

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE**

**THOMAS NEELY,**

**Plaintiff,**

**v.**

**No.: 3:05-CV-304**  
**(Phillips/Guyton)**

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

**Defendants.**

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**DEFENDANTS' MOTION IN LIMINE**

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Come now the defendants, and hereby move this Honorable Court for a ruling regarding an objection made during the direct examination of plaintiff's expert witness, Dr. Thomas Koenig. In support of said motion, defendants would state as follows:

In the course of direct examination, counsel for the plaintiff asked witness Thomas Koenig, M.D., for an opinion regarding whether the plaintiff was capable of gainful employment relative to his former employment. (Deposition of Thomas Koenig, M.D., page 30, line 14-17, attached hereto as Exhibit One). An objection was stated on the basis of lack of qualification. The defendants assert that the plaintiff has failed to prove that Thomas Koenig, M.D. is qualified to testify about any vocational opportunities that exist for the plaintiff. In subsequent testimony, counsel for the plaintiff again tried to illicit testimony from the witness, who testified again beyond his qualifications by claiming that in his opinion, he did not think the plaintiff would have been "employable." (Deposition of Thomas Koenig, M.D., page 32, lines 10-11).

On cross examination, the witness admitted that he is not qualified as a vocational rehabilitation counselor. (Deposition of Thomas Koenig, M.D., page 35, lines 13-14). He further acknowledged that he has no ability to know what jobs are available for disabled other than a “good general idea.” (Deposition of Thomas Koenig, M.D., page 35, lines 17-19). The witness acknowledged that his “general ability” to testify about employability is equal to that of any other board certified orthopedic surgeon, and that he has never preformed a vocational analysis. (Deposition of Thomas Koenig, M.D., pages 35-6, lines 20-25, 1,6).

The defendants assert that the plaintiff has failed to qualify the expert in the area of vocational assessment, and that the testimony of the witness should be stricken. The plaintiff claims in his lawsuit that he has suffered a loss of earning capacity, but this claim is unsupported by any expert testimony, other then the efforts outlined above to have an unqualified witness support the claim. Instead of retaining a proper expert to analyze the restrictions placed on the plaintiff by the orthopedic expert, the plaintiff attempts to bootstrap his argument by having a medical doctor perform a vocational analysis. Such testimony is improper, and will possibly cause the jury to decide the issue of lost earning capacity on testimony from an unqualified expert. The witness admitted that he has never undertaken a vocational analysis, and that his knowledge of the subject matter is limited to what an expert in the field of orthopedic surgery would know. There will be no evidence before this Court that this, or any, orthopedic surgeon is qualified to testify as a vocational expert.

Respectfully Submitted:

SPICER, FLYNN & RUDSTROM PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on \_\_\_\_\_, 2006, a copy of the foregoing Stipulation 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.

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This 2nd day of June, 2006.

S\ Clint J. Woodfin  
Clint J. Woodfin