

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

THOMAS NEELY, Plaintiff

v.

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

APPEARANCES:

ROBERT J. ENGLISH, MICHAEL C. INMAN, Attorneys for the Plaintiff, Thomas Neely

CLINT J. WOODFIN, Attorney for the Defendant, Fox of Oak Ridge, Inc. and Benjamin H. Curd

DEPOSITION OF THOMAS M. KOENIG, M.D. November 30, 2005

NO. 3:05-CV-304 PHILLIP/GUYTON

1 client and Mr. Inman's client, Thomas Neely. And if you 2 would throughout this deposition, testify based on 3 reasonable medical certainty or probabilities. Will you do 4 that for us? 5 A I will. 6 Q Okay. Dr. Koenig, where do you practice 7 medicine? 8 A I practice in Knoxville, Tennessee, on 9 Kingston Pike. 10 Q What's your specialty? 11 A Orthopedic surgery. 12 Q Doctor, what does that mean, what does 13 that entail? 14 A It involves the study and treatment of 15 bones, muscles, tendons, ligaments, discs and nerves. 16 Q Okay. And where did you take your 17 medical training, sir? 18 A Most of my medical training was in 19 Philadelphia, Pennsylvania. I went to a medical school 20 there called Hahnemann Medical University, and then from 21 there I did a residency for five years at Hahnemann Medical 22 University, and then I did an optional one year in 23 Washington, D.C. with George Schonholtz in arthroscopy. 24 Q Okay. Doctor, where do you do your 25 surgeries here in Knoxville when you do surgery?

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Table with 2 columns: WITNESS and PAGE. Includes THOMAS M. KOENIG, M.D. with sub-entries for Direct Examination, Cross Examination, and Redirect Examination.

EXHIBITS

Table with 3 columns: NO., DESCRIPTION, and PAGE. Lists exhibits 1 through 4 including Curriculum vitae, List of medical expenses, and MRI reports.

1 A I've got privileges at a fair number of 2 facilities. Most of my surgery is done out west, the more 3 major cases at Parkwest. There are a bunch of surgery 4 centers like Parkwest Surgery Center Tower, Knoxville 5 Surgery Center, Fort Sanders West. It may be easier to 6 tell you where I don't have privileges, but primarily out 7 here in the west. 8 Q Okay. Is that for convenience sake? 9 A Yes. Whenever I first came here in 10 1992, I didn't mind the travel so much and thus I had 11 privileges at Children's, I'm sorry, East Tennessee 12 Children's, U.T., Regional, and as your practice matures, 13 you don't have the time to run around to the various 14 different places, so it's more or less stayed out here in 15 the west. 16 Q Doctor, as a matter of maturity, how 17 long have you practiced, been licensed to practice 18 orthopedic surgery in the state? 19 A In the state, since '92. 20 Q Okay. Are you Board certified, sir? 21 A Yes, sir. And recently recertified. 22 Q Okay. What does it mean to be Board 23 certified, Dr. Koenig? 24 A When you sit for your Boards the first 25 time, you undergo a rigorous written exam with several

1 The videotaped deposition of THOMAS M. KOENIG, 2 M.D., taken by agreement of counsel, for any and all 3 purposes allowable under the Federal Rules of Civil 4 Procedure, before DENISE M. HOOD, Court Reporter and Notary 5 Public in and for the State of Tennessee at Large, on the 6 30th day of November, 2005, at the office of the witness, 7 11808 Kingston Pike, Knoxville, Tennessee.

8 It is agreed that the reporter may swear the 9 witness, take the deposition stenographically, and 10 afterwards reduce the same to typewritten form when the 11 completed deposition may be used in the above-styled cause.

12 The plaintiff does not waive any objections until 13 the time of the trial. All formalities are expressly 14 waived as to caption, certificate, transmission, and the 15 reading and signing of the deposition by the witness.

16 THOMAS M. KOENIG, M.D., 17 having been first duly sworn, was examined and 18 deposed as follows:

19 DIRECT EXAMINATION

20 BY MR. ENGLISH:

21 Q Would you state your name for the 22 record?

23 A Sure. Thomas Martin Koenig, M.D.

24 Q Dr. Koenig, my name is Bob English, as 25 you know, and I'm here to ask you some questions about my

1 hundred questions. I no longer remember, but I'm sure it's 2 four or five hundred questions, and you have to pass those. 3 On the assumption that you've passed those, then the Board 4 queries you as to what you actually do as far as practice 5 goes, and you have to simulate for them and gather all the 6 x-rays, all the operative reports for about a six-month 7 period of your time and they have the ability to scrutinize 8 that. They ask you to come to Chicago and you carry a 9 bunch of bags with x-rays and all kinds of stuff, MRI's, 10 your operative reports, and then they grill you. You sit 11 for about eight hours and they ask you anything and 12 everything and hopefully you pass, and if you pass, then 13 you are, at that time, Board certified. I think ever since 14 1988, if you're certified, you're certified for a limited 15 time, ten years, then you had to re-sit for Boards again. 16 Q And you did so? 17 A Yes, sir. I think I'm good through the 18 year 2014, if I'm not mistaken. I have a CV, if you'd 19 like. 20 Q Doctor, we have a copy of your CV. 21 Would you hand that to the doctor and see if that's the 22 most recent CV he has, Ms. Court Reporter? 23 A Yes. That is correct. And I'm 24 recertified through the 31st of December, 2014. 25 MR. ENGLISH: Let's make your CV Exhibit

1 comfortable at work with attempts at weight loss, with
 2 attempts of trials of epidural steroids, both to the
 3 cervical spine and lumbar spine, physical therapy, tincture
 4 of time despite -- and I've tried to be fair to everybody
 5 and tried getting him to work to some level. Despite all
 6 those attempts, he reports back to me on the 15th of
 7 November that he has unchanged low back pain, unchanged
 8 neck pain. In that regard, if I can't get him better and
 9 get him back to the workplace, I'm in a little bit of a
 10 dilemma. I can't keep pushing this gentleman. I can't
 11 keep saying no, you've got to go back, you've got to go
 12 back. I've got to say all right, fine, we've tried to do
 13 everything we can, we've tried to gently persuade you to
 14 get back to the workplace, we've tried to get you to
 15 physical therapy, we've done everything we can, you're not
 16 getting better. There comes a point where you have to fish
 17 or cut bait, and in short, sir, I don't think that this
 18 gentleman's going to be able to go back to the workplace
 19 and be productive.

20 Q And you made that change on the day that
 21 he was asked by his lawyer to come and see you and be
 22 evaluated for this lawsuit?

23 A I made that change based on the fact
 24 that enough time had elapsed from when his accident
 25 occurred on July 2004 to November 2005, roughly a year and

1 whatsoever noted. It was unlikely he was going to
 2 get better. It was unlikely despite our attempts
 3 at getting him back to work at some limited basis
 4 at fifteen pounds that he was going to be able to
 5 do the work and feel good about it and, you know,
 6 say, hey, look, I can do this without hurting.

7 In short, everything was right in the
 8 fact that there was enough time had evolved,
 9 enough studies had been done, enough physical
 10 therapy had been given that a decision could be
 11 made on a medical basis to say all right, it
 12 doesn't look like we're going to be able to get
 13 you back to work.

14 Q You hadn't done any objective tests for
 15 him since the MRI of his cervical spine that was done,
 16 correct, since November of 2005?

17 A If you're talking about radiographic
 18 tests, that would be correct. However, of course, he
 19 received an objective evaluation here in the office in
 20 regard to muscle strength testing, reflexes, things of that
 21 nature.

22 Q His chronic obesity obviously gives him
 23 problems as well with his spine?

24 A Yes, sir. However, that should actually
 25 be limited to his lumbar spine. It's unlikely that his

1 a half, call it a year and four months, whatever it works
 2 out to be. There was plenty of time to allow this
 3 gentleman to try to get better. He did not get better
 4 despite appropriate conservative care and semi-invasive
 5 care to where there comes a point and some would have said
 6 that perhaps I should have come to this point earlier and
 7 said you know what, you should have given him no duty much,
 8 much earlier, some might have said as early as six months.
 9 I tried harder to get him back to work. I tried -- this
 10 gentleman is a very complicated person, very complicated
 11 case. He's got congenital anomalies, he's not getting
 12 better. I tried as hard as possible to get him back to the
 13 workplace.

14 Q But on the day that he came in for his
 15 evaluation is when you made the change?

16 A Because on --

17 Q That's yes or no. You can explain it
 18 later, but yes or no, did you make the change to no duty on
 19 the date he was sent in by his lawyer for an impairment
 20 evaluation for this lawsuit?

21 A The answer to that question is yes.

22 MR. ENGLISH: Explain your answer,
 23 Doctor, if you would.

24 THE WITNESS: Sure.

25 MR. WOODFIN: I'll let you do that on

1 obesity significantly alters his cervical spine. There's
 2 not much weight that your head carries.

3 Q What did you call it, atapost tissue; is
 4 that correct?

5 A Yes, sir.

6 Q Depending on how much is there, that
 7 could affect his cervical range of motion, could it not?

8 A That could to a limited degree.

9 Q The jury's going to have a look at this
 10 man so they'll be able to look at his neck and see how much
 11 of that is there.

12 A Right. And please understand that that
 13 also would be part and parcel of what you felt would be --
 14 I did feel that he had some preexisting limited range of
 15 motion.

16 Q I think you related that to the
 17 congenital defect, though, did you not?

18 A Related it to preexisting conditions.
 19 Of course, the largest component of which would be the
 20 congenital defects. Yes, sir.

21 Q I didn't see anything in your record
 22 that said you limited it because of fatty tissue in his
 23 neck.

24 A No, sir. You know, you also try to sit
 25 there and you try to be thorough, you try not to be wordy.

1 Redirect Examination. This man is also --

2 MR. ENGLISH: Well, no, excuse me, Mr.
 3 Woodfin, for the sake of continuity so the jury
 4 doesn't get confused, I would like for him to
 5 explain it now and then you can delete it if the
 6 judge wants you to.

7 MR. WOODFIN: Well, I'll object to it.
 8 You can say what you want now --

9 MR. ENGLISH: Go ahead and explain it.

10 THE WITNESS: Well, I'm confused enough
 11 as it is to whereby if you could repeat the
 12 question so that I could answer it because I've
 13 lost continuity.

14 MR. ENGLISH: Okay.

15 MR. WOODFIN: I didn't have a question.

16 MR. ENGLISH: Well, would you explain
 17 your answer as to why the change in the
 18 restrictions were made on the day he came in to
 19 see you at my request, as you always see people
 20 for different attorneys?

21 THE WITNESS: Sure. Please understand
 22 the reason why was that a sufficient period of
 23 time had taken place between when the injury
 24 occurred and when I was seeing him. There was no
 25 substantial improvement or no improvement

1 Some people would state that I'm a wordy as it is, and in
 2 short, I tried to give you as concise a plan as possible.

3 Also, sir, you try not to necessarily be cruel in a written
 4 document that you know is going to be poured over by a
 5 bunch of people to sit there and if there's a way you can
 6 elegantly state that he's got a preexisting problem and not
 7 sit there and say all right and part of it's because of the
 8 layer of atapost tissue and just sit there and say he's got
 9 a preexisting impairment of this and this much, and you can
 10 do it elegantly as a gentleman. I would prefer to do it
 11 that way.

12 Q You also understand you're being asked
 13 to advocate a position for the plaintiff in this case, are
 14 you not?

15 A No, sir, I don't know that I'm
 16 necessarily being asked to advocate a position for the
 17 patient. What I was asked to do was objectively -- at the
 18 end, I was asked to objectively evaluate the patient, I was
 19 asked to objectively take care of the patient, and I was
 20 asked to objectively impair the patient if any existed, and
 21 I think I did all three. Now, I will tell you this, I
 22 certainly tried to do all three.

23 Q You were beginning to see Mr. Neely upon
 24 referral of his attorney, correct?

25 A Mr. Inman, I think, was the person who