

**STATE OF MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO. AND-25-426

TAMMY LASKO

Plaintiff-Appellee

v.

ALMIGHTY WASTE, INC.

Defendant-Appellant

**ON APPEAL FROM JUDGMENT ENTERED BY
MAINE SUPERIOR COURT, ANDROSCOGGIN COUNTY
DOCKET NO. AUBSC-CIV-2023-48**

BRIEF OF APPELLEE TAMMY LASKO

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

This appeal addresses the trial of a fairly common motor vehicle accident case. The pretrial order, based on a pretrial conference with input from the parties, indicated that the trial would take less than three days. Although the defense was unwilling to stipulate to liability, it was not being challenged. The primary issue was whether Plaintiff suffered post-concussion syndrome as a result of the accident. Three treating doctors, a PCP, a treating neurologist, and a neuropsychologist, indicated their view in the affirmative, while a retained defense expert expressed his view in the negative.

After a three-day trial on April 14-16, 2025, the trial court delivered a thirteen-page Decision and Judgment in favor of the plaintiff, in the amount of \$367,892. Appendix (“A.”) 11-23. It found that Tammy Lasko sustained a traumatic brain injury as a passenger in a vehicle that was struck from behind, while stopped, by Defendant’s 35,000-pound trash truck. Ms. Lasko’s medical records were admitted into evidence by agreement at the start of the trial. (Plaintiff’s Exhibit (“Pl. Ex.”) 13, 14; Defendant’s Exhibit (“Def. Ex.”) 1-8). Other supporting evidence included medical bills in the amount of \$62,207 (Pl. Ex. 15), lost earnings in the amount of \$30,685 (Pl. Ex. 10), and pain and suffering, permanency and medical evidence from various witnesses, including the three treating providers. A. 22.

Prior to trial, the Court ruled that the defendant failed to timely disclose and produce photographic and video evidence of “weed whacking and lawn mowing” from a defense investigator, Cory Dyke. As a result, that evidence would be inadmissible. A. 26-29, 38. However, the court nevertheless allowed the subject of lawn care to be pursued by the defense, during the cross- examination of Ms. Lasko. Despite her injuries, and her frequent headaches, plaintiff admitted she was able to engage in “weed whacking and lawn mowing” when she was observed by the investigator:

q. On Saturday, October 19th, 2024, did you utilize an electric lawn mower at your property in Auburn, Maine, in order to mow and mulch the lawn?

a. Yes, most likely.

q. On that same day, Saturday, October 19th, 2024, did you, for an extended period of time, use an electric weed whacker to chop down weeds around various locations of your home at 157 Third Street .. or Third Avenue in Auburn, Maine?

a. Third Street. I wouldn't say, for an extended time. I just did around my house. Yep. I mean, just the perimeter of my house, which doesn't take long.

q. But you did use a weed whacker to do that?

a. Yes.

Vol. 3 Trial Tr. 148:9-148:24 (Transcript Record Page (rp.) 37) (emphasis added).

During the trial, Almighty Waste moved without objection to have the testimony of Dr. Rordorf, its expert neurologist, taken out of order. Dr. Rordorf was unavailable on day three, the final half day of the trial. The examination of the plaintiff had not yet been completed when Dr. Rordorf testified. It was heard right after Dr. Fairchild, the Plaintiff’s PCP, on day two. Vol. 1 Trial Tr. 252-254 (rp. 63-64).

As the trial proceeded, the court continually reminded the parties that under the pretrial order, and the court's trial calendar, the trial was set to end on Wednesday at 11:30 am. There was never a protest. After the first day of trial, the parties conferred with the Court to discuss scheduling, as follows:

MR. CLIFFORD: .. tomorrow. I think we're going to take another person out of order, which will be the PCP .. Dr. Fairchild, I think, at 9? I don't know if you want to try to go earlier than 9?

THE COURT: Yeah, if you're here, and if we could start at 8:30, and even do a little bit of testimony beforehand, that would be great, just because I don't want us to waste any ..

MR. CLIFFORD: Sure.

THE COURT: .. any time.

MR. EDWARDS: But I have Dr. Rordorf scheduled for tomorrow, okay?

THE COURT: Right. In the afternoon.

MR. EDWARDS: **I could do .. and he's going to have to be out of order, because he's not available ..**

THE COURT: Right.

MR. EDWARDS: .. Wednesday.

MR. CLIFFORD: Right. I have no problem with that. I'll try to ..

MR. EDWARDS: I also have Everett Gray, who should be a 20-minute witness, I mean ..

THE COURT: Okay.

MR. EDWARDS: Directly and cross, so.

THE COURT: Okay. And we have until 11:30 on Wednesday morning, so .. because I reserved that spill over time. So I think between all of it .. looks like we have to do Dr. Sweet on Wednesday morning, right, but we should be able to get everybody in.

MR. EDWARDS: Right. Yep.

Vol. 1 Trial Tr. 252:25-254:3 (rp. 63-64) (emphasis added).

To no one's surprise, day two of the trial, focusing on the expert witnesses, took longer than anticipated. This led to another scheduling discussion with the court at the end of the day. Once again, the parties were reminded of the hard stop

at 11:30 on Wednesday, under the trial calendar and pretrial order. Vol. 2 Trial Tr.
287:20-24 (rp. 72).

THE COURT: Well, I think it was important that we got his [Dr. Rordorf's] testimony done, because I know that this was his window to provide the Court information.

MR. EDWARDS: I .. I appreciate the accommodation, Your Honor. It's simply it's –

THE COURT: No, it had to be. And everybody understood. And I checked with everyone in advance.

MR. EDWARDS: Okay.

THE COURT: So thank you.

MR. EDWARDS: I appreciate everybody for sticking around. Okay.

THE COURT: So tomorrow we're going to start at 8:30. We have a hard stop at 11:30. I have obligations midday and an afternoon docket. So this case has to be finished by 11:30 tomorrow. **How you do that, you'll have to discuss and figure it out.**

MR. CLIFFORD: I think we're going to go with the defendant very quickly, out of order, and then he'll be done. And we can just ..

THE COURT: Okay.

MR. CLIFFORD: .. finish up with plaintiff.

THE COURT: **And submitting Dr. Sweets deposition?**

MR. CLIFFORD: **Yes.**

THE COURT: Okay.

MR. EDWARDS: I -- I would prefer for him to testify in person. I mean he .. he's ..

THE COURT: Well, if there's time, he can. And if not, then we're going to submit it. And I don't know if he's even available tomorrow.

MR. EDWARDS: That he was lined up for tomorrow.

THE COURT: Okay.

MR. CLIFFORD: He was lined up. We have two other witnesses, and I have to finish her [the plaintiff] and there's not even been cross. There's no way we're going to get to that.

THE COURT: We are finishing it. This case has taken far longer than it should have. **You guys told me two days, I allocated two days, and then I moved things around to give you ..**

MR. CLIFFORD: Yes.

THE COURT: .. **an extra three hours.**

MR. CLIFFORD: Three.

THE COURT: There's been a lot of bickering and fighting that is totally unnecessary and unprofessional. I am not giving you more than two and a half days. It doesn't merit it. **We can take the deposition and put it in, or you guys work out how you get the testimony in.** But as I told you last week, I'm not going to micromanage the case. That's just not my role.

[Mr. Clifford] Right. I just .. there's there's no way. I don't think it's possible. So I just think we should put it in as a .. he's not available. I was -- I had him ready. There's no -- I have to finish up with Tammy. Jeff is going to be at least an hour and if not more and we have another witness. So it's impossible that we could get to him ..

THE COURT: **Well, whoever you get to by 11:30 tomorrow is who you get to. I will take the deposition. I need to hear from the plaintiff.**

MR. CLIFFORD: Okay. Thank you.

Vol. 2 Trial Tr. 287:9-289:16 (rp. 72)(emphasis added).

On day three, the court ruled that Dr. Sweet was unavailable to testify live because there wasn't sufficient time available to hear from him. Vol. 2 Trial Tr. 285 (rp. 72); Vol. 3 Trial Tr. 4:21-24 (rp. 1). The only substantive objection made to the proposed admission of the Sweet deposition at the end of the day Tuesday was to its length as a discovery deposition, but that was later withdrawn. Vol. 3 Trial Tr. 7:8-9:16 (rp. 2); Vol. 2 Trial Tr. 290:18-21 (rp. 73).

MR. CLIFFORD: So I don't .. I don't think there's much of a disagreement on that either. But I did want to say that we are going to offer the Sweet transcript. Because this is a bench trial, it was a rough and tumble discovery deposition. I feel comfortable just putting it in. There's .. there's banter of the type you've seen earlier, unfortunately.

THE COURT: Okay. And your objection is noted. And you preserved it yesterday as well.

MR. EDWARDS: And likewise, I also read the deposition in the last 24 hours.

THE COURT: Okay.

MR. EDWARDS: **And I think it's .. there's the usual objection if you have a deposition, but it's a pretty clean document in terms of Q and A.**

THE COURT: Okay.

App. 32, Vol. 3 Trial Tr. 7:8-8:19 (rp. 2) (emphasis added).

After the Sweet deposition was admitted, the defense did not articulate what testimony, if any, in Dr. Sweet's transcript was unduly prejudicial to its case. App. 31-32, Vol. 3 Trial Tr. 4:22-6:2 (rp. 1-2).

After the decision to admit Dr. Sweet's transcript, the prior day, defendant's counsel waived or limited his objection to use of the Sweet deposition. Counsel noted that as a discovery deposition, it might need to be "cleaned up:"

MR. EDWARDS: Well, well, I guess .. I guess one thing on the offering up the Sweet deposition in lieu of testimony. **The only concern I have is it's a discovery deposition, which would probably require some amount of just cleaning it up.**

THE COURT: Good thing you have till 8:30 tomorrow.

MR. EDWARDS: Okay.

THE COURT: Okay. Court's in recess.

Vol. 2 Trial Tr. 290:18-24 (rp. 73) (emphasis added).

The defense suggests on page 15 of its brief that it did not play any role in creating the time crunch cited by the court as a factor in rendering Dr. Sweet unavailable. It was "plaintiff's counsel who created the situation that led to the trial court's erroneous ruling...his examinations were extended, disorganized and repetitive. Lasko should not have been permitted to benefit from having run out the clock."

The trial court addressed and rejected this argument prior to admission of the Sweet transcript. It noted that the lengthy defense cross examination of Dr. Fairchild (and presumably the lengthy direct exam of Dr. Rordorf) played a significant role in the time crunch that necessitated the use of the trial deposition.

Vol 2 Trial Tr. 290:4-17 (rp. 73).

...MR. EDWARDS: Okay. I .. I guess what I would just wonder is there's been a lot of direct examination already of .. of the plaintiff. Again, I'm –

THE COURT: Going to pull the times tomorrow because your timing is off. Your assessment of timing is off. You said, for example, this morning that Peter had taken three hours. In fact, you consumed more time today than Peter did. And Peter did not take three hours. He took two hours. So I will get you the time tomorrow. Your timing is off. I'll get you the time tomorrow, but I'm not .. I don't need anyone to replot any ground. I've heard the same testimony many times now. I don't need to hear it again. This isn't a jury trial. I'm following you. I have transcript-like notes. I don't need it. Okay.

Vol. 2 Trial Tr. 290:4-17 (rp. 73).

The next day, the parties agreed to a schedule for the remaining three hours of the trial. Both attorneys made clear their intention to rest their cases. App. 31,

Vol. 3 Trial Tr. 4:8-5:5 (rp. 1).

The COURT: I wanted to talk about scheduling today because we have a hard stop at 11:30. So can you tell me what was agreed to?

MR. CLIFFORD: Yes, Your Honor. I .. Jeff and I have, I think, been working as hard as we can to make things easy for everyone else and the Court. So what we're going to do is we're going to have the defendant, Everett Gray, we're going to take him out of order because he's working. And we didn't want to go long with Tammy and not do him.

THE COURT: Yep.

MR. CLIFFORD: So we think that'll be brief. And then we're going to finish with Tammy, which we're confident we can finish before 11:30.

THE COURT: Okay.

MR. CLIFFORD: We're going to put in the Sweet deposition, over Jeff's objection. But we are going to put that in because of scheduling issues. like to add?

MR. EDWARDS: No, other than, again, this doesn't have to be on the record as much as .. to make sure we have all the exhibits, you know, admitted.

App. 31, Vol. 3 Trial Tr. 4:89-5:45 (rp. 1).

On direct exam of Dr. Rordorf, the defense established that the Sweet transcript was a document given to Dr. Rordorf by defense counsel, as part of the file materials used to support his opinions. It was considered by Dr. Rordorf as he

gave his opinions on direct examination. Vol. Trial Tr. 193:25 (rp. 48) (“I reviewed the deposition of Ms. Lasko, Dr. Sweet . . .”).

On cross examination, Plaintiff’s counsel questioned Dr. Rordorf extensively about many of Dr. Sweet’s findings that had been set forth in the Sweet deposition. For example, whether Rordorf agreed with Sweet’s diagnosis of post-concussion syndrome, despite Lasko’s presentation with a normal neurological exam. Vol. 2 Trial Tr. 272:1-8 (rp. 68). Both parties rested their cases on day three, April 16, 2025. Although this was a bench trial, neither party moved for a continuance in order to present additional testimony at some point in the future. Such a delay would have been pointless in the absence of a credible showing of prejudice resulting from admission of the Sweet transcript. The sole purpose of a continuance would be to allow Dr. Sweet to testify live, subject to a “new” and presumably much better, cross examination from the defense.¹ Ultimately, the court’s ruling to allow the defense expert Dr. Rordorf to testify live, out of order, deprived the plaintiff of the ability to call her treating neurologist live. The need to use the Sweet deposition transcript became necessary when Dr. Sweet’s slot was

¹ The defense never requested the total exclusion of Dr. Sweet’s deposition testimony. It has not pointed to any prejudice resulting from admission of the transcript. The defense fails to note that the shoe could have easily been on the other foot. Plaintiff could have insisted on presenting Dr. Sweet live during the limited time she had to present her case in chief. Dr. Rordorf claimed to be unavailable on day three, but he was a retained expert, and no trial deposition had been taken. He was not under subpoena. It would have been grossly unfair to punish plaintiff for this good deed, by excluding any testimony from Dr. Sweet.

taken by Dr. Rordorf. The Court was never asked to choose between allowing the Sweet transcript as evidence or excluding his testimony altogether.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court properly exercised its discretion to exclude surveillance evidence after defense discovery violations, and after plaintiff did not deny the conduct alleged by a private investigator
2. Whether the Trial Court properly exercised its discretion to admit the deposition transcript of a treating neurologist, after a defense request to take its expert out of order created the treating provider's unavailability.
3. Whether there is sufficient evidence supporting the Decision and Judgment.

ARGUMENT

I. Standard of Review

Under M.R. Civ. P. 52(c), findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Under the clear error standard of review, the Law Court will defer to the trial court as to which witnesses to believe, what significance to attach to particular testimony or exhibits, and what inferences may be drawn from evidence or exhibits. *See e.g., Garrison City Broad. Inc., v. York Obstetrics and Gynecology, P.A.*, 2009 ME 124, ¶ 12, 985 A.2d 465. Factual

findings will be affirmed so long as they are supported by some evidence in the record. *See e.g., Wuestenberg v. Rancourt*, 2020 ME 25, ¶ 8, 226 A.3d 227.

A discretionary decision, a procedural ruling, and most rulings admitting or refusing to admit evidence, or allowing or not allowing pretrial discovery, will be reviewed only to determine if the ruling amounted to an “abuse of discretion.” *See Camp Takajo, Inc. v. SimplexGrinnell, L.P.*, 2008 ME 153, ¶ 16, 957 A.2d 68.

This means the ruling was improper even considering the wide range of discretion accorded to trial judges in making rulings and managing pretrial and trial processes. *Id.* Evidentiary issues involving choice or subjective judgment are reviewed for an abuse of discretion. *State v. Tomah*, 1999 ME 109, ¶ 7, 736 A.2d 1047, 1050.

When a decision on the facts is adverse to the defendant, the reviewing court looks to see if there is “some evidence” to support the trial court’s ruling. In civil cases, when there is a challenge to the sufficiency of the evidence to support a finding upon which the appellant did not bear the burden of proof, the Law Court will review the record in the light most favorable to the trial court’s judgment to determine if the findings are supported by competent evidence. *Acadia Ins. Co. v. Keiser Indus., Inc.*, 2002 ME 57, ¶ 14, 793 A.2d 495, 498. Any ambiguities are resolved in favor of the judgment. *State v. Haven*, 2002 ME 38, ¶ 3, 791 A.2d 938-39; *State v. Stinson*, 2000 ME 87, ¶ 6, 751 A.2d 1011, 1014. The same standard

applies to damages findings. See *Jenkins, Inc. v. Walsh Bros., Inc.*, 2001 ME 98, ¶ 18, 776 A.2d 1229, 1235-36; *Putnam v. Albee*, 1999 ME 44, ¶ 10, 726 A.2d 217, 219-20. This standard of review leaves it to the trial court to decide which witnesses to believe and not believe and what significance to attach to each point of evidence. The court does not look to the volume of particular evidence but whether the evidence is sufficient, if believed, to support the findings that the party with the burden of proof must prove to gain a favorable ruling. See *State v. Spooner*, 666 A.2d 863, 865-66 (Me. 1995). Thus, if several witnesses testify one way, and one witness testifies to the contrary, a ruling accepting the one witness's testimony will be upheld if that testimony makes all the points necessary to support the elements which the party with the burden of proof must prove. See *id.* at 866.

Additionally, a judgment entered based on an incorrect process of reasoning or an erroneous interpretation of law will be affirmed if it is proper on other grounds. See *Melanson v. Matheson*, 1998 ME 117, ¶ 2, 711 A.2d 147; *Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 517 (Me. 1996). A judgment may be affirmed for reasons different than those stated by the trial court. *Houde v. Millett*, 2001 ME 183, ¶ 9, 787 A.2d 757, 759. Where there is no request for findings of fact, as here, the Law Court will infer that the trial court made all the findings necessary to support the judgment, if those findings are supported by the evidence

in the record. *Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶ 13, 804 A.2d 364, 369; *Associated Builders, Inc. v. Oczkowski*, 2002 ME 115, ¶ 11, 801 A.2d 1008, 1011; *Blackmer v. Williams*, 437 A.2d 858, 861 (Me. 1981).

II. The Trial Court did not err by excluding proffered weed whacking and lawn mowing evidence

A trial court has broad discretion to (1) control the order and timing of presentation of evidence, (2) set and enforce reasonable time limits on hearings, and (3) limit or exclude evidence that may be repetitive or address background or credibility issues that are not central to determination of the principal contested fact issues in a case. Review of such rulings is for abuse of discretion. *See Dolliver v. Dolliver*, 2001 ME 144, ¶¶ 10-12, 782 A.2d 316, 317-18; *State v. McKenna*, 1998 ME 49, ¶¶ 3-4, 707 A.2d 1309-10; Field & Murray, *Maine Evidence* § 611.1 at 300-02 (2000); M.R. Evid. 16.

Additionally, Under M.R. Evid. 611, the court retains significant control over the mode and order of interrogating witnesses. It is permitted to avoid the needless consumption of time and to protect witnesses from harassment and undue embarrassment. M.R. Civ. P. 16 and 26 also provide the trial court with broad to manage the trial calendar and address discovery violations.

Considerable deference is given to the trial court's determination of what constitutes relevant impeachment or rebuttal evidence. M.R. Evid. 607, 611. *See*

also *Solomon's Rock Trust v. Davis*, 675 A.2d 506 (Me. 1996) (limitation of rebuttal testimony was not an abuse of discretion). Rebuttal evidence is proper if it "repels or counteracts the effect of evidence which has preceded it." *Emery v. Fisher*, 128 Me. 124, 125, 145 A. 747, 747 (1929). A presiding judge's decision to allow rebuttal testimony may be reversed only for abuse of discretion. *State v. Gullifer*, 384 A.2d 48, 50 (Me. 1978).

In its brief, starting on page 9, the defense argues that the court abused its discretion by excluding "crucial" surveillance evidence. It suggests this evidence would have "called into question" Lasko's disability claims (for post-concussion syndrome) and what the defense described (without citation to any portion of the record) as a claim that she was "housebound."

During its review of plaintiff's motion *in limine*, the Court found that the defendant failed to produce or properly disclose alleged rebuttal / surveillance evidence in discovery. The evidence included photographs and a video showing that plaintiff was capable of mowing her lawn and weed whacking. There had been no denial of those actions by plaintiff at the time of the motion or at any time thereafter. The motion *in limine* was granted, and the evidence excluded. A. 26-29, 38. On cross examination of the plaintiff, the court nevertheless allowed the defendant to ask plaintiff whether she in fact, had previously engaged in weed

whacking and lawn mowing on the date she was observed by the investigator. She admitted that she could do those activities. Vol. 3 Trial Tr., 148:4-149:1 (rp. 37).

A. The Court did not abuse its discretion by refusing to admit the proffered evidence

The impeachment / rebuttal evidence that defendant sought to introduce was actually raised by Defendant on cross examination. Plaintiff admitted to weed whacking and lawn mowing. There was no inconsistent statement or other basis to explore the testimony further.

B. The Court properly exercised its discretion to exclude the evidence as irrelevant, cumulative and/or collateral.

The threshold for admissibility of a prior statement is the actual inconsistency of the prior statement. A prior statement that is not, to some degree, at least somewhat inconsistent with prior testimony is not admissible. M.R. Evid. 607, 611R. The court was also entitled to conclude that the surveillance evidence was inadmissible because it was cumulative and /or irrelevant. M.R. Evid. 403.

Under these circumstances, the trial court was entitled to find the potential probative value of the “Dyke evidence” as nil. Trial time was extremely limited. Testimony about lawn mowing, in the context of post-concussion syndrome, and frequent migraine headaches, was completely or largely irrelevant.

C. The Court properly exercised its discretion to exclude the proffered evidence as a sanction for discovery violations.

The defense denied the existence of any surveillance evidence in its discovery responses. A. 38. The plaintiff's discovery requests sought to learn if the defendants knew of any relevant photographs of the plaintiff, videotapes of the plaintiff, or persons with knowledge of her damages. *Id.* The Dyke evidence was responsive to these requests.

Almighty Waste did not notify the plaintiff of the existence of the lawnmowing/ weed whacking evidence after plaintiff's deposition or prior to trial. Moreover, Dyke's status as an investigator was not disclosed on the witness list. See *Donovan v. AXA Equitable Life Ins. Co.*, 252 F.R.D 82, 82–83 (D. Mass. 2008) (Private investigative materials can be used for impeachment and remain undisclosed prior to the deposition testimony of a witness. However, after the testimony of the witness, they must be disclosed to avoid unfair surprise at trial). See also A. 41, Ex. 1 of Plaintiff's Mot. in Lim.

Almighty Waste claims on page 10 of its brief that the surveillance evidence it sought to admit was confidential and protected from discovery as "work product." At the same time, it claims the surveillance photos was "crucial" evidence of plaintiff's considerable strength and stamina.

Assuming *arguendo* the surveillance evidence became relevant (if, for example, the plaintiff had actually denied lawn mowing), the defense still owed

plaintiff an affirmative obligation under M.R. Civ. P. 26 to timely disclose the surveillance evidence it intended to use at trial. Rule 26's work product rule protects only documents and tangible things, not the underlying facts or knowledge related to those items. Further, it protects only documents / things that are prepared confidentially. When a party chooses to use an item in litigation the confidential/ protected status of the document is lost. M.R. Civ. P. 26(b)(3). Moreover, the immunity conferred by the work product doctrine is not absolute. Such materials must be produced when there is "substantial need" or when there is a waiver of confidentiality. *Id.*

A primary purpose of the discovery rules, including M.R. Civ. P. 26, is to eliminate the "sporting theory of justice" and allow the sharing of evidence between parties prior to trial. *Shaw v. Bolduc*, 658 A.2d 229, 235 (Me. 1995); *Saint Paul Ins. Co. v. Hayes*, 2001 ME 71, ¶ 8, 778 A.2d 611. The mowing and weed whacking photos and videos, as defendant admits, were never intended to remain confidential, forever in the vaults of defendant. Once the defense decided it would be used as evidence at trial, it needed to be disclosed in a timely manner, to prevent an "ambush." *See* A. 41.

The court has broad authority, including under M.R. Civ. P. 16, 26 and 37, to review and sanction discovery violations, such as a failure to disclose evidence.

Key Trust Co. of Me. v. Nasson College, 1997 ME 145, ¶ 13, 697 A.2d 408. This power extends to proffered evidence that violates discovery rules or pretrial orders.

For example, in *Beaudin v. Beaulieu*, 472 A.2d 426, 428 (Me. 1984), a party sought to introduce expert testimony but ignored an order to provide the opposing side with the expert's report prior to trial, and to supplement that response to an interrogatory which directly addressed the identity and expected testimony of the witness. Given the discovery violations, the Law Court found the trial justice acted within his "sound discretion" in excluding the testimony. Similarly here, when the trial court ruled the Dyke evidence inadmissible, it acted within its sound discretion.

III. The Trial Court did not err when it admitted the deposition transcript of Dr. Hunter Sweet, an unavailable treating neurologist. The defendant thereafter waived its right to object to portions of the testimony or to request substantive edits to the transcript

The court is empowered by M.R. Civ. P. 16(b) to issue a pretrial order and hold a pretrial management conference. In the instant case, after the trial management conference, the court issued an order indicating that the case needed to be tried in less than three days. During the trial, pursuant to the pretrial order, the court pushed, prodded and cajoled the attorneys to streamline their cases, to meet the three-day deadline they themselves created. Prior to the third day of trial, it was clear there wasn't enough time to allow Dr. Sweet to testify live at trial.

After encouraging the parties to find a solution, the court found Dr. Sweet was unavailable within the meaning of the rule. Vol. 2 Trial Tr. 286:18-290:21 (rp. 72-73); Vol. 1 Trial Tr. 4:14-9:25 (rp. 1-2).

A. The court properly found the witness was unavailable after the defendant moved to take the testimony of Dr. Rordorf, its expert.

M.R. Civ. P. 32(a)(3) governs the admission of deposition testimony at trial. Like many other procedural and evidentiary rulings, it is subject to a deferential standard of review, the abuse of discretion standard. Such testimony is admissible if the court finds:

- a witness is unable to attend because of ...a conflicting commitment that could not be broken ...without subjecting the witness or others to legally enforceable sanctions.... M.R. Civ. P. 32(a)(3)(C).
- that the party offering the deposition has been unable to produce the attendance of the witness by subpoena; M.R. Civ. P. 32(a)(3)(D).
- or “such exceptional circumstances as to make it desirable, in the interests 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. M.R. Civ. P. 32(a)(3)(E).

The trial court could have found any or all of these three situations. The trial transcript at the end of day 2 and beginning of day 3, shows that Dr. Sweet was able and willing to testify live via zoom on both Tuesday and Wednesday. However, “conflicting commitments” including the need to hear from Dr. Rordorf,

Everett Gray, and the plaintiff, prevented the presentation of Dr. Sweet's live testimony.²

Defendant argues on page 13 of its brief that "it was not the case that Dr. Sweet's testimony could not have been obtained by subpoena." This is irrelevant. The record shows Dr. Sweet had committed to appear live at trial via zoom and was ready and able to testify live, the same as if he had been under subpoena. As time elapsed, it became clear to the court and to the parties that there wasn't enough time for him to testify live. Vol. 2 Trial Tr. 287:20-290:24 (rp. 72-73); Vol. 3 Trial Tr. 4:14-9:25, (rp. 1-2). Under these circumstances, it doesn't logically matter whether the live testimony in question had been procured voluntarily or via subpoena. A subpoena becomes relevant to the analysis only if an "unsubpoenaed" witness fails to appear, and the party who should have subpoenaed him, or produced him, seeks to use the deposition transcript.

Defendant did not submit any Maine cases in support of its argument that admission of an unavailable treating physician's deposition transcript justifies a reversal. Instead, when a party requests admission of its own witness's deposition

²If Dr. Sweet had retained his Tuesday afternoon testimonial slot, Dr. Rordorf would not have been able to testify, since he was unavailable on Wednesday. Dr. Rordorf's unavailability, like Dr. Sweet's, would have subjected the witness or others to a "legally enforceable sanction." The resulting mess from employing such a "hardball" tactic would have meant the defense was unable to call its expert witness live during the time allocated for trial. Rule 32(a)(3)(C). Using defendant's own logic, on pp 13-15 of its brief, Dr. Rordorf's transcript would have been inadmissible, because he was not subpoenaed, and the defense had not attempted to create a trial deposition.

due to unavailability, the burden is on that party to demonstrate that it did not procure the absence of the witness. See *Culebra II, LLC v. River Cruises and Anticipation Yachts, LLC*, 564 F. Supp. 2d 70, 79 (D. Me. 2008).

Defendant failed to raise any serious objections to the use of the Sweet transcript or to demonstrate prejudice. At the end of day 2, it stated “The only concern I have is it's a discovery deposition, which would probably require some amount of just cleaning it up.” Vol. 2 Trial Tr. 290:21, (rp. 73). By the morning of day 3, before the trial resumed, counsel indicated that the Sweet transcript was relatively clean, and made no attempt to redact portions of the transcript before observing it being offered into evidence. Vol. 3 Trial Tr. 8:14-19 (rp. 2).

Given the limited time available on day three, Dr. Sweet’s prior availability, the length of time counsel took to examine the prior witnesses, and the content of the pretrial order, (which reflected the parties agreement to try the case within three days) the Court reasonably concluded Dr. Sweet was unavailable and/or that it was in the interests of justice that the deposition testimony be used.

B. Alternatively, the Sweet transcript was admissible as part of the defense’ expert witness file.

The alternative scenario, total exclusion of Dr. Sweet’s testimony, was never requested at trial and would not have been a just result. Vol. 2 Trial Tr. 290:18-23 (rp. 73). Counsel did not disclose or even hint that he would be seeking to exclude Dr. Sweet’s deposition testimony when he requested that Dr. Rordorf take Dr.

Sweet's spot on the Tuesday testimony roster. He never articulated any viable prejudice, especially after sharing Dr. Sweet's transcript with his expert, and questioning him about it on direct exam.

In an effort to circumvent the trial court's finding that Dr. Sweet was unavailable, Almighty Waste, on page 15 of its brief, argues that Ms. Lasko was solely responsible for the delays that led to the unavailability. Ms. Lasko "should not have been permitted to benefit from having run out the clock in this fashion." The court, pursuant to its broad discretion, found otherwise, that defense counsel was also responsible for the delay, and that it had conducted repetitive and unduly long examinations. Vol. 2 Trial Tr. 290:7-17 (rp. 73).

IV. Any Errors Committed by the Court were Harmless

The actions of the trial court are reviewed under the "harmless error" standard. *See* M.R. Civ. P. 61; M.R. Crim. P. 52(a); M.R. Evid. 103(a). Erroneous trial court rulings will not result in a reversal of the trial court's judgment when the error is "harmless"—meaning the error did not result in substantial injustice or affect substantial rights. In *Kay v. Hanover Ins. Co.*, 677 A.2d 556, 558 (Me. 1996), a medical expert stated his opinion that an automobile accident caused the amputation of a diabetic's foot. The Law Court found the opinion was properly supported. It was based on the deposition of a treating physician, the history given

by the plaintiff and an actual physical examination after the amputation was performed. The Court's decision (A. 11-23) is supported by sufficient evidence. It heard from experts and several other witnesses and reviewed numerous medical records. Admission or exclusion of the surveillance evidence, or the Sweet deposition, would not have altered the outcome.

When an expert's theory is supported by some facts and evidence, it will support a favorable verdict. See *Green v. Cessna Aircraft Co.*, 673 A.2d 216, 220 (Me. 1996). Here, the factual findings of the court were supported by the admitted medical records and/or the testimony of many other witnesses besides Dr. Sweet. Under the harmless error rule, evidence that is offered and admitted without proper objection becomes "consent evidence," even if it is otherwise inadmissible under the rules.

Next, on page 15 of its brief, the defense speculates that if Dr. Sweet had testified live at trial, Almighty Waste would have been able to challenge his conclusions based on new evidence "that emerged at trial." The record shows there was no "new evidence at trial," and none is identified in the defense brief.

Although there is a bald claim of prejudice, there is no actual evidence of prejudice in the record. The facts in this rear-end accident are basic and were well established in the timeline of the treatment, marked as Pl. Ex. 3, and the medical index, marked as Pl. Ex. 13. The medical events and records in the timeline were

considered by all of the testifying doctors in their discovery depositions and at trial. No “smoking gun” emerged during the trial. To the contrary, the trial court repeatedly noted, including in the quoted sections above, that the testimony was frequently repetitive and unduly long.

The defendant’s decision to rest after day three of trial made strategic sense. It had successfully bargained for Dr. Rordorf and Everett Gray, the truck driver, to be taken out of order, ahead of Dr. Sweet. The defense was also able to finish its lengthy cross-examination of the Plaintiff in the limited time available on day three.

The defendant’s brief did not analyze the contents of the Sweet transcript in any fashion. Defendant does not try to explain why admission of the transcript was unjust or unduly prejudicial. Even if the transcript had not been admitted, the complete medical records of Dr. Sweet, admitted without objection, which would have been available for review and consideration by the court. Unsurprisingly, the opinions in those records and the deposition testimony are eerily similar. In both, Dr. Sweet explained what happened during the neurological visits, and the rationale for his continuous conclusion that the plaintiff was experiencing post-concussion syndrome as a result of the accident.

In his deposition, Dr. Sweet consistently disagreed with Attorney Edwards, who challenged many of his medical opinions. Dr. Sweet’s unavailability was due

to limited trial time, not fear of a live cross examination. Assuming *arguendo* it was error to introduce his transcript, the only fair or just remedy would have been to continue the trial so that Dr. Sweet's response to Mr. Edward's questions could be heard live by the court, where they undoubtedly would have remained the same. Total exclusion of testimony would have been grossly unfair.

CONCLUSION

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

DATED: January 30, 2026

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CERTIFICATE OF SERVICE

I, Peter Clifford, Esquire, Attorney for Appellee, Tammy Lasko, 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:

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