

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Law Court Docket No. And-25-426

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TAMMY LASKO  
Appellee

v.

ALMIGHTY WASTE, INC.  
Appellant

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On Appeal from the Superior Court, Androscoggin County  
Docket No. AUBSC-CV-2023-48

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**BRIEF OF APPELLANT ALMIGHTY WASTE, INC.**

Jeffrey T. Edwards, Bar No. 0679  
Preti, Flaherty, Beliveau & Pachios, LLP  
One City Center  
P.O. Box 9546  
Portland, ME 04112-9546  
207-791-3000  
jedwards@preti.com

Attorney for Appellant  
Almighty Waste, Inc.

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## FACTUAL AND PROCEDURAL BACKGROUND

In 2018 Tammy Lasko was a passenger in a car that, while stopped at a red light in Lewiston, was hit from behind by a trash truck owned by Almighty Waste. Appendix (“A.”) 11. The impact pushed the car approximately two car lengths into the intersection. *Id.* “The force of the collision caused Ms. Lasko to move forward and then jerk backward inside her vehicle, hitting the headrest. Ms. Lasko experienced instant pain in her neck and a slight headache.” A. 11–12. She was taken to the hospital, where she “was given a physical examination and a neurological examination, both of which were normal.” A. 12. Lasko “complained of neck pain and upper back pain,” and “a headache and tingling in her hands,” and “was diagnosed with a cervical strain and discharged” with instructions to follow up with her primary care provider and an orthopedist. *Id.*

Lasko “was not initially diagnosed with a concussion or a head injury, and she did not report to the emergency room any cognitive issues, light sensitivity, or vertigo,” but she reported that over time “her headache worsened,” and “she began to experience issues with light sensitivity, vertigo, ringing in her ears, concentration issues, and cognitive issues such as the ability to recall common names of household items.” A. 12. Lasko says she has continued to experience issues of this nature, and she

continued to see medical providers about them (A. 13–16), even though “[i]t is unusual for a person to complain of post-concussive symptoms many years later and several doctors noted that a full recovery was expected by this point.” A. 17. The trial court wrote that “[a]t this juncture, it is unclear whether Ms. Lasko is one of the slim percentage of the population that will never recover, because she stopped receiving treatment.” *Id.* (footnote omitted).

In contrast to Ms. Lasko’s treating physicians, Guy Rordorf, M.D., who has an academic appointment at Harvard Medical School (April 15, 2025 Transcript at 190), offered expert testimony that “she did not suffer a concussion from the accident and that her symptoms are not causally connected to the accident[,]” but instead “are the result of Ms. Lasko’s pre-accident neck problems and . . . preexisting underlying arthritis.” A. 18. The Court “afforded [Dr. Rordorf’s] testimony limited weight . . . .” *Id.*

The trial court believed that “Ms. Lasko’s testimony in which she described her symptoms and experiences was highly credible.” A. 18. It came to that conclusion after denying Almighty Waste the opportunity to impeach Lasko with pictures and video of her mowing the lawn on a steep incline, doing other yard work, and otherwise engaging in activities that appeared to be at odds with her testimony about her medical condition. On

March 14, 2025, Almighty Waste listed Corey Dyke as a witness. After ascertaining that he was a private investigator, Lasko moved on April 8 to exclude the pictures and video he had taken of her, and Dyke’s testimony about what he observed, on the ground that his name and “any investigative materials he has obtained” should have been “timely disclosed under Rule 26 . . . .” A. 39–40. The trial court granted Lasko’s motion over Almighty Waste’s objection that the pictures and video Dyke was prepared to testify about were protected work product, and in any event did not even exist at the time Almighty Waste responded to Lasko’s discovery requests. *See* Defendant’s Memorandum in Opposition to Plaintiff’s Motion in Limine to Exclude Corey Dyke as a Witness and All So-Called Private Investigative Evidence, April 10, 2025; A. 27–28 (transcript pages 16–17, 20). Lasko did not renew her discovery requests after the surveillance materials were created. The trial court nevertheless sanctioned Almighty Waste for what it found to be a discovery violation and ruled that “the appropriate outcome is the exclusion of the surveillance video and other investigative materials that were not produced, and exclusion of the witness from trial, because the plaintiff was entitled to this evidence.” Tr. 28 (transcript page 19). The surveillance materials, which the trial court did not view, were entered into the record by an offer of proof. A. 28–29 (transcript pages 21–22).

The discovery deposition of one of Lasko's experts and treating physicians, Dr. Hunter Sweet, was admitted into evidence over Almighty Waste's objection that he should testify in person so that Almighty Waste could cross-examine him. After Lasko's counsel declared "[w]e have two other witnesses" for the final day of trial, and "[t]here's no way we're going to get" to Dr. Sweet, the Court indicated that Almighty Waste would not be able to call Dr. Sweet as a witness unless "there's time," because "[w]e are finishing it. This case has taken far longer than it should have." April 15, 2025 transcript at 288. The next day Dr. Sweet's deposition was admitted over Almighty Waste's objection. A. 32 (transcript page 8) ("[Y]our objection is noted.")

After not seeing the pictures and video described above or hearing live testimony from Dr. Sweet, the court ruled that "the injuries sustained by Ms. Lasko as a result the impact of the Defendant's truck, which include the post-concussive symptoms extensively discussed above, were proximately caused by the defendant's negligence," and that "[a]lthough Ms. Lasko had pre-existing conditions, the court does not conclude that those conditions made her more susceptible to injury; rather, Ms. Lasko's continuing symptoms, which include headaches, light sensitivity, and

ringing in her ears, are a result of the 2018 motor vehicle accident.” A. 21. It awarded her \$367,892.89 in damages. A. 22. Almighty Waste appealed.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Did the trial court abuse its discretion when it excluded pictures and video of Lasko mowing the lawn on a steep incline and doing other yard work and engaging in other activities that appeared inconsistent with her claimed injuries?

2. Did the trial court abuse its discretion when it let Lasko introduce the discovery deposition of Dr. Hunter Sweet into evidence despite the fact that Dr. Sweet was available to testify at the trial?

### **ARGUMENT**

The Law Court reviews the facts underlying an evidentiary ruling for clear error and reviews the trial court’s ultimate decision to admit or exclude evidence for an abuse of discretion. *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 25, 96 A.3d 700; *see also Spickler v. York*, 566 A.2d 1385, 1388 (Me. 1989) (“Although the determination of admissibility of testimony, including the testimony of an expert witness, falls within the discretion of the trial justice, we will overturn the trial justice’s determination for a clear abuse of that discretion.”).

**I. The trial court should not have excluded Dyke's pictures and video and his testimony about Lasko's activities.**

The trial court abused its discretion and committed clear error when it sanctioned Almighty Waste for what it found to be a discovery violation by excluding pictures and video showing Lasko mowing her lawn on a steep incline and doing yard work and other things that appear inconsistent with her claimed injuries. This evidence would have been crucial because the trial court found that "Ms. Lasko's testimony in which she described her symptoms and experiences was highly credible" (A. 18), and the pictures and video would have called her credibility into question. While Lasko tersely acknowledged having mowed the lawn, the excluded pictures and video would have challenged her credibility in a way that her few words on the subject did not. The excluded evidence would have revealed that she used an electric lawnmower and a weed whacker over an extended period of time, which would have called into question her claim that she was housebound and disabled, the credibility of her testimony in general, and the accuracy of the medical histories she gave to her medical providers (which were the basis for the diagnosis of concussion and post-concussion syndrome).

While Lasko may not have known about the pictures and video until Dyke was disclosed as a witness, she knew about her own activities, and she must have realized that some of her activities might have been observed. Lasko's knowledge of her own behavior should eliminate any concern about unfair surprise. Contrary to what the trial court believed, Almighty Waste was not required to disclose the pictures and video in discovery. It therefore committed no discovery violation.

There was no discovery violation because the materials in question had not yet been created at the time when Almighty Waste responded to Lasko's interrogatories and document requests. The pictures and video were not produced because they did not exist when Lasko requested them, and she did not renew her request after they were created. And under Rule 26(e) Almighty Waste had no duty to supplement a response that was complete when made. Nor was Almighty Waste under any obligation under the rules to turn over its work product documents to Lasko on the eve of trial or to advise her that it had obtained additional work product during its trial preparations that it would not be providing on the basis of privilege. The trial court's decision to exclude the evidence as a sanction was therefore an abuse of discretion.

The work product doctrine protects from discovery “documents [and tangible things] . . . prepared in anticipation of litigation,” unless the party seeking discovery “demonstrates that it has a substantial need for the documents to prepare its case and cannot obtain the substantial equivalent of such documents without undue hardship.” *Dubois v. Off. of Att’y Gen.*, 2018 ME 67, ¶ 18, 185 A.3d 734, 741–42 (quotation marks omitted) (citing Rule 26(b)(3)). “A document is protected as work product . . . if it was created because of the party’s subjective anticipation of future litigation . . .” *Id.* The pictures and videos in question were created, not just in anticipation of litigation, but in the midst of litigation. And Lasko made no showing of substantial need. These materials are therefore protected work product that Almighty Waste would not have been required to disclose even if they had existed at the time it responded to Lasko’s discovery.

It was an abuse of discretion for the trial court to impose the extreme sanction of excluding key evidence that would have called in question Lasko’s credibility where Almighty Waste committed no discovery violation in the first place. If the trial court was concerned that it would be unfair to let Almighty Waste hold onto this evidence until after Lasko had testified at trial, it could have ordered that the evidence be given to her before she

testified. *See State v. Lowery*, 2025 ME 3, ¶ 22, 331 A.3d 268, 276 (“A trial court may . . . take steps to ensure the fairness of the proceeding by providing an opportunity for witness voir dire, with cross-examination, or by granting a continuance to allow for additional preparation time.”). Instead it denied Almighty Waste any opportunity to use this key evidence. That was reversible error.

The trial court also committed reversible error and abused its discretion by excluding Dyke’s trial testimony. Dyke was retained to conduct surveillance of Lasko’s activities to see if inconsistencies with her claimed injuries might emerge. What Dyke observed is summarized in his report, which is in the record via Almighty Waste’s offer of proof. A. 28–29. In addition to testifying about Lasko’s extended lawn maintenance activities on October 19, 2024, Dyke would also have testified about her frequent long-distance car rides to Wales, Maine in order to provide companion services to an elderly gentlemen. There was no basis for the trial court to exclude testimony by Dyke about his firsthand observations that was highly relevant on the key issue of Lasko’s injuries.

**II. The trial court should not have admitted Dr. Sweet's deposition testimony into evidence in lieu of live testimony.**

Rule 32 spells out the circumstances under which a deposition may be introduced into evidence at trial in lieu of live testimony:

The deposition of a witness . . . may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment, or a conflicting commitment that could not be broken or scheduled at another time without subjecting the witness or others to legally enforceable sanctions or significant risk of physical detriment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Me. R. Civ. P. 32(a)(3). None of these circumstances are present here: Dr. Sweet is not dead; he was not more than 100 miles from the place of trial or outside of the United States; and he was not unable to attend or testify because of age, illness, infirmity, or imprisonment, or a conflicting commitment that could not be broken or rescheduled. It was not the case that Dr. Sweet's testimony could not have been obtained by subpoena. Nor did any exceptional circumstances exist that could justify presenting a

discovery deposition instead of live testimony. Because none of the circumstances listed in Rule 32(a)(3) that permit the use of a deposition at trial instead of live testimony were present, the trial court abused its discretion in admitting Dr. Sweet's deposition in lieu of live testimony.

Almighty Waste objected to the admission of the Sweet deposition as evidence and did not waive the requirements of Rule 32. The use of a discovery deposition at trial is no substitute for live testimony under oath; while it may happen in exceptional circumstances, it should not have happened in this case. Rule 32 does not permit the use of a discovery deposition as a matter of convenience simply because it makes the trial faster. Instead, "[t]he conditions set forth in Rule 32(a) must be satisfied before the deposition can be used at all." § 2142 General Principles Relating to the Use of a Deposition, 8A Fed. Prac. & Proc. Civ. § 2142 (3d ed.); see *Loinaz v. EG & G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990) (noting "the long established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person.") (quotation marks omitted).

Deposition testimony is "second best, not to be used when the original is at hand." *Loinaz*, 910 F.2d at 8 (quotation marks omitted). Because the requirements for the use of a deposition in lieu of live testimony were not

met, it was an abuse of discretion for the trial court to let Lasko introduce Dr. Sweet's deposition into evidence. The fact that the case was not decided until September, several months after the trial was cut short, indicates that there is no good reason why the trial could not have been extended for the half day that would have been required to take Dr. Sweet's live testimony.

It is Lasko's counsel who created the situation that led to the trial court's erroneous ruling. Despite being well aware of the time limits the trial court had imposed, his examinations of his witnesses were extended, disorganized, and repetitive. Lasko should not have been permitted to benefit from having run out the clock on the trial in this fashion.

The trial court's error in admitting the deposition prejudiced Almighty Waste because if Dr. Sweet had testified, Almighty Waste would have been able to challenge his conclusions based on the evidence that emerged at trial, something it obviously could not have done at a pre-trial discovery deposition. The decision to admit Dr. Sweet's discovery deposition deprived Almighty Waste of the opportunity to conduct an appropriate cross-examination of Dr. Sweet in the context of all the evidence and testimony that was presented at the trial with a judge presiding. It was therefore reversible error.

## CONCLUSION

For the foregoing reasons, the trial court's judgment should be vacated and the case remanded for further proceedings consistent with this Court's opinion.

December 16, 2025

/s/ Jeffrey T. Edwards  
Jeffrey T. Edwards, Bar No. 0679  
Preti, Flaherty, Beliveau & Pachios, LLP  
One City Center  
P.O. Box 9546  
Portland, ME 04112-9546  
Tel: 207-791-3000  
jedwards@preti.com

Attorney for Appellant  
Almighty Waste, Inc.

**CERTIFICATE OF SERVICE**

I, Jeffrey T. Edwards, attorney for Appellant, Almighty Waste, Inc., certify that I will, upon notification of approval by the Court, email and mail (by U.S. mail) copies of this brief to the attorney listed below:

Peter Clifford  
10 Moulton Street, 5<sup>th</sup> Floor  
Portland, ME 04101

Dated: December 16, 2025

/s/ Jeffrey T. Edwards  
Jeffrey T. Edwards