# STATE OF MICHIGAN

# COURT OF APPEALS

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LINDA S. AMOS,

Plaintiff-Appellee,

v

KELLER TRANSFER LINE, INC., and JOHN LUCAS,

Defendants,

and

RTI TRANSPORT, INC.,

Defendant-Appellant.

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UNPUBLISHED
April 26, 2005

No. 254232
Wayne Circuit Court
LC No. 02-200555-NI

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

RTI Transport, Inc. ("RTI"), appeals as of right an order of judgment in favor of Linda S. Amos ("Amos"), following a jury trial, in this third-party auto negligence case. We affirm in part, reverse in part and remand.

## I. Directed Verdict

For its first issue on appeal, RTI contends that the trial court erred in denying its motions for directed verdict because Amos' claims were insufficient to establish a serious impairment of body function or an objective manifestation of a medically identifiable injury. We disagree. We review de novo the grant or denial of a motion for directed verdict. *Smith v Jones*, 246 Mich App 270, 273; 632 NW2d 509 (2001). The evidence is reviewed in the light most favorable to the nonmoving party to determine whether factual questions existed over which reasonable minds could differ. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). With reference to RTI's assertion that Amos' injuries are not sufficient to meet the threshold requirements as defined by MCL 500.3135(7), questions of statutory interpretation are also reviewed de novo. *Sweatt v Dep't of Corrections*, 468 Mich 172, 177; 661 NW2d 201 (2003).

RTI asserts that Amos' subjective complaints of headache, tinnitus and dizziness are insufficient to establish that her claimed impairment is "objectively manifested," as required by MCL 500.3135(7),[1] because they do not comprise a "medically identifiable injury or condition that has a physical basis." *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting SJI2d 36.11. RTI's argument that it was for the court and not the jury to determine if Amos' complaints met the threshold for a serious impairment of body function is without merit. MCL 500.3135(2)(a)(i) and (ii) are clear that the court determines this issue, as a matter of law, only when "there is no factual dispute concerning the nature and extent of the person's injuries." MCL 500.3135(2)(a)(i). In this instance, the "nature and extent" of Amos' injuries was highly contested, with RTI asserting that Amos did not incur a closed-head injury and that, even if she did, the resultant condition did not sufficiently impact her ability to lead her "normal life." Furthermore, in cases involving the assertion of a closed-head injury, a question of fact for the jury's determination is created if a physician, "who regularly diagnoses or treats closed-head injuries" provides sworn testimony that "there may be a serious neurological injury." MCL 500.3135(2)(a)(ii). Gerald F. Robbins, D.O., Amos' treating neurologist, stated, under oath, that Amos had "sustained a serious neurologic injury."[2] As such, the trial court did not err in

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[1] MCL 500.3135(7) states, "As used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

[2] Robbins' videotaped deposition was played before the jury. In that deposition, the following exchange occurred:

> Q. Okay. Can I ask your opinion then, Doctor, with respect to whether Linda Amos – based upon your examination, all the testing that you've gathered, including the neurological testing, the history, and following her over the years or over the months – indeed years, within a reasonable degree of medical certainty, what is your diagnosis of Ms. Amos?
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> A. Her history and findings were to me – would be indicative of a closed-head injury as a result of a motor vehicle accident.
>
> * * *
>
> Q. All right. When there's a closed-head injury, the law asks us to obtain from the treating doctor who spends a period of their [sic] life treating or diagnosing closed-head injuries to give an opinion on whether the patient may have experienced a serious neurological injury in the ordinary sense of the term.
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> Based upon the history and your examination, the testing, the neuropsychological testing that you've reviewed and the audiogram and all of your total picture of Ms. Amos, would you tell us, Doctor, whether, in your opinion, she may have experienced a serious neurological injury?

(continued…)

permitting the issue of the existence of a "serious impairment of body function" to be resolved by the jury.

RTI is in error in asserting Amos failed to objectively verify her complaints in a manner sufficient to establish either a closed-head injury or serious impairment of body function. The statute requires only that a plaintiff demonstrate an "objectively manifested impairment" not objectively verifiable medical testing results. MCL 500.3135(7). The term "objectively manifested" has been defined by case law as not being "predicated on serious pain and suffering, but on injuries that affect the functioning of the body." *Jackson, supra* at 650, quoting *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982). Amos met this requirement through evidence presented regarding her inability to return to her prior job post-accident, her decreased socialization and inability to participate in activities that comprised her "normal life." RTI also ignores the testimony of Amos' neurologist that indicated an abnormality in the visual evoked response test and anomalies in an MRI performed on Amos indicating "findings in the periventricular region with a suspicion of demyelinating process." Upon follow-up testing, Amos' neurologist opined that the MRI findings and symptoms were not consistent with a diagnosis of demyelinating disorder, but more likely demonstrated "a closed-head injury and postconcussion syndrome."

RTI also takes issue with the presentation of neuropsychological testing as a basis to establish the existence of an objectively manifested condition. RTI asserts that results of neuropsychological testing cannot be used as an alternative to medical testimony to establish the existence of a serious neurological injury or as a means to objectify a plaintiff's subjective complaints. Contrary to RTI's assertion, MCL 500.3135 does not provide the exclusive manner by which a plaintiff may establish the existence of a closed-head injury and the existence of a factual dispute. *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000). MCL 500.3135(2)(a)(ii) does not serve to limit the admissibility of evidence relating to the existence of a closed-head injury. Instead, it merely provides an exception that permits a plaintiff to automatically create a jury question by providing testimony of a medical physician that a serious neurologic injury *may* exist. Amos came forward with sworn testimony from a neurologist that satisfied the requirements of MCL 500.3135(2)(a)(ii). The neuropsychological testing performed was merely another mechanism available to Amos to establish the existence of a medically verifiable serious neurological impairment that affected her ability to lead her life. Issues that subsequently arise regarding the interpretation of test results or methodologies employed in testing and the resulting diagnoses are evidentiary in nature and go to the weight of the evidence.

In determining whether Amos suffered a serious impairment of body function, it was appropriate for the jury to consider her general lifestyle before and subsequent to the accident.

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(…continued)

> A. Considering her inability to function in the real world – and our task has been, over the last year, year and a half, to get her back to a functional state—in the real world, we've had difficulty. We are approaching some semblance of improving her functionality, but with her complaints and with what we found on testing and her ability to function, it seems that she's sustained a serious neurologic injury in her ability to function.

*May v Sommerfield*, 240 Mich App 504, 506; 617 NW2d 920 (2000). Objective evidence of the impact of the injuries upon her "general ability to lead [] her normal life" was presented to the jury through testimony by Amos and her family and friends. MCL 500.3135(7). Furthermore, Amos' treating neurologist recommended that she not return to her prior employment and Amos testified that she was unable to work at her previous level of functioning and was compelled to discontinue most of her prior recreational pursuits.

RTI's contention that the court improperly permitted evidence of Amos' resolved musculoskeletal injuries to be presented to the jury is without basis. Counsel for Amos made it abundantly clear that she did not assert that injuries to her back, neck and knee, which were admittedly resolved, constituted a serious impairment of body function meeting the required threshold criteria. Amos consistently claimed that evidence of these injuries was submitted to the jury because noneconomic damages were compensable once the claimed threshold injury of a closed-head injury was established. *Byer v Smith*, 419 Mich 541, 544; 357 NW2d 644 (1984). Because evidence of these injuries was properly presented to the jury for its evaluation of noneconomic damages, the trial court did not err in failing to preclude reference to medical testing that originally established the existence of the physical condition. Further, although RTI contends that reference to such medical testing improperly influenced the jury's determination, it offers no proof that such evidence was improperly considered or given exaggerated importance by the jury in its determination of damages.

## II. Expert Testimony

RTI next asserts that the trial court erred in failing to exclude testimony of Amos' neuropsychology expert because it failed to meet the reliability standards of MCL 600.2955(1). We disagree. RTI does not take exception with the tests utilized, but rather contends that the interpretation of the results is faulty. RTI asserts that Amos' expert compared Amos' test results with an improper population, or normative sample, and did not account for or determine Amos' actual premorbid functioning in arriving at his conclusion of the existence of a closed-head injury. As such, RTI contends that the expert's testimony is scientifically unreliable based on the criteria delineated in MCL 600.2955(1). Because of the failure of RTI's counsel to object to the testimony during examination of the witness, the issue is unpreserved. We review unpreserved evidentiary issues to determine whether there was plain error affecting a party's substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

MCL 600.2955(1) is a statute and not a rule of evidence. It does not displace evidentiary rules. *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd in part on other grounds, 465 Mich 885 (2001). Based on RTI's framing of this assertion of error as an evidentiary issue, the trial court's decision to admit the testimony of Amos' expert as evidence is reviewed under the rules of evidence. MRE 702 provides that "[a]s long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible." *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997), citing *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

RTI asserts that the expert's methodology was flawed in failing to secure verification of Amos' premorbid academic or psychological functioning and did not follow acceptable scientific methodology in reaching his determination regarding the existence of a closed-head injury. However, both Amos' and RTI's neuropsychology experts used many of the same tests in reaching their divergent conclusions. As noted by Amos' expert, the possibility of procuring premorbid psychological testing results for Amos were minimal, as such evaluations were not routinely performed by the schools that Amos attended. While Amos' expert did not procure Amos' high school transcripts to verify self-reports of her academic or prior intellectual functioning, the records obtained and relied upon by RTI's expert do not significantly contradict Amos' own recounting of her academic history. Amos' expert acknowledged that Amos reported being a poor student and receiving primarily C's and D's in high school, and noted, "She has some long lasting developmental limitations in language related areas, learning disability." The issue raised by RTI focuses primarily on Amos' expert's methodology of comparing Amos to a normative population in the interpretation of her test results. However, even RTI's own expert recognized the necessity of the methodology used. RTI's expert opined that there would be a necessity for "clinical fine tuning" in the interpretation of Amos' test scores, which is consistent with the interpretive model used by Amos' expert in his acknowledgement of her poor academic performance, his expectations that Amos performed on certain tests in accordance with her prior abilities, and an accounting for this discrepancy in Amos' expert's interpretation of his testing results.

It has been routinely recognized by this Court that defects in evidence are subject to attack on cross-examination and go to weight, not admissibility, of the evidence. *Lopez v General Motors Corp*, 224 Mich App 618, 632 n 20; 569 NW2d 861 (1997). RTI had an opportunity to attack the testimony and testing results of Amos' expert. Counsel for RTI questioned Amos' expert extensively, and its own expert, about the informational history obtained from Amos and the data used in formulating his diagnosis, as well as any information that Amos' expert did not procure or review in his determination of neuropsychological deficits. Any defects in the expert's diagnosis were sufficiently brought to the jury's attention and are matters of weight, not admissibility. "When reviewing a trial court's decision to admit evidence, we do not assess the weight and value of the evidence, but only determine whether the evidence was the kind properly before the jury." *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993). As such, the trial court did not err in the admission of expert testimony and testing results, as it comprised the kind of evidence that is properly before a jury and is consistent with the requirements of MRE 702.

## III. Exemption for Taxes

RTI next contends that the trial court erred in failing to allow RTI an exemption for the amount of taxes Amos would have paid on the income claimed as damages, pursuant to MCL 500.3135(3)(c). We agree. The meaning and application of MCL 500.3135(3)(c) is a matter of statutory interpretation this Court reviews de novo. *Sweatt, supra* at 177.

Deductions for prospective taxes are proper only when they are specifically provided for by statute. *Gorelick v Dept of State Highways*, 127 Mich App 324, 341-342; 339 NW2d 635 (1983). MCL 500.3135 provides, in relevant part:

> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:
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> * * *
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured. [MCL 500.3135(3)(c).]

"When a statute's language is clear and unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written." *Krug v Ingham County Sheriff's Office*, 264 Mich App 475, 481; 691 NW2d 50 (2004). Likewise, contrary to Amos' assertion, there is no risk of double taxation of the amounts received as compensation for lost wages. Under 26 USC 104(a), "the recovery for lost wages is excludable as being 'on account of personal injuries,' as long as the lost wages resulted from time in which the taxpayer was out of work as a result of her injuries." *Gerbec v US*, 164 F3d 1015, 1021 (CA 6, 1999). Given that there is no risk of double taxation and the clear and unambiguous language of the statute, RTI was entitled to a credit for prospective taxes in the award.

Amos further contends that, even if RTI was entitled to an exclusion, RTI failed to meet the requisite burden of proof by not presenting expert testimony regarding Amos' prospective tax status and, hence, should be precluded from the receipt of any exemption. In this instance, RTI sought to submit an offer of proof, which the trial court indicated it would permit. In addition, Amos' W-2's for three consecutive years prior to the accident were submitted into evidence. As Amos' tax rate could easily be extrapolated by the wage verification information submitted into evidence, the trial court did not lack a factual basis upon which to reduce Amos' award or require expert testimony for this determination. Therefore, the trial court erred in not permitting RTI to receive an exemption for Amos' prospective tax liability.

## IV. Photographs

RTI contends that the trial court erred in admitting photographs of Amos' car after the accident when Amos was not the individual who took the photographs and was allegedly unable to verify that the car in the photograph belonged to her. We disagree. While Amos acknowledged that she did not take the photographs, she stated that she was able to identify the car in the photograph based on its similarity to the make and model of the vehicle she had owned for at least two years before the accident and having viewed photographs of her vehicle after the accident. The introduction of photographs into evidence is within the discretion of the trial court. *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 290; 416 NW2d 415 (1987). The test to determine whether a trial court abused its discretion in the admission of photographs is a determination of whether the photographs present a faithful or reasonable representation of a scene as it existed at the time of the accident. *Id.* at 291. The actual photographer is not required

for purposes of authentication. *Id.* "As long as a witness admits that a photograph is a fair representation of what is shown, it is properly admitted to be given whatever weight the jury deems is due." *Id.* Because Amos was able to identify the vehicle, admission of the photographs into evidence was not an abuse of the trial court's discretion.

## V. Improper Discovery

RTI next asserts error by the trial court in permitting the belated exchange of discovery with reference to the raw test data of both neuropsychologists. RTI specifically contends that the belated exchange was unfair and inherently prejudicial to RTI's case because the materials were not received within a timeframe for RTI's use in examination and cross-examination of witnesses. What RTI ignores, is the fact that it stipulated to the exchange of the data and the schedule for the exchange. Error necessitating reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Because RTI stipulated to the exchange, with knowledge of the schedule for testimony of the impacted witnesses, it cannot now assert that the trial court's approval of the exchange constituted error.

## VI. Attorney Misconduct

RTI's remaining claims of error focus on statements by Amos' counsel. Specifically, RTI contends that counsel for Amos (a) improperly made references to insurance and compared RTI to an insurance company; (b) made derogatory references to RTI as a "trucking corporation;" (c) misstated the evidence regarding statements of an examining physician, the type of rehabilitative services received by Amos and the speed and size of the semi-truck involved in the accident; and (d) made improper appeals to the sympathy of the jury.

"An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial jury. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunter v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996) (citations omitted). Instruction by a trial court to the jury before opening statements and following closing arguments that the statements of counsel are not evidence is generally sufficient to cure any prejudice which might arise from remarks by counsel that are improper. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). In addition, if prejudice arising from an improper argument could have been cured by an instruction if such an instruction had been requested, there is no error requiring reversal. *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 65; 454 NW2d 188 (1990).

Amos' counsel's comments on insurance during voir dire merely served to explore the opinions or mindset of prospective jurors rather than incite any prejudice that the prospective jurors may have had against insurance companies. Likewise, taken in context, the references to RTI as a trucking company were not made in a derogatory manner. Consequently, these comments were not improper.

RTI did object during opening argument by Amos' counsel to a reference that "3 out of 4 times these head injuries are missed, and you'll hear that from the defendant's own doctor, in the emergency room there." No further reference was made in closing and the trial court instructed

the jury that the statements of the attorneys were not evidence and reflected only "what they believe the evidence may show in this case." This instruction properly alleviated any prejudice from this statement. This instruction also cured any harm caused by the reference to Amos' receipt of vocational rehabilitation. Likewise, references to the speed of the semi-truck were not objected to by RTI during Amos' counsel's opening statement, but were objected to during closing and the trial court gave an appropriate curative instruction. Therefore, none of these statements rises to a level of misconduct warranting a new trial.

RTI also cites multiple instances during opening and closing statements when Amos' counsel referred to the failure of RTI to admit liability, the need to make RTI accountable, to secure road safety and appeals to the jury's sympathy for Amos should she not be compensated for her damages. At trial RTI's counsel objected only to the statement involving road safety, for which the trial court provided a curative instruction. Although some of these comments were improper, they are not part of a "studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunter*, *supra* at 95. Furthermore, the trial court's instructions were sufficient to alleviate the prejudice caused by these remarks. *Hunt*, *supra* at 65.

Because the statements made by Amos' trial counsel were either appropriate or had a minimal prejudicial effect that was cured by the trial court's instructions, there was no error warranting reversal. For the same reasons, the cumulative effect of any errors will not warrant a new trial. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000).

With the exception of the trial court's ruling on the tax exemption, we affirm the rulings of the trial court. As to the tax issue, we reverse and remand to the trial court for recalculation of Amos' wage loss damages with a credit for prospective tax liability in accordance with MCL 500.3135(3)(c). We do not retain jurisdiction.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski