STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. And-25-426

TAMMY LASKO
Appellee

v.

ALMIGHTY WASTE, INC.
Appellant

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

REPLY BRIEF OF APPELLANT ALMIGHTY WASTE, INC.

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I. The surveillance evidence.

Lasko's first argument is that "[t]he impeachment/rebuttal evidence that defendant sought to introduce was actually raised by Defendant on cross examination," where she "admitted to weed whacking and lawn mowing." Red Br. 19. According to Lasko, "[t]here was no inconsistent statement or other basis to explore the testimony further." *Id.*

It is understandable that Lasko would not have wished to explore the issue further, but her brief acknowledgment at trial of having done yard work could not have had the same impact that the extensive surveillance video and photographs the trial court improperly excluded would have had. To dismiss this evidence as "irrelevant," or "cumulative and/or collateral" (Red Br. 19), misses the point of demonstrative evidence. *See United States v. Perrotta*, 289 F.3d 155, 166 n. 9 (1st Cir. 2002) ("Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect.") (quoting 2 *McCormick on Evidence* § 212 (5th ed. 1999)).

The video and photographic evidence at issue here is not "[a] prior statement" (Red Br. 19), and Lasko fails to explain why admission of that

evidence should have hinged on the existence of an "inconsistent statement or other basis to explore the testimony further." *Id*. The evidence should have been admitted because it would have enabled the factfinder to evaluate the credibility of Lasko's overarching story in a way that her few words on the subject could not.

Lasko asserts that Almighty Waste improperly "denied the existence of any surveillance evidence in its discovery responses" (Red Br. 20), but she has no answer to the argument that "[t]here 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." Blue Br. 10 ("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."). Even if Lasko is right that the materials ceased to be protected work product when Almighty Waste used them at trial, a party is not required to disclose materials the other side has not requested.

Lasko cites *Beaudin v. Beaulieu* for the uncontroversial proposition that trial courts have "broad authority . . . to review and sanction discovery violations," 472 A.2d 426, 427 (Me. 1984)—but by Lasko's own account the

issue in *Beaudin* was that "a party sought to introduce expert testimony but *ignored an order* to provide the opposing side with the expert's report prior to trial . . . ." Red Br. 22 (emphasis added); *see Beaudin*, 472 A.2d at 427 (the appellant "contends . . . that the trial court abused its discretion by excluding the testimony of her expert witness as a sanction *for failing to comply with a pretrial discovery order*.") (emphasis added). No court order was ignored here.

II. The deposition testimony.

Lasko argues that Dr. Sweet's deposition testimony was admissible under any of three scenarios identified in Rule 32(a)(3), but none of the scenarios apply.[1] Nothing in the record supports the idea that Dr. Sweet was unable to testify because of "a conflicting commitment that could not be broken . . . without subjecting the witness or others to *legally enforceable sanctions* . . . ." (Red Br. 23, quoting Rule 32) (emphasis added)—no legally enforceable sanction is identified that Dr. Sweet or anyone else would have been subjected to if he had testified. Nor is there evidence that Dr. Sweet's attendance could not have been produced by subpoena.[2] *Id.*

[1] Contrary to what Lasko suggests, Dr. Sweet's deposition was admitted over Almighty Waste's objection. A. 32 (transcript page 8) ("[Y]our objection is noted.")

[2] Lasko claims it is "irrelevant" that (as Almighty Waste argues) "it was not the case that Dr. Sweet's testimony could not have been obtained by

It is instructive that Lasko never explains why exactly it was that Dr. Sweet could not have testified. Her best hope seems to be Rule 32(a)(3)'s "exceptional circumstances" provision, but the circumstances here are not at all exceptional—Dr. Sweet just couldn't be there at the time that was available for his testimony. That is not grounds for admitting his deposition. *See* General Principles Relating to the Use of a Deposition, 8A Fed. Prac. & Proc. Civ. § 2142 (3d ed.) ("The conditions set forth in Rule 32(a) must be satisfied before the deposition can be used at all."). Lasko herself appears to concede the point near the end of her brief when, in the course of discussing a different topic, she declares that "Dr. Sweet's unavailability was due to limited trial time" (Red Br. at 28–29)—which is obviously not an exceptional circumstance.

A heading in Lasko's brief declares that "the Sweet transcript was admissible as part of the defense' [sic] expert witness file." Red Br. 25. But no such argument appears under the heading. Instead she writes that "[defense] [c]ounsel 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." Red Br.

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subpoena" (Red Br. 24, quoting the Blue Brief)—yet she herself cites that prong of Rule 32(a)(3) and argues the trial court could have found that it applies.

25–26. The reason for this is straightforward: defense counsel expected that there would be time for Dr. Sweet to testify the next day. The argument gets Lasko nowhere.

III. Harmless error.

Lasko's harmless error argument is puzzling. The cases she cites are sufficiency of the evidence cases, not harmless error cases. In *Kay v. Hanover Ins. Co.*, 677 A.3d 556 (Me. 1996), the question was not whether an error was harmless, but whether there was a sufficient evidentiary basis for an expert opinion. *Id.* at 558 ("[T]he trial court properly determined that Campbell had a sufficient basis for expressing his opinion . . . ."). Likewise in *Green v. Cessna Aircraft* Co., 673 A.2d 216 (Me. 1996), the question was whether an expert opinion was supported by facts in the record. *Id.* at 220 ("Because Green's experts have presented a hypothesis that is not supported by the facts in evidence, the court correctly granted a summary judgment for Cessna Aircraft Company and Maine Instrument Flight."). Lasko asserts that the trial court's decision "is supported by sufficient evidence" (Red Br. 27), but the argument being made is not that there was insufficient evidence to support the verdict—it is that Almighty Waste was deprived of the opportunity to challenge the testimony and credibility of key witnesses. Lasko's conclusory speculation that

"[a]dmission or exclusion of the surveillance evidence, or the Sweet deposition, would not have altered the outcome" (*id.*) does not support the trial court's decision to deprive Almighty Waste of the opportunity to put on its case.

It is true that "[n]o 'smoking gun' emerged during the trial." Red Br. 28. That, however, is why the exclusion of the surveillance evidence and the denial of the opportunity to cross-examine Dr. Sweet could have made a real difference. Lasko tells us that "[u]nder 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" (*id.* 27), but it is unclear why this assertion appears in her brief given that Almighty Waste objected at trial to the evidence in question.

For an error by the trial court to be harmless, "the reviewing court must be convinced that it is *highly probable* that the error did not affect . . . substantial rights." *In re Scott S.*, 2001 ME 114, ¶ 25, 775 A.2d 1144, 1152 (emphasis added). Here, we have no idea what would have happened if Almighty Waste had been permitted to present its case as it had been prepared, so while it is certainly *possible* that the outcome would not have changed, that cannot be said to be *highly probable*. The denial of the

chance to defend itself in the manner of its choosing deprived Almighty Waste of substantial rights. The trial court's errors were not harmless.

CONCLUSION

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

February 19, 2026

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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:

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Dated: February 19, 2026

/s/ Jeffrey T. Edwards
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