And those other two individuals are Pamela
5 Girdwood, is that right?
6 A That sounds familiar.
7 Q Okay. And the -- these are copies of the driver's
8 licenses in your police report?
9 A Yes.
10 Q Okay. Or in death investigation report?
11 A Or death investigation, yes.
12 Q Sure. And Pamela Girdwood, what was your understanding
13 with regarding to Ms. Girdwood?
14 A I don't know, I did not interview Ms. Girdwood.
15 Q Okay. And how about -- how is it that you got the
16 license then or a photocopy of the li.....
17 A Because they were there and the Alaska State Troopers
18 were going to come out and I -- I would assume that if
19 you refer to the Alaska State Troopers investigation,
20 you'll see that they interviewed those individuals. We
21 did not.
22 Q And then there was another individual by the name of
23 Edward James McDonald?
24 A I believe so.
25 Q Okay. And that was another employee, is that right?

1 A That is my understanding, yes.
2 Q And you indicated that after you interviewed Ms. Byler
3 and Mr. Barton, you then transported Ms. Byler to the
4 airport?
5 A Back out to Alaska Airlines, yes.
6 Q Okay. And Mr. Barton went with you, didn't he?
7 A No, he did not.
8 Q Okay. Where did Mr. Barton go?
9 A I'm not sure. He wasn't with me when I transported Ms.
10 Bylers at -- back out to the airport.
11 Q Okay. With regard to -- and you'd submitted a -- an
12 affidavit, as we made some reference, dated March 27,
13 2009, right?
14 A That is correct.
15 Q And you indicated that you had had a conversation with
16 Ms. Riedel-Byler back from the station to the airport.
17 A That is correct.
18 Q And that's the one you've described here today about the
19 -- where there was some discussion about taxes, is that
20 right?
21 A That is correct.
22 Q Okay. And that wasn't taped, was it?
23 A No, it -- no, it wasn't. That was not taped, no, it
24 wasn't.
25 Q Okay. And why wasn't that one taped versus the one --

1 the transport to the station as well as the station?
2 A The reason was is when you make first contact with Ms.
3 Bylers, there's going to possibly be some -- some
4 information that she was going to give me or we're going
5 to discuss which I feel is very important. That was a
6 contact tape which you look at the report, it'll say a
7 contact tape. When we go back to the station, we conduct
8 the formal interview of Ms. Bylers which needs to be
9 recorded and so on. Then I conducted a -- a taped
10 interview with Mr. Barton which needed to be a recording.
11 At that time, the interview's over, the investigation's
12 over, it's the Alaska State Troopers. So there's really
13 no need for me tc tape my conversation or -- or my
14 contact with Ms. Bylers back to the airport for her to
15 make arrangements for the transport of -- of Jerry Lee
16 Bylers and that is why I did not tape record that.
17 Q Well, when you first picked her up at Yakutat Coastal,
18 she was emotional, was she not?
19 A She was emotional, yes.
20 Q Okay. And you've described that particular contact in
21 the report that is provided, right?
22 A That is correct.
23 Q And there isn't anything in your -- it's fair to say and
24 I'm happy to provide you a copy of your report. There's
25 nothing in your report about any conversation with Ms.

1 Byler on the way back to the airport, is there?
2 A No, there's not.
3 Q And so the first time that there's any indication with
4 regard to this conversation that you had with Ms. Byler
5 is March 27, 2009?
6 A Yes.
7 Q And that would have been what, something -- almost two
8 years after the incident?
9 A That is correct.
10 Q And with regard to that transport, sir, isn't it true
11 that Mr. McDonald, Eddie McDonald, actually gave Ms.
12 Byler a ride to -- first of all, he had a rented van and
13 took them to a bed and breakfast?
14 A I don't -- I don't know an Eddie McDonald.
15 Q Well, I thought you did, sir, because you took a
16 photograph of.....
17 A Yeah, they took copies at the station. I never talked
18 with Mr. McDonald.
19 Q Okay. Well, you have a copy of his license, correct?
20 A That is correct.
21 Q Okay. And did you take that photo or did somebody else?
22 A It had to be somebody else.
23 Q Well, isn't it true, sir, that Mr. McDonald rented a van,
24 took Ms. Byler and the other two employees to a bed and
25 breakfast and then dropped her off at the airport? Isn't

1 that the way it happened?
2 A That is not correct.
3 Q You agree though, sir, that this conversation that you
4 say happened with Ms. Byler on the way back to the
5 airport was never recorded in your death investigation
6 report, is that right?
7 A That is correct, is was not recorded.
8 Q And your death investigation report was prepared on or
9 about May 16, 2007, right?
10 A That is correct.
11 Q So it would have been prepared after this conversation
12 you say occurred between you and Ms. Byler on the way
13 back to the airport?
14 A The final version of that report would have been done
15 about that time, yes, that's correct.
16 Q I've got no further questions.
17 THE COURT: Any redirect?
18 MR. BRENNAN: Just a few, Mr. Nichols.
19 JOHN S. NICHOLS
20 testified as follows on:
21 REDIRECT EXAMINATION
22 BY MR. BRENNAN:
23 Q Chief Nichols, you were asked about whether you had a
24 conversation with Mr. Ryman. Did you have a conversation
25 with Mr. Ryman following your interview or your

1 bank.....

2 A Mm-hmm.

3 Q .....you withdrew all the money and then you say you paid

4 the bills yourself?

5 A Well, yeah, I was going to -- I withdrew it in November

6 but December rolled around and there was a bunch of bills

7 so I paid them. This -- this company had huge bills. I

8 don't know if you've looked at what our repair or our

9 fuel or food -- grocery but it's got big bills.

10 Q When did you set up ABC Leasing, LLC and Alaskan Leader

11 Tours, LLC?

12 A November 16th, 2007 is when I met with Frank Nosek to

13 talk about opening up Alaskan Leader tours and -- and

14 that's when Frank discussed with me the appropriate way

15 -- way -- business models to use and he had told me that

16 when I had set up Alaskan Adventure Tours, I had set it

17 up not according to the standard business model and

18 that's when he suggested opening up ABC as a holding

19 company and Alaskan Leader Tours as my bear viewing

20 company.

21 Q And the business plan he was proposing to you anticipated

22 that AAT would transfer assets directly to ABC Leasing

23 instead of through you individually, correct?

24 A No, that's not correct.

25 Q Have you reviewed the business plan which, apparently,

1 A The intent was to get out of bear hunting becau -- I
2 couldn't use Alaskan Adventure Tours' name for anything
3 but bear hunting. It was so tied to bear hunting and I
4 wanted to go into bear viewing and eco tourism. That --
5 that's what happened.
6 Q Was the intent also to get out from under threatened
7 claims against AAT?
8 A No, there was no threatening claims. I lost my father-
9 in-law in May. It was a terrible, horrible season. It
10 was -- it was a terrible loss and life needed to be a lot
11 easier. We wanted to do eco sightseeing and bear
12 viewing, things that people appreciated. Hunters didn't
13 appreciate what they were killing. They were always
14 worried about it being big enough or.....
15 Q So it was a voluntary choice to get out of the hunting,
16 guiding business?
17 A Yeah, for me. I -- I didn't want to do that anymore, I
18 wanted a new company that had -- could go into bear
19 viewing that wasn't tied -- you can't do bear viewing
20 with a company that's been out killing bears.
21 Q Wasn't there.....
22 A People wouldn't like it.
23 Q Wasn't there.....
24 MR. FITZGERALD: Objection. Judge, can we approach?
25 THE COURT: Well, let's take a break. We'll reconvene at

1 A Yes.
2 Q Sometime in December?
3 A Correct.
4 Q Had you already met with Mr. Nosek by that time?
5 A Yeah, I met with him on November 16th.
6 Q Was the meeting with Mr. Nosek and the idea to form these
7 companies and go in a new direction, was that
8 precipitated, motivated in any way whatsoever with regard
9 to seeing a tax lien -- well, it couldn't have been,
10 right?
11 A No, it wasn't motivated by that. I was already by the
12 start of 2007 season disenchanted with how everything was
13 going and after Jerry's death and -- and came to -- to
14 finish out the season, I -- I was -- already started
15 playing with different ideas of what can I do, how can I
16 get a different business going, you know, where can I go
17 from here because I'm done with this, I don't like it
18 anymore, it's not fun.
19 Q But by the time you met with Mr. Nosek, the tax lien
20 hadn't even been filed?
21 A No, it hadn't been filed. I think it was like
22 December 20th or something.
23 MR. FITZGERALD: No further questions.
24 THE COURT: Redirect?
25 MR. BRENNAN: Thank you.

1 of our crew there and equipment. I actually didn't
2 retrieve it, Darren did.
3 Q I want to talk to you a little bit about May 15, 2007
4 when you went into the City of Yakutat after Jerry
5 Byler's death.
6 A Okay.
7 Q Did you -- you heard John Nichols's testimony about
8 picking you up at the airport? Do you recall that?
9 A Yes.
10 Q And why don't you tell us from there what happened?
11 A Picked up at the airport. I was told when we made the --
12 the death report to the Coast Guard -- the troopers were
13 also notified and was told that a trooper report had to
14 be filed on his accidental death and that would occur
15 when we got into Yakutat. Got into Yakutat, was met at
16 the airport by the, I think, city police. I didn't know
17 who they were. Chief Nichols, I guess, is who I -- he
18 identified himself as. Went to the police station.
19 Myself, one of the guides, Luke Barton, made the
20 interviews. He said we had -- needed to be interviewed.
21 Luke went first is the best of my recollection and then I
22 went. My -- it was taped.
23 Q Let me ask you about the taping. Were you aware until
24 this trial that you had been taped on the way from the
25 airport to the station?

1 A No, I had no idea I was being taped.
2 Q And how did you find that out?
3 A I found it out here when -- found out that the -- it had
4 been taped.
5 Q Okay. Were you aware that it'd been requested and
6 produced during the trial?
7 A Yes.
8 Q And once you were at the station, you were interviewed?
9 A Correct.
10 Q And you knew you were being recorded at that point?
11 A Yeah, he asked permission to record me. He says, you
12 know, may I -- may I record this and I said no, go ahead,
13 I don't see why not, go ahead.
14 Q And then what happened after that interview?
15 A Well, after that interview, I waited in the lobby with
16 Luke and by that time, Eddie and Pam had arrived and they
17 went back and were interviewed and I was -- they -- the
18 police station let me use their phone to call Juneau to
19 make arrangements to have a mortuary receive Jerry's body
20 to send it back home.
21 Q And then after making those arrangements, what happened?
22 A Well, we all waited together and after everybody was done
23 interviewing, Eddie had -- had rented a van, apparently,
24 when he came in so he had a van downstairs and I offered
25 to take everybody to lunch and I took them to lunch and

1 by that time, it was getting towards the flight out to
2 Juneau time and they took me to the airport and that was
3 -- that was it, I got on a flight for Juneau.
4 Q What airline did you leave on?
5 A Alaska Airlines.
6 Q Okay. You were here when Chief Nichols testified that he
7 had given you a ride to the airport during which there
8 had been some conversation between you and he about
9 taxes. Do you remember hearing that?
10 A I heard that.
11 Q And was that truthful or a false testimony?
12 A It was a lie.
13 Q Is there any doubt in your mind about the events that you
14 have described that you were involved in.....
15 A No, I have.....
16 Q .....as far as how you got to the airport?
17 A I have no doubt. I can't understand why he would lie in
18 a position of a police officer.
19 Q The fall season, did you receive any mail from Seward
20 while you were out in Icy Bay?
21 A Fall season? We got out there August -- I'm not sure the
22 exact date but we left August 16th, I think, from Seward
23 so it had been maybe a day to get down there, day and a
24 half, and from that point until we got back to Seward
25 November 13th, I didn't get any mail.

1 Q And is this 2000 -- exhibit A, is this your 2008 return?
2 A Exhibit AA?
3 Q Yes.
4 A Yes.
5 MR. FITZGERALD: Move on AA, Judge.
6 THE COURT: Any objection?
7 MR. BRENNAN: No.
8 THE COURT: AA's admitted.
9 (Defendants' exhibit AA admitted)
10 Q And, finally, Ms. Byler, in forming ABC and Alaskan
11 Leader Tours, LLC, did the formation of that have
12 anything to do with any existing or expectation that you
13 had some sales obligation or other liabilities?
14 A No. I wanted to get away from the hunting.
15 Q With regard to -- there was one liability on the ALASKA
16 ADVENTURE, wasn't there?
17 A Yeah, there was a -- a -- a note with First National.
18 Q Okay. Besides that, were you aware of any encumbrances
19 or liens against any of the vessels?
20 A No, everything else was clear.
21 Q And with regard to the ALASKA ADVENTURE, that was sold in
22 February of '08?
23 A Yes.
24 Q And when that was sold, was the note to First National
25 Bank paid off?

1 BY MR. BRENNAN:
2 Q Chief Nichols, this is Jim Brennan, and you recall
3 testifying here in court the other day about the
4 circumstances in which you interviewed Kimberly Byler
5 while you returned her to the airport following your
6 interview at the police station, is that right?
7 A I do.
8 Q All right. And, sir, do you stand by that testimony?
9 A Yes, I do.
10 Q When did you pick -- do you -- have you checked your
11 records to see what the timing was on May 15, 2007 when
12 you picked up Ms. Byler at the airport?
13 A Yeah, that was at -- that was at 1031 hours.
14 Q 10:31 a.m.?
15 A That is correct.
16 Q All right. And you picked her up at the airport after
17 she had flown in from Icy Bay, is that correct?
18 A That is correct.
19 Q All right. And did you anticipate doing an interview of
20 her at that time?
21 A Yes.
22 Q All right. Were you expecting the Alaska State Trooper
23 sergeant to come in sometime that day to continue the
24 investigation?
25 A Yes, Sergeant Cox from the Alaska State Troopers would be

1 flying in on Flight 61 Alaska Airlines.

2 Q And was Sergeant Cox of the troopers in Yakutat at the

3 time you picked up Kimberly Byler at the airport?

4 A No, he was not.

5 Q And what did you do then after you picked up Ms. Byler at

6 the airport?

7 A I transported Ms. Bylers to the Yakutat Department of

8 Public Safety.

9 Q All right. And what did you do there?

10 A I conducted a taped interview with Ms. Bylers.

11 Q When did -- do you have records indicating when that

12 interview ended?

13 A That interview ended at 10:51 hours and it was

14 approximately 19 minutes long.

15 Q You say it ended at 10:51?

16 A I mean, correction, no, it -- correction. Correction, it

17 ended at 1110 hours and it was approximately 1951.

18 Q 1951 meaning what?

19 THE COURT: No, 19 minutes.

20 A Nineteen minutes long.

21 THE COURT: Oh, sorry.

22 Q Nineteen minutes and 51 seconds long so it ended at 11:10

23 though, is that correct?

24 A No, it.....

25 Q All right. And.....

1 A No, no, no. Sir, what -- what happened, I started --
2 stopped the tape at 11:10 a.m. The interview was
3 approximately 19 minutes long.
4 Q Okay. So it ended at 11:10 a.m., is that correct?
5 A That is correct.
6 Q All right. And what did you do next?
7 A Shortly after that, I interviewed Brian Barton.
8 Q When did that interview start?
9 A That interview started at 11:15 and ended at 11:26.
10 Q 11:26 it ended?
11 A Yup.
12 Q Is that correct?
13 A That is correct.
14 Q All right. And Mr. Barton, who was he?
15 A He was an assistant guide with the Bylers' company.
16 Q All right. And after that interview with Mr. Barton
17 ended at 11:26, what did you do next?
18 A Then I gave Ms. Bylers a ride out to the airport.
19 Q How long does it take to drive to the airport?
20 A From the public safety building, approximately five
21 minutes.
22 Q Okay. And was it during that drive that you had your
23 conversation with Ms. Byler that you testified to
24 regarding taxes?
25 A That is correct.

1 Q All right. And did you deliver Ms. Byler to the airport?
2 A Yes, I did.
3 Q All right. Was the deceased's body still at the airport?
4 A No, it wasn't because that was transported by Officer
5 Gordon.
6 Q Was -- I'm sorry, transported.....
7 A By Officer Gordon.
8 Q Oh.
9 A She actually transported the body.
10 Q Okay. And had Sergeant Cox of the Alaska State Troopers
11 arrived yet at the airport when you delivered Ms. Byler
12 back to the airport?
13 A Yes, when I was out at the airport, actually, Sergeant
14 Cox from Alaska State Troopers had just arrived.
15 Q He had just arrived? I'm sorry, we're having trouble
16 hearing you.
17 A I'm sorry, had just arrived, yes, in Yakutat.
18 Q All right. And did you go back -- where did -- what did
19 you do next?
20 A Shortly after that, I -- I returned to the station. I
21 returned to town. I can't honestly say if I went
22 directly to the station but I left the airport.
23 Q Did you at some point go back to the station during that
24 day?
25 A Yes, I did.

1 Q All right. And did you have occasion to see Sergeant Cox
2 there?
3 A Yes, I did see Sergeant Cox at the station.
4 Q So Sergeant Cox of the troopers, was he using your police
5 statement -- station to conduct his investigation?
6 A Yes, he was.
7 Q I'm sorry, your response?
8 A Hello?
9 MR. BRENNAN: I've got a delay here.
10 A Yes.
11 Q And did you see Ms. Byler at the station again?
12 A Yes, I did.
13 Q All right. So you had -- let -- just to recap, am I
14 correct that you had picked her up at the airport,
15 transported her into the station, interviewed her in the
16 station and when you were completed with that,
17 redelivered her to the airport at which time you saw
18 Sergeant Cox of the troopers had arrived and then
19 sometime later back at your station, you saw Ms. Byler
20 and Sergeant Cox there?
21 A Yeah, the only thing changed in that is right after I
22 interviewed her, I actually interviewed Brian Barton
23 first and then I gave Ms. Bylers a ride out to the
24 airport.
25 Q Thank you. Other than that, is my summary correct?

1 A It is correct.

2 Q All right.

3 MR. BRENNAN: No further questions.

4 JOHN S. NICHOLS

5 testified as follows on:

6 CROSS EXAMINATION

7 BY MR. FITZGERALD:

8 Q Chief Nichols, this is Kevin Fitzgerald.

9 A Yes.

10 Q This conversation that you said that you had with Ms.

11 Byler on the way back to the airport, this was the one

12 that isn't in your case report, is that right?

13 A That is correct.

14 Q And there's no tape of it, right?

15 A There's no tape on it, no.

16 Q Even though there's a tape of your initial contact with

17 her in the ride to the -- from the airport to the station

18 as well as at the station, is that right?

19 A That is correct.

20 Q Now, you interviewed Mr. Barton?

21 A Yes, I did.

22 Q And you also saw, did you not, Pam Girdwood and Eddie

23 McDonald, correct?

24 A I -- I believe I saw them at the station but I can't tell

25 you when that was.

1 Q I thought yesterday you testified you weren't sure that
2 you'd ever seen them and couldn't explain why their photo
3 ID's were in the report.
4 A That -- that's why I said I believe I saw them at the
5 station. I wish I could tell you yes for sure but that's
6 what I'm telling you, I believe I may have saw them at
7 the station.
8 Q Well, didn't you testify the other day that you couldn't
9 explain why their ID's were in your report, right?
10 A Well, the -- the reason the ID's were in the report is at
11 one time, they probably gave them to dispatch or somebody
12 made copies of them for the case report but at no time
13 did I interview either one of those.
14 Q No, no, they were interviewed by Trooper Cox, right?
15 A I -- I believe so. I -- I didn't see him interview them
16 so I can't testify that they for sure were interviewed by
17 him.
18 Q You don't know that?
19 A I -- I don't know if they were interviewed by him.
20 Q Didn't.....
21 A I did not see it.
22 Q Didn't -- with regard to the drive to the airport, how
23 long a trip is it from the airport?
24 A It's approximately five minutes.
25 Q And what -- when was the flight that Ms. Byler was going

1 to be taking from Yakutat? When was that going to leave?
2 A If you're talk -- you're talking about the one that was
3 going to be later that evening?
4 Q Is it your testimony that there was a flight leaving
5 later on that evening?
6 A Ye -- well, see, Flight 61 is what Sergeant Cox arrived
7 on and that -- that arrives maybe between 11:30, you
8 know, 12:00 o'clock, depending on the schedule and I
9 can't recall what time it arrived at but the -- the later
10 flight leaves Yakutat -- it's Flight 61 and it usually
11 leaves probably around 5:30 or so.
12 Q And so you were taking Ms. Byler -- according to you, you
13 finished with Ms. Byler at what time?
14 A Her -- her interview stopped at 1110 hours.
15 Q And Mr. Barton was interviewed thereafter?
16 A At 1115 hours.
17 Q And when did his finish?
18 A At 1126. Those CD's that I supplied you have all the
19 times and events on them.
20 Q No, no, and I understand that but I also understand that
21 some of this report, apparently, is incomplete. So what
22 -- you indicated that after 11:26, you transported Ms.
23 Byler to what airport?
24 A It would be the Yakutat airport.
25 Q And your testimony is that you transported her there at

1 what, about 11:30 for a 5:30 p.m. flight?
2 A No, I -- I transported her out there so she could make
3 arrangements to have the body flown because the body had
4 to released there.
5 Q Oh, she'd already made those arrangements at the police
6 station. Did -- were you there when she did that?
7 A No, I was not.
8 Q Okay. So is it your testimony then that you transported
9 Ms. Byler to the Yakutat airport at about 11:30 for a
10 5:30 or 6:00 o'clock flight?
11 A That's the time I transported, yes, somewhere around that
12 time, after 11:30.
13 Q And that's when the flight leaves, right?
14 A No, the -- the flight doesn't leave until like 5:30 or so
15 and it's Flight 61.
16 Q That was my point. That was my point, the flight doesn't
17 leave until something like 5:30, right?
18 A That is correct.
19 MR. FITZGERALD: No further questions.
20 THE COURT: Any redirect?
21 MR. BRENNAN: No.
22 THE COURT: All right. Thank you, sir. We'll go ahead
23 and hang up.
24 A All right. Thank you.
25 THE COURT: Good-bye.

1 THE COURT: Okay.

2 MR. BRENNAN: All right.

3 MR. FITZGERALD: My objection stands, Judge.

4 MR. BRENNAN: All right. So.....

5 THE COURT: Well, I guess -- well, in essence, what's
6 being requested is a supplement to the opposition to your
7 motion and.....

8 MR. BRENNAN: That's fair enough, Your Honor, and we
9 believe that there's good grounds for that. This is a late --
10 or this is late-arriving evidence that's directly relevant to
11 the.....

12 THE COURT: All right. And was the deposition taken in
13 direct response to these claims about this time line?

14 MR. BRENNAN: The deposition was taken by the ally of AAT
15 in this litigation and.....

16 THE COURT: The estate of Jerry Byler?

17 MR. BRENNAN: Yes, that's correct and we were happy that
18 they took the deposition and we participated in it and the
19 evidence that came out of that deposition directly relates to
20 this motion and should be considered. There's no reason not
21 to consider it.

22 THE COURT: I think it -- it's only fair in that Mr.
23 Fitzgerald was not at the deposition that it be -- I think it
24 can come in. I think that the entire -- as much as I don't
25 want to invite reading more pages rather than less, I think

1 that, in fairness, the entire deposition should come in and I
2 will give Mr. Fitzgerald the opportunity to file, you know, a
3 supplemental affidavit to rebut it.....
4 MR. BRENNAN: Fair enough.
5 THE COURT: .....and can you scan that to him perhaps as
6 early as today so that we can have this ready for.....
7 MR. BRENNAN: Yes.
8 THE COURT: .....you know, the record complete within a
9 reasonable time?
10 MR. BRENNAN: Yes.
11 THE COURT: And can you file any -- I guess it would be
12 supplemental supplemental response to the Cox deposition, Mr.
13 Fitzgerald, within say a week?
14 MR. FITZGERALD: Yes, Judge, I'll file a reply within a
15 week.
16 MR. BRENNAN: Just so I can be clear on this.....
17 THE COURT: Just so we're clear on that, why don't I look
18 for a reply then on the -- no later than the 20th. That's
19 actually more than a week.
20 MR. BRENNAN: Is Your Honor looking for briefing or a
21 reply affidavit?
22 THE COURT: I'm assuming if they want to submit it -- I
23 don't want more briefing.
24 MR. BRENNAN: Okay.
25 THE COURT: So I'm getting sworn testimony from you. I