

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

THOMAS NEELY,

Plaintiff,

v.

No.: 3:05-CV-304
(Guyton)

FOX OF OAK RIDGE, INC. and
BENJAMIN H. CURD,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION IN LIMINE

The Plaintiff's response to the Defendant's motion in limine is as follows:

The Defendant has asked this Honorable Court for an Order excluding the testimony of Thomas Koenig, M.D., as to his opinion whether the Plaintiff, Thomas Neely, was capable of gainful employment relative to his former employment. Depo. Thomas Koenig, M.D., 30:14-17 (Nov. 30, 2005) In reviewing the Defendant's objection/motion in limine, it appears to be an evidentiary question, which goes to the weight of the evidence not the qualifications of Dr. Thomas Koenig. Dr. Koenig was never proffered as an expert in the field of vocational rehabilitation. However, Dr. Koenig did testify in his expert capacity as an orthopedic surgeon about Mr. Neely's physical restrictions, "no duty" (Depo. Thomas Koenig, M.D., 32:1-2) and Dr. Koenig's first-hand knowledge regarding Mr. Neely's former job description, which was obtained in the course of over a year by Dr. Koenig's treatment of Mr. Neely. (Depo. Thomas Koenig, M.D., 14:13-20; 30:22-25, and 31:1-6) Thus, Dr. Koenig testified concerning his

treatment and the physical restrictions, which he placed upon Mr. Neely, and not as a vocational rehabilitation counselor as the Defendant would suggest.

In regards to the Defendant's motion in limine to strike Dr. Koenig's testimony that he did not believe that Mr. Neely would have been "employable" (Depo. Thomas Koenig, M.D., 32:10-11) the Defendant made no objection during or after that statement. Furthermore, the Federal Rules of Civil Procedure, Rule 32 (d)(3)(A) (2005), states:

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

This lack of objecting to Dr. Koenig's testimony prejudices the Plaintiff in that the objection is one which might have been obviated or removed if presented at that time. Therefore, the Plaintiff is incapable of remedying this objection and will be forever prejudiced. The Federal Rules of Civil Procedure, Rule 32 (d)(3)(B) (2005), further states:

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

The Defendant was aware the Dr. Thomas Koenig's proof deposition was taken with the Plaintiff not waiving any objections until the time of trial. (Depo. Thomas Koenig, M.D., 3:12-13) A proper objection could have and should have been made to the form of the answer. However, as the record will show no objection was made and is therefore forever waived.

In conclusion, this Court should enter an Order denying the Defendant's Motion in Limine concerning the Defendant's objection to Dr. Koenig's statement involving his first-hand knowledge and the Defendant's unspoken objection as it is untimely and should be forever waived.

Respectfully submitted this 9th day of June, 2006.

s\Michael C. Inman
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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2006 a copy of the foregoing Plaintiff's Response to Defendant's Motion in Limine was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s\Michael C. Inman
Michael C. Inman, Attorney for Plaintiff