

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

THOMAS NEELY,)	
)	No. 3:05-CV-304
Plaintiff,)	
)	Knoxville, TN
vs.)	June 21, 2006
)	9:30 a.m.
FOX OF OAK RIDGE,)	
)	
Defendant.)	

TRANSCRIPT OF JURY TRIAL (CONTINUED)
BEFORE THE HONORABLE H. BRUCE GUYTON
UNITED STATES MAGISTRATE JUDGE

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(NOTE: Unless provided to the Court Reporter, all proper nouns are spelled to the best phonetic approximation.)

This cause came on for hearing on the 21st day of June 2006, in the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable H. Bruce Guyton presiding.

The Court having been duly opened, the following proceedings were continued from the previous day:

DEPUTY CLERK: All rise.

DEPUTY COURT: Bring the jury in.

(Jury in at 9:25)

DEPUTY CLERK: The United States District Court for the Eastern District of Tennessee is now open with the Honorable Bruce Guyton, United States Magistrate Judge presiding. Please come to order and be seated. Docket No. 3:05-CV-304, Thomas Neely v Fox of Oak Ridge.

THOMAS NEELY,
the plaintiff, having been previously sworn, returned to the stand to continue testimony as follows:

DIRECT EXAMINATION (Continued)

BY MR. ENGLISH:

Q You are Thomas Neely that testified yesterday?

A Yes, I am.

Q Tom, when I asked you about a wreck, if you had ever had any wrecks before the one we're here about today, you told me you had not. Have you rethought that?

1 A Yes, sir. I forgot I was in an automobile
2 accident over 20 years ago. And I just forgot about it.

3 Q Okay. Was it much like the one we are here
4 today about?

5 A Yes. I clipped the rear end of another
6 vehicle.

7 Q Did you acknowledge responsibility for that?

8 A Yes, I did.

9 Q Okay. You also told me about a deer running
10 into you. But you didn't consider that a wreck?

11 A I didn't. A deer actually hit me on the way
12 to work one night. And I didn't --

13 Q Okay. When you went out to measure the curb
14 next to the entrance that the car in front of you was entering,
15 you testified yesterday that you measured it seven inches above
16 the lowest part next to the curb?

17 A Yes. As I pointed out in the photo.

18 Q Was the entrance to the car that was going
19 across, what was the height of that entrance?

20 A The lowest point was three inches.

21 Q Okay. And what was the highest point?

22 A Seven inches.

23 Q Okay. So there was a distinct bump there?

24 A Yes.

25 Q Okay. When you slowed down so that you

1 wouldn't hit that car that was turning, in the rear, how fast
2 do you think you were going when you were impacted?

3 A I was nearly at a stop.

4 Q Okay. And had you been following that car a
5 safe distance behind in your opinion?

6 A Yes. Three, four, five car lengths. I had
7 seen him turn on his turn signal.

8 Q Okay. And whenever he did that, what did you
9 do?

10 A I slowed down too, along with the other
11 vehicles.

12 Q Okay. Did you put your turn signal on?

13 A No.

14 Q Okay. You weren't planning on turning there?

15 A No. I had no intention.

16 Q Okay. And when I asked you yesterday about
17 the effects of the injuries from this wreck on your life, has
18 it had any effect on your ability to pay your bills?

19 A Yes. I'm currently behind in about everything
20 that we have. I'm delinquent on one month in our land payment.
21 I was almost two. But we did manage to make one payment. When
22 we get close to that second month, the people from the bank
23 threaten to foreclose.

24 MR. WOODFIN: Your Honor, I'm going object to
25 that. That's hearsay.

1 THE COURT: Sustained.

2 BY MR. ENGLISH:

3 Q Have you ever had any problems paying bills to
4 support you and your wife and your children before this car
5 accident?

6 A No, I haven't. I've always managed to make a
7 living in some capacity. I've never made a great deal of
8 money. I've always worked to support my family.

9 Q Okay.

10 A And now I'm unable to do that.

11 Q When did you first start working, Tom?

12 A I started mowing grass when I was probably 12
13 or 13 years of age. I mowed grass all summer long to make
14 enough money to buy a new push mower, because my dad didn't
15 want me using his to wear it out.

16 Q Okay. Did you -- did you work continuously at
17 one job or another up until the time of this wreck?

18 A Yes. I have worked all the way through trying
19 to support my family. I've even dug graves by hand with my
20 wife's in-laws in order to support our family.

21 Q Okay.

22 A It just really tears me up to a great deal --
23 point that I can't get out and work and support them. I'm
24 sorry.

25 Q That's okay. Thank you, Tom.

1 THE COURT: Are you ready, Mr. Neely?

2 MR. NEELY: Yes. I'm sorry.

3 THE COURT: That's okay.

4 Mr. Woodfin?

5 MR. WOODFIN: Thank you, Judge.

6 CROSS EXAMINATION

7 BY MR. WOODFIN:

8 Q Mr. Neely, when did you go out and take this
9 photograph?

10 A I took it yesterday.

11 Q This photograph here?

12 A It was taken Monday.

13 Q Monday of this week?

14 A Yes. I took the measurements on the curb
15 Monday. Let me clarify that, I'm sorry.

16 Q Well, when was it, sir? Monday of this week?

17 A I took the measurement of the curb, yes, on
18 Monday.

19 Q When did you take the photograph?

20 A I didn't take the photograph.

21 Q You didn't? I thought you told your lawyer
22 you did?

23 A No.

24 Q Okay. You went out there and took
25 measurements with what, a level and measuring tape?

1 A A measuring tape. Yes, sir.

2 Q So you got down and measured the curb, and
3 then measured the part where the cars turn in on that driveway?

4 A I used a measuring tape and looked at it to
5 the best of my ability. Yes, sir.

6 Q Despite the fact that you can't do anything,
7 you were able to do that, weren't you?

8 A I pulled out a measuring tape. Yes, sir.

9 Q Is it your testimony that you lost
10 consciousness at the scene of this accident?

11 A I don't know whether or not -- I did or not.

12 Q You didn't know whether you did or didn't. Is
13 that what you're telling us?

14 A I don't think I did at the time.

15 Q Do you remember when I took your deposition?

16 A Yes.

17 Q Do you remember when you told me that you did
18 not lose consciousness?

19 A I do not remember that statement.

20 Q Do you remember telling your doctors that you
21 did lose consciousness at the scene of the accident?

22 A I do not remember all the exact wording that I
23 told the doctors. No.

24 Q Do you have any explanation for why the
25 doctors say that you did tell them that you lost consciousness

1 at the scene of the accident?

2 A No, I do not.

3 Q Do you remember when I took your deposition
4 and you told me you were having memory problems?

5 A Yes, sir. I do.

6 Q Do you remember telling me that you told your
7 doctors that you were reporting to them that you had memory
8 problems?

9 A Yes, I do.

10 Q Do you have any explanation for why there's no
11 mention by the doctors that you have here testifying for you
12 today that you were reporting memory problems?

13 A No.

14 Q Any explanation for that? What was your
15 answer, sir?

16 A No.

17 Q Do you remember telling me that you had a
18 bruise on your back after this accident?

19 A No.

20 Q Did you tell your doctor you had a bruise on
21 your back?

22 A Yes. I had a place on my back. I could not
23 see it.

24 Q You say it was there ever since the accident?

25 A Yes.

1 Q Do you have any explanation for why your
2 doctor disagrees with that?

3 A No.

4 Q Do you remember I asked you what kind of pain
5 you were having in your deposition?

6 A Yes.

7 Q You told me you had pain in your back?

8 A Yes.

9 Q Pain down both your legs?

10 A Yes.

11 Q Pain into your feet?

12 A Tingling in my feet. Yes.

13 Q And your toes?

14 A Tingling in my toes. Yes.

15 Q And from your neck, you told me you had pain
16 up into your head?

17 A Yes.

18 Q Pain down your arms?

19 A Tingling going down both arms. Yes.

20 Q Pain down your hands?

21 A Yes. Tingling in my hands.

22 Q Tingling in your fingers?

23 A Yes.

24 Q You tell me your eyes hurt?

25 A The pain from the back of my head caused the

1 eyes to hurt. Yes.

2 Q And you think you reported all of those things
3 to your doctor?

4 A Yes.

5 Q You told me when I took your deposition that
6 you had been taking methadone, or had not had a day that you
7 had not taken your methadone. Do you remember that?

8 A Yes, sir.

9 Q And yesterday you didn't take your methadone?

10 A Yes.

11 Q And you told me in your deposition that you
12 wouldn't be able to function at all if you didn't take your
13 methadone?

14 A That's what I told you yesterday.

15 Q Yesterday you sat here and told this jury what
16 you believe is your problem caused by this accident?

17 A Yes.

18 Q And you told me that if you tried to pick up
19 something greater than 15 pounds, you have increased pain. Do
20 you remember that?

21 A Yes.

22 Q But you told me that if something was less
23 than 15 pounds, you were able to pick that up. Do you remember
24 that?

25 A No.

1 Q You told me that you applied for jobs at
2 Kroger and at Walmart?

3 A Yes.

4 Q And you didn't have any response back from
5 them. Is that what your answer or response was then?

6 A Yes.

7 Q You told this Court and jury yesterday that
8 you had filled out the applications, but you don't have the
9 applications to show them today, do you?

10 A No. It's done on a computer.

11 Q You and your wife were selling things at a
12 flea market on the weekends; is that right?

13 A My wife is. Yes.

14 Q You go with her?

15 A Yes.

16 Q Do you help her?

17 A I watch the children.

18 Q Okay. You have a three year old and a nine
19 month old, or six-month old; is that right?

20 A My daughter is seven months. (Inaudible) is
21 almost three.

22 Q And you're able to watch the children while
23 your wife is engaged in --

24 A I help with that, along with my sister and
25 brother-in-law.

1 Q But you're there doing that?

2 A Yes. I try to.

3 Q Okay. Helping watch those children is
4 something that's difficult to do, is it not?

5 A It's not too bad.

6 Q You told me that you helped your wife
7 transport the things that you sell back and forth to the flea
8 market; is that correct?

9 A I ride with her. Yes.

10 Q And you drive as far as Bristol, Virginia to
11 pick things up?

12 A I ride with her.

13 Q And you've driven out there before, sir,
14 haven't you?

15 A No. I ride with her.

16 Q You've driven to the flea market before?

17 A I ride with her. And on occasion, I do drive.

18 Q And you drive to your doctor, which is an hour
19 and a half away?

20 A I very seldom ever drive. And it is never
21 without the assistance of someone.

22 Q What kind of assistance are you talking about,
23 sir?

24 A My wife is usually at my side.

25 Q You told me in your deposition that there were

1 times that you drove by yourself to the doctor. Do you
2 remember that?

3 A No. I do not.

4 Q In addition to the money that's generated from
5 the flea market, you and your wife also have rental property
6 that generates income; is that correct?

7 A We have a rental property. Yes.

8 Q And recently you and she have come up with a
9 name for the flea market business. Do you remember telling me
10 that?

11 A We had to do that in order to apply for a
12 business license.

13 Q Because the flea market was turning a profit
14 for you and your wife?

15 A Well, we thought it would.

16 Q When you were working at Ridge View, you had
17 that job for approximately 14 months before this accident
18 happened?

19 A Something like that. Yes.

20 Q And Ridge View is an outpatient psychiatric
21 facility; is that right?

22 A Inpatient, too.

23 Q What hours did you work?

24 A I worked 40 hours a week.

25 Q What times of the day did you work?

1 A There's three different shifts. I worked all
2 three at different periods of time.

3 Q Before that, you worked at the hospital in
4 Scott County as a security guard?

5 A And orderly. Yes, sir.

6 Q And while you were working there, you hurt
7 your knee?

8 A Yes, I did.

9 Q You filed a workers' comp case for that?

10 A Yes, I did.

11 Q And you actually filed something asking the
12 court to approve the settlement that you reached in your
13 worker's comp case?

14 A The worker's comp case -- did settle it. Yes.

15 Q And you had to appear before the judge to have
16 that approved?

17 A Yes, I did.

18 Q And part of the settlement that you reached
19 paid you money to close out your right to go back to the
20 doctor, did it not?

21 A Yes, it did.

22 Q And Scott County was the longest job that you
23 had had, correct, at the hospital?

24 A Yes.

25 Q Why did you leave there?

1 A The position was dissolved.

2 Q Did you have any problem going back with your
3 knee?

4 A No.

5 Q Other jobs that you've had include being a
6 photographer for a newspaper; is that correct?

7 A Yes.

8 Q The doctors that you have here to testify for
9 you today are doctors that your lawyers sent you to; correct?

10 A These are doctors that I chose.

11 Q The lawyers gave you a name?

12 A They gave me a group of names that I selected
13 from.

14 Q How many were in the group?

15 A At least three.

16 Q Who else was in the group, Mr. Neely?

17 A I don't have those names in front of me.

18 Q Do you remember when I took your deposition
19 and asked you who had referred you to these doctors?

20 A Yes.

21 Q Do you remember being -- what you said,
22 confused about that?

23 A Yes, I do.

24 Q How come you weren't confused yesterday?

25 A I don't know.

1 Q You told your doctors that you had hurt your
2 knees in this accident, did you not?

3 A I told them my knee was hurt. I didn't say it
4 was due to the accident.

5 Q You didn't tell them that you hurt your knee
6 in this accident? Is that what you're telling this jury today?

7 A No. I didn't tell them that it was due to the
8 accident. I said my knee was hurt. I didn't say it was due to
9 the accident.

10 Q Do you remember telling me in your deposition
11 that you thought your knees were hurt as a result of this
12 accident?

13 A No. I do not.

14 Q And you agree, do you not, that you don't have
15 any doctor here today who's going to testify about any problem
16 that you have with your memory, do you?

17 A I have no knowledge.

18 Q You told me that you had this TENS unit that
19 was prescribed for you that did not help you. Do you remember
20 that?

21 A I don't think it gave me much relief.

22 Q Do you remember telling your doctor that it
23 did give relief, and that's why you were prescribed another one
24 from Dr. Koenig?

25 A I only had the one prescribed.

1 Q You don't think that Dr. Degnan prescribed you
2 one?

3 A I only have the one TENS unit, as I stated.

4 Q Before this accident, you had been on
5 medication for high blood pressure; correct?

6 A I have been on high blood pressure medicine
7 for a great number of years.

8 Q And you were having problems with cramps in
9 your legs that you take medication for?

10 A When I take water pills, yes.

11 Q And that was before this accident as well?

12 A Yes.

13 Q In the accident itself, you told me and this
14 jury that you were about three or four car lengths behind this
15 car that was turning in front of you; correct?

16 A Yes.

17 Q And your car, the Kia, is what, about eight
18 feet long?

19 A I have no idea.

20 Q So you think you were about 20 feet behind
21 this other car?

22 A Three to four car lengths.

23 Q And you said that you saw that van that hit
24 you just seconds before it hit you?

25 A Yes.

1 Q And you have no idea how long it had been
2 behind you?

3 A Well, you notice the traffic behind you. But
4 as far as singling out different vehicles...

5 Q You don't know how long this vehicle had been
6 traveling behind you, do you, sir?

7 A No.

8 Q You don't know anything about the speed of the
9 vehicle?

10 A No.

11 Q You told this jury yesterday that your seat
12 was broken off as a result of this accident. Do you remember
13 that?

14 A I said it was broken.

15 Q The seat itself has a little lever on the side
16 which will allow it to recline back, did it not?

17 A Yes, it does.

18 Q You told this jury also that you drove this
19 vehicle back from Kentucky after this accident; correct?

20 A Yes.

21 Q Were you able to adjust the seat after that
22 accident so that you could drive the vehicle back?

23 A No.

24 Q You just drove it with the seat in the
25 reclined position?

1 A No.

2 Q What happened? Tell us, sir.

3 A I used a bunch of items that we had with us to
4 prop the seat into an upright position and hold it there while
5 I drove the vehicle home.

6 Q How much were you weighing at the time of this
7 accident, sir?

8 A The same as I am now.

9 Q What do you weigh now?

10 A Right around 300 pounds.

11 Q Did you have trouble ever getting in and out
12 of this car before this accident?

13 A No. I did not.

14 Q You live approximately an hour and a half from
15 Knoxville?

16 A About an hour and 15 minutes.

17 MR. WOODFIN: That's all.

18 THE COURT: Just a moment, Mr. English, before
19 we go any further.

20 I notice you've taken a few notes this
21 morning?

22 THE JUROR: Yes.

23 THE COURT: Anyone else taking notes?

24 Unfortunately, we're not -- jurors aren't allowed to
25 take notes during the trial. I should have mentioned

1 that yesterday. That's kind of a local rule we have
2 here. I'm going to ask you to stop doing that. I
3 hate to do that because I know you're trying hard to
4 follow what is being said. But there are reasons why
5 we have that rule, and I'll go into that. When we are
6 all through here, I'll explain to you why that is.

7 THE JUROR: Okay.

8 THE COURT: All right, Mr. English.

9 REDIRECT EXAMINATION

10 BY MR. ENGLISH:

11 Q Mr. Neely, when you went out and measured at
12 my request, the height of the curb right next to where the man
13 was turning in, what type of a measuring device did you use?

14 A A little bitty ten-foot tape measure. A
15 little square tape measure that --

16 Q Is it a rigid tape measure, or one that folds
17 up, or --

18 A One that retracts inside into itself.

19 Q Is it rigid? Like if I held it out here three
20 feet, would it be rigid?

21 A Oh, yes.

22 Q Could you take that and hold it down and look
23 and see how high the curb was without bending down? Did you
24 bend down to measure the curb?

25 A No, I did not. I just leaned over.

1 Q Okay. And you measured it with that ten-foot
2 tape measure?

3 A Yes, I did.

4 Q Okay. And so whenever Mr. Woodfin asked you
5 if you bent over to do that, you did not bend over?

6 A No, sir.

7 Q Okay. Do you know whether you lost
8 consciousness when you were hit and your seat broke and your
9 car was totaled in this wreck, sir?

10 A No, I --

11 MR. WOODFIN: I object to the question, Your
12 Honor. There's no proof that the car was totaled.

13 MR. ENGLISH: The testimony yesterday was that
14 it was totaled, in his professional opinion --

15 THE COURT: Maybe you could re-ask the
16 question without that last word in it.

17 MR. ENGLISH: Very well.

18 BY MR. ENGLISH:

19 Q When you were hit in the rear and knocked
20 forward hard enough to break your seat back, do you know
21 whether or not you lost consciousness?

22 A No, I do not. It happened too quickly.

23 Q Okay. You still don't know how fast the guy
24 that hit you was going?

25 A No. I do not.

1 Q Okay. And did you go to the doctor, the
2 orthopedic doctor, the bone doctor... When you went to
3 Dr. Koenig, was he interested in talking to you about your
4 orthopedic problems, or about memory problems?

5 MR. WOODFIN: Objection to the question, Your
6 Honor. We don't have any statement from Dr. Koenig
7 about what he was interested in doing. And I don't
8 know if Mr. Neely can testify about what the doctor
9 was interested in doing.

10 MR. ENGLISH: Your Honor, we have his
11 testimony as to what he actually did. So it's
12 self-explanatory, I believe.

13 MR. WOODFIN: It's not self-explanatory to me.

14 THE COURT: Ask your question again.

15 BY MR. ENGLISH:

16 Q Okay. When you went to Dr. Koenig, did he
17 want to see you for orthopedic, or for memory problems?

18 A He wanted to check out my back.

19 THE COURT: Overruled. He can say what he
20 went to the doctor for.

21 Q Okay. Go ahead and answer, Tommy.

22 A He wanted to checkout, first, my back. And
23 then go to my neck. He had steps that he wanted to take care
24 of first. He did things in a very orderly fashion, checking
25 out me and the parts of my body that was hurt.

1 Q Okay. Did Mr. Woodfin ever ask for you to be
2 seen by a doctor of his choice, an independent medical doctor?

3 A No.

4 Q Have you taken your methadone today for pain,
5 Tommy?

6 A Yes, I have.

7 Q Why did you not take it yesterday?

8 A At your request.

9 Q At my request?

10 A Yes, sir.

11 Q So you would be clear-headed?

12 A Yes, sir.

13 Q Are you clear-headed today?

14 A Somewhat, sir.

15 Q When you applied for jobs at Kroger and
16 Walmart, did you tell them the truth about your physical
17 condition after this wreck?

18 A Yes. In each one of the applications, they
19 list different boxes on the computer. And the age that we live
20 in, the computer age, everything is done on a computer now.
21 It's very seldom you hand write anything. Especially at these
22 big places of business. And there's boxes that you have to
23 fill out different things like that in.

24 Q Did your wife have a booth at the flea market
25 before this wreck?

1 A No, she did not.

2 Q Okay. And the rental property that he was
3 asking you about, how much did that bring in to you and your
4 wife?

5 A It brings in three hundred dollars a month.
6 Without that, we would probably would have had that property
7 taken away from us.

8 Q Okay. You were at Ridge View whenever this
9 wreck happened. That's where you were driving to on the day of
10 the wreck?

11 A Yes, sir.

12 Q Did you attempt to go back there with the
13 restrictions that Dr. Koenig had placed on you?

14 A I gave the restrictions to my immediate
15 supervisor.

16 Q Don't say what he said, please.

17 A Uh-huh (affirmative).

18 Q Okay.

19 A And with the restrictions.

20 Q Were you allowed to go back to work?

21 A No.

22 Q You're not claiming that your knees were hurt
23 in this wreck?

24 A No. I claim no obligation to my knee for this
25 wreck.

1 Q And when Mr. Woodfin said you filed suit for
2 workers' comp against the Scott County Hospital for your knee
3 injury, you didn't actually file suit for that. His law firm
4 filed suit for that on behalf of the hospital, didn't it?

5 MR. WOODFIN: Objection, Your Honor. I have
6 no involvement in that case. And I don't know where
7 that's coming from.

8 MR. ENGLISH: But his law firm did, Your
9 Honor.

10 MR. WOODFIN: I don't know that to be true.

11 MR. ENGLISH: And he knew it.

12 MR. WOODFIN: I don't know that to be true,
13 Your Honor.

14 THE COURT: What is the relevance of that now?

15 MR. ENGLISH: Well, Your Honor, he made a
16 statement. He said that this man filed suit in the
17 worker's comp case. He didn't. His own law firm
18 filed suit on behalf of the Scott County Hospital to
19 settle the workers' comp case. And he made a
20 misstatement to him and to the jury and to the Court.

21 MR. WOODFIN: I think that would require some
22 proof, Your Honor. I don't know that to be the case.

23 THE COURT: I think we established that he had
24 a work-related injury claim that was settled.

25 MR. ENGLISH: Your Honor, it was settled

1 across the street. If you would like, I can get the
2 copy of the documents.

3 THE COURT: No. What I'm saying is I don't
4 think there's any dispute that the man had a
5 work-related injury claim that was settled --

6 MR. ENGLISH: I'll not belabor the point, Your
7 Honor.

8 THE COURT: If he didn't file it, that's fine.

9 MR. ENGLISH: Pardon?

10 THE COURT: If he didn't file it, that's fine.

11 BY MR. ENGLISH:

12 Q When your wife started this flea market booth
13 and you started selling things out of your house, what sort of
14 items did you sell out of your house in order to exist?

15 A We sold a lot of different things. We had a
16 real nice collection of ceramics, indian artifacts, a whole
17 bunch of different items. We sold off practically everything
18 that we had.

19 I'm also two years now behind in my taxes, and
20 making monthly restitution to the State of Kentucky for
21 delinquent taxes on our property.

22 Q Okay.

23 A We're also one month behind in our water bill,
24 and one month behind in our electric bill.

25 MR. ENGLISH: Okay. Thank you. That's all.

1 THE COURT: Mr. Woodfin, any recross?

2 MR. WOODFIN: No.

3 THE COURT: Okay. All right, sir. Thank you.

4 You can step down.

5 (The witness is dismissed.)

6 MR. ENGLISH: Your Honor, at this time, we
7 would like to play for the jury the videotaped
8 deposition of the pain doctor that treated Mr. Neely,
9 Dr. Joe Browder.

10 THE COURT: All right. Members of the jury,
11 this is commonly done in trials, and that is that a
12 witness will give testimony by videotape so that they
13 don't have to come to court for various reasons. Very
14 often medical professionals do that.

15 You should consider this testimony that's
16 being given by videotape to be just as if it were
17 being given here in the courtroom. Give it the same
18 weight as you would any testimony that would be given
19 in the courtroom. All right.

20 All right. Is it ready to go? I guess we'll
21 just watch that screen there.

22 Mr. English would you like for us to lower the
23 lights in the courtroom for this?

24 MR. ENGLISH: I don't care, Your Honor. I'm
25 just making notes. We probably need as much light as

1 we can get.

2 THE COURT: Okay.

3 MR. ENGLISH: We're having trouble with the
4 audio.

5 (Videotape deposition of Dr. Browder is presented.)

6 MR. ENGLISH: Your Honor, at this time, I
7 would like to file as Exhibit 12, the transcript of
8 the Deposition of Dr. Browder. May I approach the
9 clerk?

10 THE COURT: Yes.

11 MR. ENGLISH: Does the Court want the
12 videotape that we just played filed also?

13 THE COURT: No. Does this transcript have the
14 exhibits attached to it?

15 MR. ENGLISH: Yes.

16 THE COURT: All right. At this time
17 Exhibit 12 will be received.

18 (Exhibit 12 - was marked and admitted.)

19 MR. ENGLISH: At this time, we would like to
20 play the deposition of Dr. Thomas Koenig, the
21 certified orthopedic surgeon that treated this man.

22 THE COURT: How long is that videotape,
23 Mr. English?

24 MR. ENGLISH: I think about an hour and 10 or
25 15 minutes.

1 THE COURT: Okay. Why don't we take a little
2 break then at this time before we get into that.

3 Madam Clerk, it will be about 15 minutes.

4 DEPUTY CLERK: Please rise. This Court is in
5 recess.

6 (Jury out at 10:35.)

7 (Court in recess.)

8 (Jury in at 11:18.)

9 MR. ENGLISH: Your Honor, at this time, the
10 plaintiff would like to offer the deposition by
11 videotape of Dr. Koenig. Exhibit No. 11, I believe.

12 THE COURT: All right, Mr. English.

13 Members of the jury, just as we did before, we
14 consider this just like testimony in court. All
15 right.

16 (The videotape deposition of Dr. Koenig is presented.)

17 MR. ENGLISH: Your Honor, it didn't show the
18 doctor being sworn in, and he was sworn in. So I
19 would like to back it up, if the Court would like us
20 to, to show that he was, in fact, sworn.

21 MR. WOODFIN: I'll stipulate that he was.

22 MR. ENGLISH: Okay. Very well.

23 MR. INMAN: Your Honor, is it audible to the
24 Court?

25 THE COURT: It is to me. Can the jury hear

1 it? All right. Thank you.

2 MR. ENGLISH: That's a problem with the
3 equipment and I apologize.

4 (Videotape deposition of Dr. Koenig continues.)

5 MR. ENGLISH: Your Honor, I would like to file
6 this as Exhibit No. 11. May I approach the clerk?

7 THE COURT: Yes.

8 (Exhibit 11 - was marked and admitted.)

9 THE COURT: All right. Let's take our
10 lunchtime break now. Let's try to get back by 1:45,
11 if we can. Okay. Thank you.

12 DEPUTY CLERK: Please rise. The Court is in
13 recess.

14 (Jury out at 12:34.)

15 (Court in recess for noon break.)

16 (Jury in at 1:45)

17 DEPUTY CLERK: Court is in session. Please be
18 seated.

19 THE COURT: The plaintiffs next witness,
20 please.

21 MR. ENGLISH: Your Honor, at this time, I
22 would like to read into the record the mortality
23 tables as set out, the Table VI of T.C.A.

24 Someone who is age 48 like Mr. Neely, he has a
25 life expectancy of 32.85 years. Or a little over

1 13,000 days. And the plaintiff rests, Your Honor.

2 THE COURT: All right. Thank you.

3 Mr. Woodfin?

4 MR. WOODFIN: Your Honor, with the plaintiff
5 having rested, there are some matters that I do need
6 to take up with the Court outside the presence of the
7 jury. I apologize. I did not know that they were
8 going to rest after that witness. I'm sorry.

9 THE COURT: That's okay. We've heard some
10 evidence and they rested. We'll have the jury step
11 out to take up that matter.

12 (Jury out at 1:47)

13 THE COURT: All right, Mr. Woodfin.

14 MR. WOODFIN: Thank you. Your Honor, at this
15 point in the case, on behalf of Fox of Oak Ridge,
16 Inc., we respectfully move this Court for an order
17 directing the verdict in favor of Fox of Oak Ridge, as
18 there has been no proof put on by the plaintiff in
19 this record to show that Mr. Curd, the agent or
20 employee of Fox Oak Ridge was negligent in any manner.
21 Which would, of course, eliminate the plaintiff's
22 ability to collect damages from Fox of Oak Ridge.

23 The only testimony that we have heard with
24 regards to the accident was that Mr. Neely was struck
25 in the rear, but he was unable to say how far behind

1 him the vehicle was, the speed of the vehicle, whether
2 the vehicle engaged in some type of action which was
3 negligent in allowing this vehicle to collide with his
4 rear.

5 Since there's simply no proof before the Court
6 that Mr. Curd, the agent of Fox of Oak Ridge, Inc.,
7 was negligent at this time, the verdict should be
8 directed in favor of the defendant.

9 The plaintiff may try to imply that somehow
10 skidding into the rear of a vehicle is negligent. The
11 Supreme Court, or the Court of Appeals in Tennessee
12 has addressed that. And it said that skidding did not
13 infer negligence. People skid for a lot of reasons.

14 As a matter of fact, we have proof in this
15 record which shows that the road was wet at the time
16 that this accident occurred.

17 So all the jury has heard, and all the proof
18 that there will be from the plaintiff about this
19 incident was that one car struck the rear of the
20 other.

21 With no further proof of negligence, the case
22 simply cannot go forward.

23 MR. ENGLISH: Your Honor, in response to that,
24 I would just say that obviously it's a question for
25 the jury to determine who the cause of this accident

1 was. It's unquestioned that the rear-end collision
2 happened as alleged in the answer of the defendant.
3 And that Mr. Curd was driving a car as the agent of
4 Fox of Oak Ridge. And that he struck this man on a
5 rain-slickened road. There's an abundance of proof in
6 there. It's just a question for the jury to
7 determine, Your Honor.

8 THE COURT: Any further, Mr. Woodfin?

9 MR. WOODFIN: Your Honor, at this point, I
10 would have to think that the jury to be able to
11 determine this question, there must be some proof set
12 forth by the plaintiff that the defendant's agent
13 breached some type of duty. There is very simply no
14 proof in the record that the defendant breached any
15 duty whatsoever to this plaintiff.

16 Accidents happen. You can't infer negligence
17 from the fact that an accident happened. There must
18 be some proof set forth by the plaintiff that the
19 agent of the defendant engaged in some level of
20 conduct which merits a breach of duty that he owed to
21 the plaintiff.

22 There's no proof in the record. It's not our
23 burden to prove that. It's the plaintiff's burden to
24 allow that to be carried forth to the jury. And there
25 is no evidence in this record that anything Mr. Curd

1 did, or did not do, was negligent. It's as simple as
2 that.

3 There's no testimony from Mr. Curd whatsoever.
4 The only thing that the plaintiff can say is that he
5 was struck in the rear. Why? The jury can't tell
6 why. There is nothing for them to determine. Nothing
7 for them to weigh. There is no way that the plaintiff
8 can argue that negligence can be inferred just because
9 an accident happened.

10 THE COURT: All right, Mr. Woodfin. The
11 evidence that has been put in the record so far by the
12 plaintiff was that he was driving in a reasonable
13 manner down the road. He slowed almost to a dead stop
14 in order to allow a car to turn in front of him into a
15 shopping mall area. At that point, he was struck in
16 the rear by another vehicle.

17 That raises to the jury a question as to
18 whether or not the car that struck him was being
19 operated in an unreasonable manner in the
20 circumstances then existing.

21 I think that your argument is that their case
22 is weak. But it's still a jury question. So,
23 respectfully, your motion will be denied.

24 And shall we bring the jury back in?

25 MR. WOODFIN: There's one other matter I need

1 to take up quickly, Your Honor, regarding an element
2 of damage that the plaintiff has set forth.

3 THE COURT: Okay.

4 MR. WOODFIN: As the Court is aware, one of
5 the claims in this case is for lost earning capacity.

6 The plaintiff has asserted in his complaint
7 that he is seeking damages for this lost earning
8 capacity.

9 And at this point, it is our contention that a
10 verdict should be directed in favor of the defendant
11 for that issue of damages for the following reasons.

12 The case law in Tennessee says that damage
13 element must be proven with reasonable certainty.
14 It's not whether there is a question about the amount
15 of the damages that's the question. It's the question
16 about whether these damages actually exist at all.

17 Usually we see in cases like this the
18 plaintiff will present credible proof, or attempt to
19 present credible proof through some level of
20 vocational testimony from an expert that he or she is
21 unable to engage in certain types of employment, and
22 can engage in others.

23 And therefore the jury is able to calculate
24 what the amount of lost earning capacity would be
25 based on that testimony.

1 All we have here in this case is evidence that
2 a plaintiff is saying, I can't work. There's nothing
3 to support that.

4 In fact, the overwhelming weight of the
5 evidence from our perspective is that the evidence
6 does not support the plaintiff's contention that he
7 cannot work.

8 The existence of these damages is in question,
9 not the amount. It's clear that the law says the
10 amount of this damage, if it's presented to the jury,
11 is to be allowed -- the jury is allowed to listen to
12 that and determine that amount.

13 But this plaintiff has testified that he's
14 seeking employment. He has applied for several
15 positions of employment beyond what he was doing
16 before. And whether or not the jury can even
17 calculate, or begin to speculate as to what this level
18 of lost earning capacity is, tells us that this should
19 not be a question that should be submitted to the
20 jury.

21 There's no proof to support it from any other
22 source other than the plaintiff. And the plaintiff's
23 own testimony equally weighs in favor of the fact that
24 there would not be any lost earning capacity because
25 he has applied for other jobs. So the total existence

1 of this element of damage is missing based on the
2 proof that's been presented to the Court. And we
3 would respectfully move that the Court direct a
4 verdict in our favor on the issue of damages.

5 THE COURT: Mr. English.

6 MR. ENGLISH: Your Honor, the proof is that
7 this man hasn't worked a day since his wreck two years
8 ago, almost. That proof is that he went to doctors,
9 four certified orthopedic specialists that restricted
10 him to 15 pounds lifting and sent him back to try to
11 go to work. And he couldn't go to work. They
12 wouldn't take him back.

13 The proof is that the other pain doctor that
14 he was referred to by the orthopedicist says he
15 probably won't be able to work. This certainly
16 goes...

17 He can argue that to the jury, but this is a
18 question of -- not of a disability, but it goes to the
19 weight of the evidence.

20 The jury may not believe that he is unable to
21 go to work. Or that he is able to work. But this is
22 certainly a jury question.

23 THE COURT: All right. The Court is going to
24 find that there has been an adequate foundation put in
25 the record with regard to his lost earning capacity

1 based on the fact that he hasn't worked for the last
2 couple of years, and what he was making before that.
3 And I don't think the fact that he made application to
4 some other places for employment changes any of that.

5 So the bottom line is, that's a question for
6 the jury to decide whether or not he's entitled to
7 that element of damage. And if so, how much. But he
8 certainly has laid a predicate for it. So that motion
9 respectfully will be denied.

10 Mr. Woodfin, anything else?

11 MR. WOODFIN: Nothing further, Your Honor.
12 Thank you.

13 THE COURT: Are we ready to bring the jury
14 back in?

15 MR. ENGLISH: I believe so, Your Honor. With
16 30 minutes per side, Mr. Inman will start for us.
17 Would that be too much, Your Honor?

18 THE COURT: Well, do you have witnesses?

19 MR. WOODFIN: Mr. Curd.

20 THE COURT: Okay. Well, have you all agreed
21 on an amount of time for closing?

22 MR. WOODFIN: We really haven't.

23 THE COURT: I would think 30 minutes ought to
24 be sufficient. Actually, neither one of you used the
25 whole 15 the first time. So maybe we won't use the

1 whole 30. But 30 minutes, that's what it will be. Of
2 course, you can divide it up if you want to.

3 All right. Madam Clerk, if you will bring the
4 jury in.

5 (Court in recess.)

6 (Jury in at 1:57)

7 DEPUTY CLERK: Please be seated. The Court is
8 again in session.

9 THE COURT: It is now the defendant's
10 opportunity to call any witnesses the defendant might
11 like to call.

12 Mr. Woodfin?

13 MR. WOODFIN: I call Benjamin Curd, Your
14 Honor.

15 THE COURT: All right. Madam Clerk, if you'll
16 bring in Mr. Curd.

17 BENJAMIN CURD,
18 the first witness called on behalf of the
19 Defendant, having been first duly sworn,
20 was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. WOODFIN:

23 Q Mr. Curd, can you hear me okay?

24 A Yeah, I hear you.

25 Q Go ahead and tell the jury your name, please.

1 A Okay. I was driving --

2 Q Just go ahead and tell them your name first,

3 please.

4 A Oh, Ben Curd.

5 Q Okay. Where do you live, sir?

6 A I live in Morristown now.

7 Q How old are you?

8 A I'm 73.

9 Q Do you work?

10 A Yeah.

11 Q What do you do?

12 A I'm a porter.

13 Q Try to get right up to that microphone so they

14 can hear you.

15 A Porter.

16 Q What do you do as a porter?

17 A Well, I pick people up and take them home.

18 Q Who do you work for?

19 A Paul Benton.

20 Q Is that a car dealership?

21 A Yeah.

22 Q Back in 2004 when you were involved in an

23 accident with the plaintiff in this case, who were you working

24 for?

25 A Mr. Fox.

1 Q And why didn't you work for Lester Fox
2 anymore?

3 A He's got a used car lot in Clinton.

4 Q Are you still working --

5 A I -- Paul Benton.

6 Q All right. Is that the same location when you
7 worked with Fox?

8 A Yeah. Uh-huh (affirmative).

9 Q Okay. Mr. Fox sold the business?

10 A Yeah.

11 Q And you just stayed with the business?

12 A Yeah.

13 Q All right. How many hours a day do you work,
14 sir?

15 A Sometimes over ten.

16 Q And how many days a week?

17 A Five.

18 Q All right. On the day that this accident
19 happened, July 12, 2004, you were driving the van, were you
20 not?

21 A That's right.

22 Q Tell these ladies and gentleman how you came
23 to drive that van?

24 A I went to pick the van up to have some work
25 done on it. And when I was coming back, it was raining.

1 Q And where were you going to take the van?

2 A Back to Fox in Oak Ridge.

3 Q All right. And had it been raining the whole
4 time you were driving?

5 A Yeah.

6 Q Okay. Were you driving on Charles Sievers
7 Boulevard on that day?

8 A Yeah.

9 Q As you were driving, were you driving faster
10 or slower than the speed limit?

11 A I was driving slower than the speed limit.

12 Q Why?

13 A I just don't like to be driving fast.

14 Q What were the weather conditions like?

15 A It rained pretty good.

16 Q And at some point, this vehicle that was
17 driven by Mr. Neely was in front of you; right?

18 A Yeah. That is right.

19 Q Okay. And tell us what happened then, when
20 that vehicle was in front of you?

21 A He stopped and was on the phone. And before I
22 could stop, I slid into him.

23 Q When you hit the brakes, did your vehicle
24 slide?

25 A It slid.

1 Q And did you expect that to happen on that wet
2 road?

3 A I didn't expect it to, but it did.

4 Q So you tried to stop?

5 A I tried to stop.

6 Q Tell me about the impact between the two
7 vehicles.

8 A It wasn't hit that hard.

9 Q Did anything happen to you inside of the van?

10 A No. It sure didn't.

11 Q Can you see those pictures up there on that
12 screen in front of you?

13 A Yeah.

14 Q Okay. Tell us what those pictures show. Is
15 that the van you were driving?

16 A Yeah.

17 Q The one with the ladders on top of it there?

18 A Yeah. Uh-huh (affirmative).

19 Q Okay. And that's two pictures of the same
20 vehicle?

21 A Yeah.

22 Q And that's the vehicle you were driving?

23 A Yeah.

24 Q Can you see those two pictures that are up
25 there now?

1 A Yeah.

2 Q Does that show what damage was done to the
3 vehicle you were driving in this accident?

4 A A little dent in the bumper.

5 Q Go ahead and... I'm going to point my finger,
6 and you tell me if I'm in the right place when it comes up on
7 there, okay?

8 A Okay. Yeah.

9 Q Can you see where my finger is?

10 A Yeah. I see your finger.

11 Q And on the top one also?

12 A Yeah.

13 Q Any other damage done to that van you were
14 driving?

15 A No, it wasn't.

16 Q When you got out, did you go see Mr. Neely?

17 A Yeah. I went around and seen him.

18 Q How was he sitting?

19 A He was leaning back, but the seat went all the
20 way down. It was down, but it was not all the way.

21 Q Did you call an ambulance?

22 A Yeah. I went ahead and called an ambulance.

23 MR. WOODFIN: All right. Okay. Your Honor,
24 these will be defendant's Exhibits 13 and 14. I would
25 offer those at this time.

1 THE COURT: Do you have an objection,
2 Mr. English?

3 MR. ENGLISH: No.

4 THE COURT: All right. Exhibits 13 and 14
5 will be admitted.

6 (Exhibit 13 - was marked and admitted.)

7 (Exhibit 14 - was marked and admitted.)

8 MR. WOODFIN: That's all, Mr. Curd. Thank
9 you. You just sit there for a minute. Mr. English is
10 going to ask you some questions.

11 MR. CURD: Okay.

12 CROSS EXAMINATION

13 BY MR. ENGLISH:

14 Q Mr. Curd, you were driving a big full-sized
15 van, weren't you?

16 A Yes. Big van.

17 Q Big van?

18 A Uh-huh (affirmative).

19 Q And the bumper is heavy gauge steel, isn't it?

20 A Yeah. They're heavy.

21 Q And when you gave your deposition, I asked
22 your attorney to furnish me with a repair estimate, didn't I?

23 A Uh-huh (affirmative).

24 Q Do you know whether or not I've ever been
25 given that?

1 A For the van?

2 Q Yeah. Do you know whether your attorney ever
3 found that or not?

4 MR. WOODFIN: Well, Your Honor, I'm not this
5 man's attorney. I hate to clarify that in front of
6 the jury like that. This man is not a party to this
7 case.

8 BY MR. ENGLISH:

9 Q Mr. Curd, at the time of this wreck, of course
10 it was raining, and it was raining pretty hard, and you knew
11 that?

12 A Yeah.

13 Q And you've driven for many years?

14 A Uh-huh (affirmative).

15 Q And you knew that whenever it rained --

16 THE COURT: Mr. Curd, you have to answer yes
17 or no.

18 A Yes.

19 Q And you knew that when it rained the roads get
20 slick, you being a professional driver?

21 A Yeah.

22 Q And you know that whenever the roads get slick
23 you're supposed to slow down and be careful, didn't you?

24 A Yeah. I slowed down.

25 Q Okay. But you were following Mr. -- according

1 to your deposition, you were following Mr. Neely about 20 feet
2 behind him at 35 miles an hour on a wet road, weren't you?
3 Didn't you tell me that in your deposition under oath?

4 A Yeah.

5 Q Okay. And when he stopped, you say for no
6 reason at all -- and that's what you told me in the
7 deposition --

8 A Yeah. That's right.

9 Q He just bowed up and stopped for no reason?

10 A Yeah. He was on the phone.

11 Q Okay. And whenever you stopped, he was going
12 about 35 miles an hour; is that right?

13 A I guess that's as fast as he was going.

14 Q Okay. And when he stopped -- you told me on
15 the deposition that he stopped his car on a rain-slickened
16 road --

17 A Yeah.

18 Q -- going 35 miles an hour, in about five feet?

19 A Yeah.

20 Q Okay. And then whenever he stopped, you were
21 so close to him -- you were 20 feet behind him?

22 A Yeah.

23 Q And you were going about the same speed limit,
24 about 35? The same speed, not the speed limit?

25 A Yeah.

1 Q Okay. And you couldn't get stopped because
2 you were too close to him?

3 A I slid.

4 Q Okay. And if you had gone into the other
5 lane, you wouldn't have hit him, would you?

6 A I couldn't go in the other lane.

7 Q Why couldn't you?

8 A I was over here.

9 Q Couldn't you go in the left-hand lane? The
10 fast lane?

11 A No. I couldn't right then.

12 Q Why? Do you remember me asking you, or
13 Mr. Inman asking you in your deposition -- page --

14 A You know, I tried to miss, to get over -- I
15 hit him.

16 Q Page 18.

17 "Do you know whether or not the passing lane
18 was clear?"

19 And you said, "I'd say it was."

20 A Uh-huh (affirmative).

21 Q Do you remember giving that statement?

22 A Yeah. But I tried to get -- but I hit him as
23 I was trying to.

24 Q I understand that. But if you had been
25 following a little further back, you would have probably not

1 have hit him?

2 A Yeah.

3 Q And if you had been following a little slower,
4 you probably wouldn't have hit him?

5 A Yeah.

6 Q And if the roads weren't wet, you probably
7 wouldn't have hit him?

8 A That's right. If they wasn't wet, I wouldn't.

9 Q Okay. And you were following -- since you
10 were in this big van, this big heavy van, you were following
11 about one car length behind him, or 20 feet behind him whenever
12 he --

13 A It was 20 feet.

14 Q -- whenever you realized there was going to be
15 a wreck --

16 A Yeah.

17 Q -- on a rain-slickened road? And he didn't
18 have anything to do with you following that close to him, did
19 he?

20 A I don't reckon he did.

21 Q And he didn't have anything to do with you
22 driving that fast, that close behind him, did he?

23 A I don't reckon he did.

24 Q And I know he didn't, and I know you didn't,
25 have anything to do with it raining that day.

1 A If he hadn't stopped on me, I wouldn't have
2 hit him.

3 Q I know it. But you're telling this jury that
4 he stopped for no reason at all?

5 A He was talking on the telephone.

6 Q And he stopped --

7 A Yeah.

8 Q -- going 35 miles and hour --

9 A In the road.

10 Q -- in five --

11 A Yeah.

12 Q -- on a wet road?

13 A Yeah. He sure did.

14 Q Okay. And then after you hit him going 35
15 miles an hour, or 25 miles an hour -- you slowed down some when
16 you hit him, didn't you?

17 A Yeah. I sure did.

18 Q And you knocked him about two or three feet
19 you said?

20 A Yeah. Something like that.

21 Q And you hit him, totaled his vehicle, broke
22 his seat, and knocked him two or three feet forward? Is that
23 right?

24 A I don't know. His seat was broke. His
25 seat -- the thing on his top back seat went all the way down

1 when I went up there to see about him.

2 Q Well, you saw it?

3 A Yeah.

4 Q I thought you told me that --

5 A I didn't know the seat was broke.

6 Q Okay. On Page 13 of your deposition... And I
7 asked you, "And his seat broke in the wreck, because you saw
8 that, didn't you?"

9 And you said, "Yeah --

10 THE COURT: Mr. Curd, wait until he finishes
11 his question, and then you start your answer.

12 MR. CURD: All right.

13 THE COURT: The Court Reporter can't take down
14 both of you talking at the same time.

15 All right. Mr. English, restate you question.

16 And then we'll get the answer.

17 BY MR. ENGLISH:

18 Q You told me on your deposition, his seat
19 broke. I asked you, "And his seat broke in the wreck, because
20 you saw that, didn't you?"

21 And your answer was, "Yeah. I seen the seat
22 laying back."

23 A That's right.

24 Q Okay. And that's exactly what your testimony
25 is today?

1 A Yeah.

2 Q Okay. And he was looking up at the ceiling of
3 his car, wasn't he?

4 A Yeah.

5 Q Okay. Fox Motor Company is out of business at
6 this time, aren't they?

7 A Yeah.

8 Q You're working for the people that bought them
9 out?

10 A Yeah.

11 Q Okay. That van that you were in, that big
12 van, that sort of felt like it's built real strong, isn't it?

13 A Yeah, it is.

14 Q And you weren't hurt in this wreck?

15 A No. I sure wasn't.

16 Q And he was in a real small compact car, was he
17 not?

18 A Yeah.

19 MR. ENGLISH: Thank you, sir.

20 THE COURT: Mr. Woodfin.

21 MR. WOODFIN: Nothing further for this
22 witness, Your Honor.

23 THE COURT: Thank you, sir, for your
24 testimony. You may step down.

25 May this witness be excused?

1 MR. WOODFIN: As far as I'm concerned.

2 THE COURT: Mr. English?

3 MR. ENGLISH: Yes, Your Honor.

4 THE COURT: All right. Mr. Curd, you may be
5 excused.

6 (Witness is excused.)

7 (Bench Conference.)

8 MR. ENGLISH: Your Honor, may we approach? At
9 this time, we would like to move for a directed
10 verdict in behalf of the plaintiff. The testimony of
11 Mr. Curd is, he is without a doubt clearly at fault
12 with this wreck to -- clearly too fast. I don't think
13 there's any question that he is entitled to a directed
14 verdict in this case. There's no question of the
15 facts if it would be sent to the jury.

16 MR. WOODFIN: Just as the plaintiff had
17 mentioned in our record on directed verdict there's
18 evidence on both sides the accident happened as a
19 result of someone's negligence, or it just happened.

20 Mr. Curd testified that he slid on a wet road.
21 If the jury believed that testimony, they may find
22 there was no negligence in this case.

23 THE COURT: That's a jury question. I
24 respectfully deny the motion.

25 All right. Mr. Woodfin?

1 MR. WOODFIN: Your Honor, we would just like
2 to include portions of Mr. Neely's deposition into the
3 record regarding his testimony that he gave on direct
4 examination regarding these matters.

5 THE COURT: Be sure and give us the page and
6 line.

7 MR. WOODFIN: I shall.

8 THE COURT: All right.

9 MR. WOODFIN: If the Court wouldn't mind, I
10 have the condensed transcript for the Court to follow
11 as well, if the Court needs to.

12 THE COURT: That would be fine. Give it to
13 the Clerk.

14 MR. WOODFIN: Thank you.

15 (Mr. Woodfin reading from the deposition testimony of
16 Mr. Thomas Neely taken on May 24, 2006.)

17 BY MR. WOODFIN:

18 This was from the deposition of the plaintiff,
19 Thomas Neely, taken May 24, 2006, in this lawsuit. Beginning
20 on Page 4, Line 14. Question to Mr. Neely from me:

21 "Question: You understand after speaking
22 with your lawyers what this is about today,
23 and this is my opportunity to ask you
24 questions about the allegations you make in
25 this case, and also about your condition

1 since the accident?

2 "I know you were taking some medication
3 today. Do you think that is going to have an
4 impact on your ability to answer my
5 questions?

6 "Answer: No, I don't."

7 Jumping over to Page 5, beginning on Line 21.

8 "Question: How long has she done that?

9 "Answer: Since the accident.

10 "Question: Did she work before the
11 accident?

12 "Answer: No.

13 "Question: Do you help her at the
14 flea market?"

15 Answer on Page 6.

16 "Answer: I try to be a little
17 assistance."

18 Jumping over to Page 14, Line 20 -- we'll
19 start with Line 16.

20 "Question: We have talked to Dr. Koenig,
21 who is the orthopedic doctor that treated
22 you. That's who the doctor is; correct?

23 "Answer: That's one of the doctors.

24 "Question: He had mentioned at one point
25 that there was a bruise on your back. Do you

1 remember anything about that?

2 "Answer: Yes.

3 "Question: Tell me about that.

4 "Answer: It was early on in the
5 condition.

6 "Question: Do you think it was caused by
7 the accident with Mr. Curd?

8 "Answer: That's the only thing I can
9 figure out that it would come from.

10 "Question: Did it happen right away?

11 "Answer: Yes. To the best of my
12 knowledge, it was due to the accident."

13 Page 20, beginning at Line 17.

14 "Question: Were your knees hurting before
15 this accident?

16 "Answer: No.

17 "Question: Were they hurting afterwards?

18 "Answer: Yes.

19 "Question: How are they now?

20 "Answer: One knee is hurting.

21 "Question: Which one?

22 "Answer: My left knee."

23 Beginning on Line 19.

24 "Question: What's the next doctor that
25 you went to?

1 "Answer: I followed up with my family
2 doctor the next day.

3 "Question: Then after that, what doctor
4 did you go to?

5 "Answer: I don't remember.

6 "Question: Would it have been Dr. Degnan,
7 the orthopedic doctor?

8 "Answer: I don't remember.

9 "Question: At some point you did see him;
10 correct?

11 "Answer: Yes.

12 "Question: How was it that you came to
13 know about Dr. Degnan?

14 "Answer: I don't remember.

15 "Question: Did someone refer you there?

16 "Answer: Yes.

17 "Question: Who?

18 "Answer: I don't remember.

19 "Question: What about Dr. Koenig? How
20 did you wind up there with him?

21 "Answer: Dr. Koenig. I don't remember
22 the series of events that lead us -- me, to
23 Dr. Koenig.

24 "Question: When you say, "led us," who
25 are you talking about?

1 "Answer: That led me to Dr. Koenig.

2 "Question: In his notes, it said your
3 lawyers had referred you over there. Does
4 that sound right?

5 "Answer: That could be. Yes."

6 Jumping down to Line 24.

7 "Question: Was every doctor you had seen
8 a referral from your lawyers?

9 "Answer: Or doctors, yes.

10 "Question: What doctor referred you to
11 what doctor?

12 "Answer: I don't remember that series of
13 events.

14 "Question: Can you name one doctor that
15 you saw at the request of another doctor?

16 "Answer: Dr. Koenig referred me on to a
17 different one.

18 "Question: Who?

19 "Answer: They each referred me on to a
20 different one.

21 "Question: Who?

22 "Answer: I don't remember. You're
23 getting me confused."

24 On Page 39, beginning at Line 18.

25 "Question: Tell me what problems you

1 think you have with your memory.

2 "Answer: I can't remember a lot due to
3 this accident.

4 "Question: Have you been treated by a
5 doctor for that?

6 "Answer: No, I haven't.

7 "Question: Have you told any doctor that?

8 "Answer: Yes, I have.

9 "Question: What doctor?

10 "Answer: All of the doctors above.

11 "Question: So every doctor you have seen,
12 you've told them you have memory problems as
13 a result of this accident?

14 "Answer: Yes."

15 Page 49, beginning at Line 3.

16 "Question: Do you drive?

17 "Answer: When I have to. Yes.

18 "Question: What do you mean, "when you
19 have to"?

20 "Answer: I don't like to.

21 "Question: What do you have to drive for?

22 "Answer: I don't want to not be able to
23 drive."

24 On Line 22, same page.

25 "Question: Where do you drive when you

1 drive?

2 "Answer: Sometimes I drive down here to
3 the doctor."

4 Page 52, beginning at Line 1.

5 "Question: What did you do as a security
6 officer?

7 "Answer: I patrolled the grounds at the
8 hospital.

9 "Question: Before that, where did work?

10 "Answer: I was self-employed.

11 "Question: Doing what?

12 "Answer: We set up flea markets and
13 festivals.

14 "Question: When you say "set up," what do
15 you mean? Sell things?

16 "Answer: Yes."

17 Page 56, Line 23.

18 "Question: Have you purchased any
19 automobiles since this accident happened?

20 "Answer: The van. I mean, I misspoke --
21 the van -- the vehicle -- the van we
22 purchased after the accident."

23 Then on Page 62, Line 21.

24 "Question: You said you go to the flea
25 market sometimes to help; correct?

1 "Answer: Uh-huh (affirmative).

2 "Question: How often does that happen?

3 "Answer: Once a week.

4 "Question: How much time are you spending
5 there?

6 "Answer: We usually get in between 8:00
7 and usually leave by 5:00.

8 "Question: Who was watching your children
9 when you were there?

10 "Answer: I try to most of the time."

11 THE COURT: All right. Thank you,
12 Mr. Woodfin. Anything else from the defendant?

13 MR. WOODFIN: No. Thank you. The defense
14 rests at this point, Your Honor.

15 THE COURT: All right. Thank you. Any
16 rebuttal testimony or evidence from the plaintiff?

17 MR. ENGLISH: No, Your Honor.

18 THE COURT: All right then. Are you ready to
19 move on to our closing arguments, gentleman?

20 MR. ENGLISH: Yes, Your Honor.

21 THE COURT: All right. We agreed to our time
22 limit, a maximum of 30 minutes each. It doesn't mean
23 they have to use it. I saw some people in the jury
24 looking at me. But you have up to 30 minutes, and you
25 can divide your time.

1 Mr. Inman.

2 MR. INMAN: Thank you, Your Honor.

3 THE COURT: Before you begin that -- I'm
4 sorry.

5 MR. INMAN: Yes, sir.

6 THE COURT: Mr. English, you read for the
7 record the actuarial chart?

8 MR. ENGLISH: I did.

9 THE COURT: Do you have a copy of that that
10 you can pass to the Clerk? I need to see that.
11 Does it have circled the pertinent --

12 MR. ENGLISH: Yes, Your Honor. It's
13 highlighted.

14 THE COURT: Thank you. I'm sorry. I should
15 have asked for this when you first introduced it.
16 Thank you.

17 All right. Mr. Inman.

18 MR. INMAN: Thank you, Your Honor.

19 CLOSING ARGUMENT

20 BY MR. INMAN:

21 Ladies and gentlemen of the Jury, I want to
22 introduce myself. My name is Michael Inman. And I am the
23 individual that everybody has been talking about here recently.
24 I feel somewhat infamous today, especially after yesterday --
25 and today's testimony as well.

1 Yes, I'm the individual, the attorney that
2 referred Mr. Neely to these doctors. That was me. But I'm not
3 going to sit here and apologize to you folks. I did it.

4 Much like some of you who have a medical
5 background, you take an oath. As an attorney, I take an oath.
6 And as part of that oath, I am to try my best to properly
7 represent my client. And as part of that, to properly
8 represent my client, I have to counsel my client. And at
9 times, yeah, that means to seek treatment for them.

10 Now, you can probably tell that I'm very nervous.
11 There is a good reason for that. This is one of my first jury
12 trials. I just have to tell you. I am not the speaker that
13 Mr. Woodfin is. I can't sit here and rattle off the way he
14 does. And therefore, I wasn't even planning to speak to you
15 folks. I was going to defer to Mr. English.

16 But sitting here and listening to the testimony
17 and exhibits that were put on, it's come to my attention,
18 you're wondering who I am. Why am I sitting here? Why have I
19 referred Mr. Neely to all these doctors?

20 And I felt that I had an obligation that I needed
21 to get up and I needed to tell you why. I'm sitting here
22 telling you that, yes, I did send him to these doctors.

23 What Mr. Woodfin has not told you, and he doesn't
24 want you to hear, is he has the right to send him to any doctor
25 he wants to. If he doesn't believe Mr. Neely, he could have

1 sent him to a doctor.

2 He had the ability, and dare I say it, the
3 obligation and duty to his client to do so. He can get a
4 second opinion. He didn't do that. He did not do that.

5 And yesterday, it came to my attention, and I'm
6 sure it came to yours... You're very observant. You sit here
7 and you study us. And quite frankly, I didn't know whether to
8 look at you or, not look at you. This is one of my first
9 cases, as I said.

10 And I don't know how you look at us. You're
11 always thinking we're plotting and trying to maybe figure out
12 some strategy. And sometimes, yes, we were. But at the same
13 time, I want to bring to your attention, there was a lot of
14 thank you's. The defendants attorney thanked you a lot
15 yesterday.

16 But I'll tell you what you haven't heard. You
17 haven't heard the first apology. You haven't heard the first,
18 "I am sorry," by the defendant. That hasn't... Those words
19 haven't come across his lips one time.

20 Now, as to -- as to this case... You know, for
21 me, as well as yourselves, this is just another day. But
22 unfortunately for Mr. Neely, this is the rest of his life. And
23 this impacts him for the rest of his life.

24 So, yes, I am nervous. Yes, I am tired. I have
25 to admit that to you. We do everything, as attorneys, we can

1 for our clients. And once again, that shouldn't have to be
2 apologized for. But as to this defendant, they haven't even
3 admitted liability.

4 Mr. Neely, who was driving over one hundred
5 miles, at least an hour and 15 minutes, according to his
6 testimony, to the job that he dearly loved, in an effort to
7 support his family, was crashed into by the defendant's driver,
8 Mr. Curd, who is professional driver. He was crashed into,
9 forever, forever, according to the testimony of the doctors,
10 taking his ability away to support his family.

11 The doctor depositions... Let me go back though.
12 It goes beyond that. It goes beyond his ability to properly
13 care for his family as far as money. He can't do the things
14 that he normally did before. This has interfered, as his
15 testimony alluded to, with his sex life due to the back pain,
16 due to the prescription, these narcotics.

17 He also has two small children. These two
18 children, one of which was conceived after the accident, are
19 now reaching for daddy. They want to be held by daddy. They
20 want to be picked up. And Mr. Neely, more than anybody, wants
21 to provide that for them. He can't do that.

22 Those limits that you heard the doctor put on
23 him, those are real. If the defendant doesn't believe it, they
24 could have sent him to a doctor. They didn't. They have no
25 testimony whatsoever to say otherwise.

1 As to the defendant's driver, as he testified
2 here earlier, he was going too fast, too close, on too slick a
3 road. And yes, he crashed into the rear of this vehicle.
4 There was a passing lane. But he was out of control. He's
5 testified to that.

6 And they still won't accept responsibility. They
7 have yet to step up to the plate and accept the responsibility
8 for causing this accident.

9 And that's not the only thing they won't accept.
10 They don't want to tell you, and they don't want you to hear,
11 as you heard through Mr. Neely's testimony, that his vehicle
12 was totaled. They don't want you to hear that.

13 They don't want you to see these pictures of a
14 huge van -- steel. He testified this is a gauged steel bumper.

15 And as you know, when you have a huge vehicle
16 crash into a small vehicle, sometimes you might get a minor
17 puncture on the vehicle that it hit. And it will total the
18 vehicle that it crashed into. Well, that is the case, ladies
19 and gentlemen.

20 And they also didn't want you to hear that he's
21 unemployable. He testified that he put in applications, even
22 with the "no duty" restrictions put on him by his doctor, to
23 try to support his family. His newborn child, his daughter,
24 his three-year-old son, they rely on him.

25 His wife was not working at the time of this

1 accident. She was caring and raising these children. He had
2 at least one child at that time. And then comes another child,
3 a minor child. She can't work. She can't help raise these
4 children. And as lot of you know who have children, can't
5 afford the daycare that it would cost to go and work. There's
6 been no assistance.

7 And I want to refer you back to Dr. Koenig's
8 deposition. And as you heard, he put on Mr. Neely a "no duty"
9 restriction.

10 As Dr. Koenig testified, he was asked: "What are
11 those restrictions?"

12 And he stated, answer: "On July 6th, it was
13 written for no repetitive bending, stooping, squatting, or
14 lifting greater than 15 pounds. He should be allowed frequent
15 changes of position."

16 Question by Mr. English: "Are those still the
17 restrictions that you put on him pertinent at this time, sir?"

18 Answer: "No in effect, I should state that those
19 were amended further whereby he was placed on no duty."

20 No duty, ladies and gentlemen. No duty.

21 Further answer: "Meaning that I really don't
22 think he can do anything."

23 You've heard Dr. Browder's deposition and
24 testimony that he couldn't go back to work. You also heard the
25 cross examination of Dr. Koenig that he couldn't go back to

1 work. He's been placed on permanent "no duty" restrictions,
2 and he's not going to get any better, as the doctors have
3 testified to.

4 Furthermore as to the pain and suffering that
5 Mr. Neely suffered through with this, he has testified that
6 it's been great, it's been exceeding. It's been so great, as a
7 matter of fact, that he's been put on pain management for
8 life -- more than likely for life. Methadone. For those of
9 you in the medical profession, you know what methadone is going
10 to do to this man.

11 Methadone, unfortunately, is going to have an
12 affect on him in years to come. And it's going to get more
13 expensive.

14 As to -- this is Dr. Koenig. And the doctor came
15 back with, I believe -- let me rephrase this.

16 Mr. English asked Dr. Koenig: "Doctor, did you
17 have any opinion as to whether or not this man will suffer pain
18 in the future as a result of these injuries?"

19 Answer: "Yes, sir. I think that unfortunately,
20 also. And that's the reason why we sent him to a pain
21 management consultant -- to Dr. Browder."

22 Referring to Dr. Browder who has been treating
23 him for his pain. In his deposition I just want to remind you,
24 he stated: "He has not be able to return to work. Apparently,
25 the type of job that he has requires the ability to physically

1 restrain patients who may become violent. So he may not be
2 able to return to that position." These are the words of a
3 doctor.

4 The defendant is going to get up here and he's
5 going tell you it hasn't been proven. He's going to tell you
6 that they're not responsible. Once again, they want to hide
7 what the facts -- what the truth is.

8 We've laid it out here for you. There's no doubt
9 that this man being the driver or a defendant is going too
10 fast, too close, on too slick a road. There's no doubt about
11 it.

12 He even testified there was a clear passing lane.
13 And that is the unfortunate result of this wreck which caused
14 Mr. Neely these injuries. Which are of a permanent nature.

15 Now, I would like... I apologize. As I stated,
16 I wasn't really planning on speaking with you today. I was
17 going to let Mr. English present this case. But I felt I owed
18 a duty to Mr. Neely to tell you why I'm sitting here, and why I
19 haven't said a word.

20 Now, Mr. Neely, as you heard read into the
21 record, is 48 years of age. The Tennessee Code Annotated table
22 stated that he has a life expectancy of 32.85 years. His
23 actual medical expenses to date, which have been filed as
24 exhibits, and which will be available to you, is sixteen
25 thousand, two hundred and eighty-five dollars (\$16,285). And

1 that's not current.

2 The actual medical expenses of Dr. Browder, which
3 has also been provided as an exhibit, too, which you'll have
4 access to, is five thousand, seven hundred and forty-three
5 dollars (\$5,743), plus office visits from 6/19/06 of eighty
6 dollars (\$80) for five visits for each one of them. That
7 equals four hundred, plus (\$400+).

8 The actual lost earnings... The date of this
9 wreck was July 12, '04. He hasn't worked a day since. And as
10 of 6/20/06, that's one hundred and one weeks, times three
11 hundred and seventy dollars (\$370), pursuant to his tax return
12 which has been provided as an exhibit. That equals
13 thirty-seven thousand, three hundred and seventy dollars, plus
14 (\$37,370+). We're not including interest on this. This is not
15 including inflation. This is just what he was making. And
16 this is the low figures.

17 Now to the actual losses. They total at 6/20/06,
18 three hundred thousand, seven hundred and ninety-eight dollars,
19 plus (\$300,798+). Once again, that's not with inflation.
20 That's not with interest. That's actual loss.

21 As for future medical expenses, as I alluded to.
22 At this time this monthly visit to Dr. Browder for pain
23 management is eighty dollars (\$80). And he stated in his
24 testimony that that's only going to go up. But at eighty
25 dollars (\$80) for life, with the life expectancy that we have

1 of 394 months are thirty-one thousand, five hundred and twenty
2 dollars (\$31,520). That's what he has to look forward to,
3 ladies and gentlemen. That's what he has.

4 And his future lost wages, from 6/20 to 2/23,
5 which is age 65, retirement age, that is at 867 weeks at a rate
6 of three hundred seventy dollars (\$370). Mind you, we took
7 into consideration and we left his pay rate the same. We
8 didn't give him a bonus. We didn't give him inflation. We
9 didn't put in any interest. But that amount is three hundred
10 twenty thousand, seven hundred and ninety dollars (\$320,790).
11 With the two combined, that's four hundred twelve thousand
12 dollars (\$412,000).

13 Now, as to the future, who knows? There's no
14 telling when this whole thing is going to end. But we do know
15 he's going to have pain. The doctor says more likely than not,
16 yes, he will have pain for life. If he's lucky to live to this
17 ripe old age.

18 His loss of enjoyment. Can you put a dollar
19 amount on that? Is it possible to put a dollar amount on this
20 man not being able to pick up his children? And the medicine,
21 once again, that's just going to go up.

22 We all know what medicine costs. We all know
23 what medical expenses are these days. Think about a loaf of
24 bread two years ago, or three years ago. Has it not gone up?

25 Think about the price of gasoline two or three

1 years ago, and what it is today. These expenses are only going
2 to get higher.

3 But we're asking you to do what's right and
4 what's just, and come back with a verdict for Mr. Neely.

5 THE COURT: Mr. Woodfin.

6 MR. WOODFIN: Thank you.

7 CLOSING ARGUMENT

8 BY MR. WOODFIN:

9 Thank you all for listening to us over these past
10 few days. I'll try to be brief.

11 You heard the evidence in this case. You've been
12 able to weigh the credibility of the witnesses that you've
13 heard. And you should be able to make a decision on what you
14 have heard.

15 A lawsuit starts out with the filing of a
16 complaint. And I mentioned that in the beginning of this
17 presentation that I made to you, that the complaint was the
18 amount that we were sued for. The complaint is a part of this
19 record of this Court. I'll just read this to you.

20 "Wherefore the plaintiff's demand the jury to try
21 this cause and award judgment in such amount that the jury
22 deems fair, but not to exceed two million, five hundred
23 thousand dollars (\$2,500,000) in compensatory damages."

24 Yet, the plaintiff expects my client to apologize
25 to him for an accident that they did not cause. They expect us

1 to apologize to you for not hiring a doctor to evaluate this
2 man when there's no need for us to hire a doctor to evaluate
3 this man.

4 The only doctors that he presented here today on
5 his behalf tell you that everything they conclude is based on
6 what he has said, and he has told them.

7 This case reminds me of a house of cards. I
8 remember when I was a kid, taking a deck or two and trying to
9 set them all up, and stack them up really high. The most
10 important part of that deck, or that stack, was the base.

11 In this case, the base upon which this whole case
12 is built is Mr. Neely, and him telling these things to his
13 doctors.

14 But then we take a look at what actually
15 occurred. The fact that he was not giving his doctors correct
16 information about what happened in the accident. The fact that
17 he told you this car that he was driving was totaled.

18 You've seen the photographs. Yet, he tells us
19 the next day he drove it home to Kentucky after it was totaled.

20 He tells his doctors he lost consciousness. And
21 then he tells us he didn't. Then he tells us he doesn't
22 remember.

23 So what happens is, the base upon which this
24 house of cards is built begins to erode. The support for
25 whatever else is presented to you in the case by way of expert

1 testimony, expert opinion, conclusions, damages, naturally
2 falls when that base erodes. If they cannot support their
3 claim for damages, the opinions of their experts with that
4 underlying credible testimony, the case must fail.

5 You're going to be asked to do three things in
6 this case. The first one is you'll be asked to determine
7 whether or not this accident was caused by Mr. Curd, and
8 therefore is attributable to my client, Mr. Fox and his auto
9 company that he had.

10 The second thing you'll be asked to determine if
11 you decide that that's true, and I don't know that that's true.
12 I heard Mr. Curd say that he did not do anything wrong. He
13 just accidentally slid on a wet road. To me, that's not
14 negligence. But that's for you-all to decide.

15 If you do determine that he was negligent, the
16 next question you're going to be asked is whether or not this
17 conduct was the cause of all these things that Mr. Neely has
18 told you about today. I know the answer to that question. I
19 think you do, too.

20 And then the final question is, what amount of
21 damages should compensate Mr. Neely for what he has told you
22 he's gone through, and which is, in your opinions, related to
23 this accident?

24 I think I know the answer to that question. And
25 I think you know as well.

1 All the things we heard from the doctors are all
2 dependant on Mr. Neely giving valid complaints and saying, I'm
3 having pain down my arms, I'm having pain down my legs.

4 Because as the doctors said, there was no test to
5 verify that. As a matter of fact, they said on several
6 occasions that the tests did not verify that there were these
7 radicular problems. So it's all been based on what Mr. Neely
8 said.

9 I pointed out numerous times where Mr. Neely has
10 been inconsistent in his testimony in this case, and has, at
11 times, changed his testimony. That's not a sufficient base to
12 hold up this house of cards. So if there's nothing to hold it
13 up, the whole case, by its very definition, has to fail.

14 Listening to what these doctors said, they
15 acknowledge that they listen to their patients. That's what
16 doctors do. They believe what the patient says. They're
17 trying to help the patient, so they give credibility to what
18 the plaintiff says.

19 They don't investigate. They don't know all the
20 facts. I tell them certain things during cross examination,
21 but they're still going to try to help the plaintiff.
22 Especially in situations where doctors are seeing people upon
23 referral from their lawyers.

24 I don't know about you folks, but if I need to go
25 to the doctor, I don't call a lawyer.

1 Sometimes we see that these doctors continue to
2 treat these people after a referral from their lawyers. And
3 you can see how things develop. The doctor doesn't know all
4 the information. The doctor doesn't have the information that
5 actually, Mr. Neely was not knocked unconscious at the scene.
6 They're just told that he was.

7 And whether they're asked if that makes a
8 difference, well of course they're going to say it doesn't make
9 a difference, because they're an advocate for their patient.

10 But you eight folks that are here today listening
11 to this case over these past few days are the advocate for the
12 system. And I remember when I talked with you in the opening
13 about being fair and reasonable, not only to both parties, but
14 the legal system as a whole.

15 When the judge instructs you about the evidence
16 in this case and how you're to decide, he's probably going to
17 say something along these lines:

18 To recover damages from permanent injury, the
19 plaintiff must prove the future effect of the injury to a
20 reasonable certainty. While it's not necessary the evidence
21 conclusively or absolutely show that the injury is permanent,
22 you may not award damages for a permanent injury based on mere
23 conjecture or possibility.

24 When that base of this case is erased, what we're
25 left with is a bunch of conjecture, a bunch of speculation, and

1 a bunch of evidence which will not allow you to conclude the
2 amount of damages that Mr. Neely is seeking in this case is
3 appropriate to award him.

4 He's testified he can't work. But he's testified
5 he's applied for jobs. He's testified he tried to put down
6 information on these applications about his pre-existing
7 problems.

8 I don't know that applications include that
9 anymore. You don't know that either, because he didn't tell
10 you anything about those specific applications, or bring you
11 any evidence of those applications. But that's the kind of
12 stuff that we're dealing with; speculation, conjecture, and a
13 desire to try to get money out of my client.

14 Mr. English said something on day one of this
15 trial that is very, very pertinent. He said on July 14, 2004,
16 the day of this accident, Mr. Neely's life was changed forever.
17 I agree with that. But it was changed by him.

18 It was on that day that, and the days that
19 followed afterwards, that he decided, I'm not going to live my
20 life anymore like I used to. I'm going to try to get money out
21 of this lawsuit. Don't reward him for that.

22 CLOSING ARGUMENT

23 BY MR. ENGLISH:

24 First of all, Mr. Woodfin is incorrect. I didn't
25 say July the 14th, I said July the 12th his life was changed

1 forever. Because that's when this accident happened. It
2 wasn't the 14th.

3 Mr. Woodfin didn't tell you that when we file our
4 lawsuit in a rear-end collision that he files an answer denying
5 that it's his fault even though this man was following too
6 closely, too fast on a rain-slickened road. And they still
7 have put this man through total hell for the last two years --
8 this Corporation.

9 Now, Michael asked me to help him in this case
10 because I've tried a few cases. And I find that it's my job to
11 help my clients if I can. I talk to a lot of people about
12 representing them, and I don't take many cases of the people I
13 talk to.

14 And if I can help someone, and I honestly believe
15 or know that they're hurt, I'm going to help them. I'm going
16 to do everything I can.

17 I've lost some cases I should have won. I've won
18 some cases I should have lost. But whenever I saw the reports
19 on Tom Neely...

20 And Mr. Woodfin didn't mention a word about those
21 two MRIs that showed two protruding disks in his neck and a
22 bulging disk in his neck, and four disks in his back that were
23 bulging. He's didn't say a word about it. Not a word. Not
24 one word. He's trying to defend this case, a rear-end
25 collision. And this is a case...

1 Most collision cases get settled. They never get
2 tried because the defendants generally settle these cases
3 because it's obvious to everybody, hopefully to you, who caused
4 the wreck.

5 Tom didn't have any control over how fast this
6 man was driving behind him. Or how close he was following
7 behind him. Or whether the road was slick. He had no control
8 over that. You heard it.

9 And it just does not make sense that he would
10 stop for no apparent reason on a rain-slickened road. And for
11 him to be able to stop from 35 miles an hour in five feet is
12 incredible. It's unbelievable. And I'm sure you do not
13 believe that.

14 And for him to have been hit hard enough to total
15 his car, and for Mr. Woodfin to object to you hearing that his
16 car was totaled... Yes, he drove it back to Kentucky. He had
17 to, to salvage it. It took him two and a half hours, I believe
18 he said, to get it back. And then he drove it to his mothers
19 one time. And then that was the last time he drove that.

20 He didn't want you to hear that about it being
21 totalled. He didn't want you to hear about the seat being
22 broke. Him being hit so hard that it was broken.

23 And for Mr. Curd to come in here and say that, I
24 was going 35, and then I slowed down and hit him about
25 45 (sic), and knocked him forward about two or three feet and

1 broke his seat and totalled it. He didn't mention a word about
2 that. I wonder why? Because that just doesn't stand the light
3 of day as being honest and truthful.

4 This case should have never gotten into a
5 lawyer's hands. This case should have been settled early on.
6 And Mr. Neely shouldn't have been put through by this
7 defendant, this corporate defendant that no longer exists,
8 shouldn't have been put through this for the last two years --
9 and his wife.

10 These people have gone from him working ever
11 since he was 13 years old mowing yards, working at the Scott
12 County Hospital. It's gone from that to this man living on
13 food stamps. And he's never done that before.

14 You saw what he said when I asked him about how
15 this affected the way he felt about him being unable to care
16 for his wife and his children. This is just a horrible
17 situation. And it cries out for justice. And it's all we can
18 do.

19 They're not accepting responsibility. And I want
20 you to do what you think is right, and what is fair, and what
21 is just. When we sue for an amount here, we have to put a top
22 figure in it. And I said, and he read, and he read correctly,
23 "...which the jury deems fair and just, but not to exceed two
24 and a half million dollars."

25 It's not for me to say what this case is worth.

1 But I want to talk to you just a few minutes about some
2 elements of the damages.

3 For instance, Tom Neely will never, ever, ever
4 work again. A board-certified orthopedic surgeon said that on
5 cross examination. And a board-certified pain specialist said
6 that. That's the head, the president, of all the pain
7 specialists that's in the State of Tennessee. These are two of
8 the best people that I know. And I'm not apologizing for
9 sending Tom.

10 Actually, I thought I sent him to Dr. Browder,
11 but I didn't, apparently. Dr. Koenig sent him to him. I am
12 not apologizing for that if I had.

13 I would have, because I know Dr. Browder is a
14 good doctor. I know Dr. Koenig is an excellent doctor. If I
15 had to go to him, or if I had a family member, I would
16 certainly want one of those people to see him.

17 And both of those doctors said that this man
18 can't work. Mr. Woodfin is talking about, well, he's applying
19 for jobs. Yes, he's applied for jobs. He's starving to death.
20 He's going to the flea markets and watching the kids while his
21 wife can eke out a meager existence, when this man took care of
22 them all of his life. All of his life. He took care of
23 himself from age 13. He took care of his wife for the
24 twenty-two years they've been married.

25 And he had a job he dearly loved that he drove

1 200 miles a day to, roughly, back and forth. And he wanted to
2 work there until they ran him off at age 65.

3 You can say what you want to about the damage
4 that was done to this van, or the damage that wasn't done to
5 the van. That was a big huge van. It was a tank. A tank hits
6 a little car, there's not going to be any damage done to it.
7 You know that.

8 You know when a big tractor-trailer, or a big van
9 hits a little car, you know who's going to come out second best
10 in that collision. And that's exactly what happened to Tom.
11 That's why his seat broke. That's why he hasn't worked a day
12 since this.

13 He did go back to Dr. Koenig. Dr. Koenig...
14 Shortly before he gave the deposition -- two weeks before the
15 deposition. Dr. Koenig wanted him to go back to work.

16 It's my obligation as a lawyer to get people back
17 to work. To get them back as good as I can. You know, whether
18 you make money on them, or whether I don't make money on them,
19 it's my job as a human being to try to get them to do the best
20 they can. And the same way with Dr. Koenig.

21 He sent him back to try to go to work. He went
22 back and tried to go to work at the job he loved. At the job
23 he would go 200 miles a day to, five days a week for a year and
24 a half.

25 And they wouldn't take him back because he was on

1 drugs, he was on methadone, and he had a lifting restriction.
2 And that lifting restriction has been taken off to a "no duty"
3 restriction. He can't work any. So this man...

4 And the law requires that we prove our case by
5 competent medical proof. Mr. Woodfin has the right. And as
6 Mr. Inman said, he has the obligation if he doesn't believe our
7 doctors, to send him to a doctor of his own. And he didn't
8 choose to do that. He could have sent him to any doctor in
9 this town to have him evaluated, and to give an opinion in this
10 case. He didn't do that for one reason.

11 After I filed the complaint, and after he filed
12 the answer, he filed the interrogatories. And when we answer
13 them under oath, we tell him who the doctors are that we've
14 been going to. We're not trying to hide anything from anybody.

15 And he sends me a medical authorization for him
16 to get the records himself, because I guess he doesn't trust
17 me. And I signed this. And he gets it. And he knows exactly
18 what was wrong with this man. From day one, once he got those
19 medical records pursuant to the authorization that I signed.

20 And if he didn't believe those, he could have
21 certainly gotten months ago... He could have gotten a doctor
22 to look at him and give an opinion.

23 He chose not to do this. This is a big
24 corporation. Fox Motors of Oak Ridge is a big corporation
25 that's been sold and it's no longer in existence.

1 He's got an obligation to come in here and prove
2 his case by reasonable medical certainty by a doctor. And he
3 had the means, and the method, and the opportunity to do that.
4 And he didn't do it because he saw the handwriting on the wall.

5 He saw the two MRIs that were read by Dr. Yount,
6 a board-certified radiologist. He saw the two MRIs that were
7 read by Dr. Koenig, a board-certified orthopedic surgeon who
8 actually read the reports and saw the films. And he saw the
9 reports of Dr. Joe Browder, who actually treated this man, and
10 who has treated him, and will treat him probably for the rest
11 of his life if Tom lives that long, or if Joe Browder lives
12 that long. Somebody is going to treat this man for the rest of
13 his life.

14 He's never going to work again. And he will turn
15 65 in 2023. So he's got a long ways to go.

16 And let's talk about the projections that
17 Mr. Inman put up here for just a minute. The actual medical
18 expenses, these were proved -- these weren't even contested by
19 Mr. Woodfin. So this sixteen thousand (\$16,000) goes without
20 saying. The actually medical expenses proven by Dr. Browder --
21 they were not contested, fifty-seven hundred dollars (\$5,700).
22 Office Visits since I took Dr. Browder's deposition, eighty
23 dollars (\$80) a month for five months. That's four hundred
24 more dollars (\$400).

25 And then let's talk about the next line, the

1 actual lost earnings. The date of the wreck was 5/12/04, right
2 here to 7/12 -- 5/12/04 to 6/20/06, that was 101 weeks as of
3 yesterday. That's 101 weeks at three hundred seventy dollars
4 (\$370) a week.

5 Now, if you look at one of the exhibits, the 2004
6 IRS tax for this man, he averaged about four hundred and twenty
7 dollars (\$420) a week the year of this wreck in '04. Look at
8 that. Do the math. He only worked -- he never worked after
9 the 12th of July. So he worked about 28 weeks. You divide 28
10 into the twelve thousand two hundred and one (\$12,201) that he
11 got, and it's going to be about four hundred and twenty dollars
12 (\$420). We didn't take that figure. We were conservative
13 because he was getting overtime during that period of time.

14 And those are documents 2002, 2003, and 2004.
15 And they verify his testimony that he was making a lot more
16 money whenever he had the wreck than he was at the Scott County
17 Hospital.

18 Future medical expenses, according to Dr. Browder
19 on Page 13 of his deposition, are eighty dollars (\$80) a month
20 for life, for 394 months, that's thirty-one thousand dollars
21 (\$31,000) and change.

22 Well, Tom may die tomorrow. He may live a lot
23 longer than his life expectancy. There's no guarantee of life
24 for him, or you, or me, or anyone else.

25 But there is one guarantee. He's got a life

1 expectancy of roughly 34 more years, or 33 more years. And if
2 I know anything, and if you know anything, prices are going up
3 in the next 33 years.

4 Think back, those of you that are old enough to
5 think back 33 years when you were spending money, what a loaf
6 of bread cost then. What a doctors visit cost then. What a
7 tank of gas cost 30 years ago. It was a lot less.

8 What do you think it will be like? Do you think
9 Dr. Browder's office is going to be charging eighty dollars
10 (\$80) a visit 20 or 30 years down the road? Of course not.
11 That's a low figure.

12 His future wage loss to 2/23/23, when he turns
13 age 65, that's 867 weeks at what he's making now. Assuming he
14 never gets another raise. Assuming inflation stops and wages
15 don't go up for the next, roughly 15 or 16 years, whatever that
16 would be, that's what he has lost when he turns 65, retirement
17 age.

18 Now, these figures right here, this is what he's
19 out right now, the sixty thousand dollars (\$60,000).
20 This is what he's going to be out if prices don't change, him
21 going to the doctor for the rest of his life.

22 This is what he's going to lose if he doesn't get
23 a raise, not being able to work until he turns age 65. His
24 actual accrued losses are four hundred and twelve thousand
25 dollars (\$412,000).

1 Now, let's talk about his pain for life, his loss
2 of enjoyment for life, and his medicine for life.

3 THE COURT: One minute, Mr. English.

4 BY MR. ENGLISH:

5 His pain for life, even though he's going to
6 retire, hopefully at 65, or he would have been able to, he's
7 going to live for another 33 years -- roughly. And he's going
8 to have pain every day. And he's sleeping about two or three
9 hours a night. But say he sleeps eight hours a night and he's
10 up sixteen hours a night (sic). Would you give him ten dollars
11 an hour for the pain he's going through? That's a huge amount
12 of money.

13 And what about his loss of enjoyment of life
14 where he can't take care of his children. He can't go hunting.
15 He can't go fishing. He can't do the things that put the
16 frosting on life that you all worked hard all week to do. He
17 just can't do that.

18 And what about this last thing, the medicine for
19 life. I put a question mark on all three of those things. I
20 don't know what the medicine is going to cost. Dr. Browder
21 said it's been going up about twice as fast as the inflation
22 index. What it will be in 30 years, nobody knows. That's for
23 you to say.

24 Ladies and gentlemen, I tried to do the best I
25 can to present Tom's case. I don't think liability is an issue

1 here. I don't think damages should be an issue here. But I
2 want you to do what you think is right, and what you think is
3 fair, and what you think is just.

4 You go back and you decide he's entitled to
5 whatever the football coach at the university makes in a year
6 after losing five games -- two million dollars. And if you
7 give him half that amount, you give him half justice, but you
8 give him injustice. Just do what you think is right. Treat
9 him the way he should be treated. He didn't do anything to
10 cause this. And these people have been horrible to him.

11 THE COURT: All right. Thank you,
12 Mr. English.

13 All right. At this time, ladies and gentlemen
14 of the jury, the Court is going to give you your final
15 instructions and your jury charge. You will get a
16 copy of this to take back to the jury room with you,
17 but I always read it anyway before you go back.

18 JURY CHARGE

19 Now that you have heard and seen all the evidence
20 in this case, and have heard the final argument of the
21 attorneys, it is my duty to instruct you on the law which
22 governs this case.

23 It is your duty as jurors to follow the law as
24 stated in these instructions, and to apply the rules of law to
25 the facts as you find them from the evidence in this case. You

1 are not to single out any one instruction as stating the law by
2 itself. You should consider all these instructions as a whole.

3 You were selected and sworn as jurors in this
4 lawsuit to decide the issues of facts and to apply the law to
5 those facts as the Court gives the law to you.

6 You are to perform this duty without any bias or
7 prejudice to any party. Our system of law does not permit
8 jurors to be governed by sympathy, prejudice, or public
9 opinion.

10 The Court, the parties, and the public expect
11 that you will carefully and impartially consider all the
12 evidence in the case, follow the law as stated by the Court,
13 and arrive at a verdict that you think is just, fair, and
14 right, under all of the proof.

15 The issues for you to decide are as follows:

16 Number one, was the defendant, Fox of Oak Ridge,
17 negligent?

18 Number two, was the defendant, Fox of Oak
19 Ridge's, negligence a legal cause of injuries to the plaintiff
20 Thomas Neely?

21 Number three, if so, what is the total amount of
22 compensatory damages that the plaintiff Thomas Neely is
23 entitled to recover?

24 Let me talk to you about burden of proof again.
25 This, of course, is a civil case. The plaintiff has a burden

1 of proving the case by what is called the preponderance of the
2 evidence. That means the plaintiff has to produce evidence
3 which, considered in light of all the facts, leads you to
4 believe that what the plaintiff claims is more likely true than
5 not.

6 To put it differently, if you were to put the
7 plaintiff's and the defendant's evidence on opposite sides of a
8 scale, the plaintiff's evidence will have to make the scales
9 tip somewhat on the plaintiff's side. If the plaintiff fails
10 to meet this burden, the verdict must be for the defendant.

11 Those of you who have sat on criminal cases have
12 heard the term "proof beyond a reasonable doubt." That
13 requirement does not apply to a civil case like this one. And
14 you should therefore put that out of your mind.

15 Generally speaking, there are two types of
16 evidence from which you as jurors may properly find the truth
17 as to the facts of this case.

18 One is direct evidence, such as the testimony of
19 an eyewitness.

20 The other is indirect or circumstantial evidence.
21 This is proof of a change of circumstances pointing to the
22 existence, or the nonexistence of certain facts.
23 Circumstantial evidence proves the fact from which an inference
24 may be drawn.

25 Let me talk to you about impeachment. What we

1 call impeaching a witness is showing that a witness may not be
2 telling the truth, and it may be done in various ways.

3 One well recognized method of impeaching a
4 witness is by rigorous cross examination to involve the witness
5 in contradictions or misrepresentation about material matters
6 in the lawsuit that the witness cannot, or does not, explain.

7 Another method is to prove that the witness has
8 made statements out of court that contradict statements made by
9 him on the witness stand about material matters.

10 Just how much any method of impeachment may have
11 succeeded in this case is a matter for you, the jury, to
12 determine.

13 When a witness is impeached, or is shown to have
14 made contradictory statements, or is shown to have told an
15 untruth about a material matter, it is entirely proper for you
16 to disregard his or her testimony altogether, except where it
17 is corroborated by other credible evidence.

18 Even an impeached witness, however, may tell the
19 truth. And if you believe such a witness has told the truth,
20 you must weigh the witness' testimony just as you weigh the
21 testimony of other witnesses.

22 It is also possible for a witness to be honestly
23 mistaken about certain facts. And you may consider the
24 circumstances under which any prior statements were made.

25 If there were any conflict in the evidence, you

1 should reconcile it if you can without hastily or rashly
2 concluding that any witness has sworn falsely. For the law
3 presumes that every witness has told, or tried to tell the
4 truth. And this presumption prevails until the contrary is
5 made to appear.

6 Any evidence to which an objection was sustained
7 by the Court, or any evidence which you were told to disregard,
8 must be entirely disregarded. And anything you may have seen
9 or heard outside of the proper course of the trial touching the
10 merits of this action is not evidence, and must also be
11 entirely disregarded by you.

12 Statements and arguments of the attorneys are not
13 evidence in this case, except when they're made as a
14 stipulation of the facts. But when the attorneys representing
15 both sides do stipulate, or agree, to a particular fact, you
16 must accept that fact as having been conclusively proved.

17 The parties have stipulated that on July 12,
18 2004, Benjamin Curd was operating a Chevrolet van as the agent
19 of the defendant, Fox of Oak Ridge, Inc. There was a motor
20 vehicle collision between the defendant's van and the
21 automobile driven by the plaintiff, Thomas Neely.

22 I'll make a few comments now about witnesses.
23 You are not bound to decide any issue of fact in accordance
24 with the testimony of any number of witnesses which does not
25 produce in your minds belief in the likelihood of truth as

1 against the testimony of a lesser number of witness, or other
2 evidence which does produce such belief in your mind.

3 In other words, the test is not which side brings
4 the greater number of witness, or presents the greater quantity
5 of evidence, but which witness and which evidence appeals to
6 your minds as being the most accurate and otherwise
7 trustworthy.

8 The testimony of a single witness which produces
9 in your mind belief in the likelihood of truth is sufficient
10 for the proof of any fact, and would justify a verdict in
11 accordance with such testimony, even though a number of
12 witnesses may have testified to the contrary, if after
13 consideration of all the evidence in the case you hold greater
14 belief in the accuracy and reliability of the one witness.

15 Now, during the trial of this case, certain
16 testimony has been shown to you by way of video depositions.
17 These are sworn answers to questions asked of witnesses in
18 advance of trial by the attorneys for the parties. Testimony
19 of a witness certainly may be presented in this form.

20 This testimony is entitled to the same
21 consideration, and is to be judged as to credibility, and
22 weighed, and otherwise considered by you the same as if these
23 witnesses had been present and had testified in court.

24 You have heard testimony from expert witnesses in
25 this case. In this case they were medical doctors. An expert

1 witness is a person with special knowledge or experience that
2 allows the witness to give an opinion. You do not have to
3 accept an expert's opinion. In deciding how much weight to
4 give each expert's opinion, you should consider the witness'
5 qualification, experience, and how the expert witness reached
6 his opinion.

7 Remember that you alone decide how much of a
8 witness' testimony to believe and how much weight it deserves.

9 Now, the defendant in this case, Fox of Oak
10 Ridge, is a corporation. This case should be considered and
11 decided by you as an action between persons of equal standing
12 in the community of equal worth, and holding the same or
13 similar situations in life.

14 The fact that the defendant in this case is a
15 corporation must not prejudice you in your deliberation or in
16 your verdict. You may not discriminate between corporations
17 and natural individuals. Both are persons in the eyes of the
18 law. And both are entitled to the same fair and impartial
19 consideration, and to justice by the same legal standard.

20 I want to explain to you now what we call
21 respondeat superior liability. A corporation may act only
22 through natural persons as its agent or employees. In general,
23 any agent or employee of a corporation may bind the corporation
24 by the actions done and statements made while acting within the
25 scope of the authority as delegated to the agent or the

1 employee by the corporation. Or within the scope of the agent
2 or employee's duties as an employee of the corporation.

3 I want to talk to you now about damages. A
4 plaintiff is entitled to recover compensation for an injury
5 that was legally caused by the negligent conduct of a
6 defendant.

7 In this case, the plaintiff has the burden of
8 proving that the defendant was at fault. In this case, this
9 means the plaintiff has the burden of proving that the
10 defendant was negligent. And two, that the negligence was a
11 legal cause of injury to the plaintiff.

12 Negligence is the failure to use reasonable care.
13 It is either doing something that a reasonably careful person
14 would not do, or the failure to do something that a reasonably
15 careful person would do under circumstances similar to those
16 shown by the evidence.

17 A person may assume that every other person will
18 use reasonable care unless the circumstances indicate the
19 contrary to a reasonably careful person.

20 The second part of fault is legal cause. A legal
21 cause of an injury is a cause which in natural and continuous
22 sequence produces an injury, and without which the injury would
23 not have occurred. A single injury can be caused by a
24 negligent act or omission of one or more persons.

25 If you find that a party was negligent, and that

1 the negligence was a legal cause of the injury or damages for
2 which a claim was made, you have found that party to be at
3 fault.

4 The plaintiff has the burden to prove the
5 defendant's fault. If the plaintiff fails to do so, you should
6 find no fault on the part of the defendant.

7 I want to talk to you now about the concept
8 called negligence per se. A person who violates a statute or
9 ordinance is negligent. However, a person violating a statute
10 or ordinance is not at fault unless you also find that the
11 violation was a legal cause of the injury or damage for which a
12 claim has been made.

13 The plaintiff in this case alleges that the
14 defendant Fox of Oak Ridge's employee, Mr. Curd, violated the
15 following statute as set forth in §55-8-124(a) of the Tennessee
16 Code Annotated: "The driver of a motor vehicle shall not
17 follow another vehicle more closely than is reasonable and
18 prudent, having due regard for the speed of such vehicles and
19 the traffic upon and the condition of the Highway."

20 I want to talk to you now about damages. If you
21 find in favor of the plaintiff, you should assess damages in an
22 amount that would reasonably compensate him for each of
23 following elements of loss or harm, if any, that he has
24 suffered, or will suffer, as a legal result of the fault of the
25 defendant. Each of these elements of damages is separate. You

1 may not duplicate damages for any element by also including
2 that same loss or harm in another element of damage.

3 The plaintiff Thomas Neely shall be awarded the
4 following elements of damage experienced in the past, if any:
5 Physical pain and suffering; mental or emotional pain and
6 suffering, including anguish; distress; fear; humiliation;
7 grief; shame or worry; loss of capacity for the enjoyment of
8 life; or disfigurement.

9 You shall also award compensation for the present
10 cash value of: Physical pain and suffering; mental or
11 emotional pain and suffering, including anguish; distress;
12 fear; humiliation; grief; shame or worry; loss of capacity for
13 the enjoyment of life; or disfigurement reasonably certain to
14 be experienced by a party in the future.

15 There is no set mathematical formula for
16 computing reasonable compensation for physical pain and
17 suffering, mental or emotional pain and suffering, loss of
18 capacity for the enjoyment of life, disfigurement; nor is the
19 opinion of any witness required as to the amount of such
20 compensation.

21 In making an award for such damages, you must use
22 your best judgment and establish an amount of damages that is
23 fair and reasonable in light of the evidence before you.

24 The next element of damages that the plaintiff
25 Thomas Neely may recover is for reasonable and necessary

1 expenses for medical care, services and supplies actually given
2 in the treatment of a party as shown by the evidence. And the
3 present cash value of medical expenses reasonably certain to be
4 required in the future.

5 The next element of damages that the plaintiff
6 Thomas Neely can recover is the value of the ability to earn
7 money that has been lost in the past, and the present cash
8 value of the ability to earn money that is reasonably certain
9 to be lost in the future.

10 In deciding what, if any, awards should be
11 made for the loss of the ability to earn, or loss of earning
12 capacity, you should consider any evidence of the party's
13 earning capacity, including among other things, the party's
14 health, age, character, occupation, past earnings,
15 intelligence, skill, talent, experience and record of
16 employment. The loss of the ability to earn money may include,
17 but is not limited to, actual loss of income.

18 Plaintiff Thomas Neely also claims damages for
19 permanent injury. To recover damages for permanent injury, the
20 plaintiff must prove the future effect of the injury with
21 reasonable certainty. While it is not necessary that the
22 evidence show conclusively or absolutely that the injury is
23 permanent, you may not award damages for a permanent injury
24 based upon a mere conjecture or a possibility.

25 In determining any damages arising in the future,

1 you must not multiply a dollar amount by the length of time you
2 think the damages will continue, or by the number of years the
3 plaintiff is likely to live. Instead, you must determine the
4 present cash value of the damages you have determined the
5 plaintiff is entitled to recover.

6 In using the expression "present cash value" in
7 these instructions, present cash value means the sum of money
8 needed now, which when added to what that sum may reasonably be
9 expected to earn in the future when invested, would equal the
10 amount of the damages, expenses, or earnings at the time in the
11 future when the damages from the injury will be suffered, or
12 the expenses must be paid, or the earnings would have been
13 received.

14 You should also consider the impact of inflation,
15 it's impact on wages, and it's impact on purchasing power in
16 determining the present cash value of future damages. Damages
17 for future pain and suffering, or disability, are also reduced
18 to present value.

19 As shown by the actuarial tables, the plaintiff
20 Tom Neely's life expectancy is 32.85 years. This life
21 expectancy is not conclusive. It's an average life expectancy
22 of persons who have reached a certain age. You should be aware
23 that many persons live longer, and many die sooner than the
24 average.

25 However, this figure may be considered by you in

1 connection with other evidence relating to the probable life
2 expectancy of the plaintiff, including evidence of the
3 plaintiff's health, occupation, habits and other activities.

4 You are not required to assume that a person
5 would have lived the number of years specified in the life
6 expectancy table. All persons do not live to the age of
7 expectancy, of course. So you will take all of the evidence
8 before you into consideration in deciding how much weight to
9 give to the evidence provided by proof of expected life
10 expectancy.

11 All right. Here are your closing instructions.

12 The fact that I have given you instructions
13 concerning the issue of the plaintiff's damages should not be
14 interpreted in any way as an indication that the Court believes
15 that the plaintiff should or should not prevail in this case.
16 That is for you, members of the jury, to decide.

17 Members of the jury, you must have no prejudice,
18 bias or sympathy for or against either party in this lawsuit.
19 Sympathy or hostility has no place in the trial of a lawsuit or
20 the making up of your mind as to what your verdict shall be.
21 Do not permit any such personal consideration to enter into
22 your deliberation.

23 Your verdict must represent the considered
24 judgment of each juror. In order to return a verdict, it is
25 necessary that each juror agree to the verdict. In other

1 words, your verdict must be unanimous. And the Court is going
2 to confirm that your verdict is unanimous when you return your
3 verdict.

4 It is your duty as jurors to consult with one
5 another and to deliberate with a view to reaching an agreement,
6 if you can do so without violence to individual judgment. Each
7 of you must decide the case for yourself, but only after an
8 impartial consideration of all of the evidence with your fellow
9 jurors.

10 In the course of your deliberations, do not
11 hesitate to re-examine your own views and change your opinion
12 if you are convinced that it is erroneous. But do not
13 surrender your honest conviction as to the weight or effect of
14 evidence solely because of the opinion of your fellow jurors,
15 or for the mere purpose of returning a verdict.

16 Remember at all times you are not partisan, you
17 are the judges. You are the judges of the facts in this case.
18 Your sole interest is to seek the truth from the evidence.

19 Upon retiring to the jury room, you will first
20 select one of your members to be the foreperson of the jury.
21 The foreperson will preside over your deliberations and be your
22 spokesperson in court.

23 When you have reached a verdict, let the court
24 security officer know, and you will return here to deliver your
25 verdict.

1 A verdict form has been prepared for your use,
2 which I will now explain to you. This is the verdict form. It
3 has three questions.

4 The first question is: Was the defendant Fox of
5 Oak Ridge, Inc. negligent?

6 You will either answer yes or no to that question.

7 If your answer is no, you simply have your foreperson
8 sign the form and return to the court.

9 If your answer is yes, you go to number two: Was
10 the defendant Fox of Oak Ridge's negligence a legal cause of
11 injury to the plaintiff Thomas Neely?

12 If your answer to that question is yes, you'll go
13 to the third question, which is: What is the total amount of
14 compensatory damages that the plaintiff Thomas Neely is
15 entitled to recover?

16 Whatever your verdict is, it must be signed and
17 dated by the foreperson of the jury. And it must state that
18 your decision must be unanimous.

19 Finally, keep in mind that you should not reveal
20 to any person, including the Court, how you stand numerically
21 or otherwise on the questions before you until after you have
22 reached a unanimous verdict.

23 If it should become necessary during your
24 deliberations to communicate with the Court, you must do so by
25 sending me a note signed by your foreperson and brought to me

1 by the Court Security Officer. And hopefully that won't be
2 necessary, but we'll have something for you to write on if it
3 is necessary.

4 Finally, the Court wants to emphasize that
5 nothing that has been said in these instructions, or nothing
6 that the Court did during the course of the trial was meant to
7 suggest or convey in any way or manner to you any suggestion as
8 to what the Court thinks your verdict should be.

9 What the verdict shall be in this case is your
10 sole and exclusive duty and responsibility.

11 All right. The exhibits that were used at trial
12 will be brought to the jury room as soon as the lawyers and
13 clerk have gone through them to make sure they are in good
14 order. You may now retire to deliberate your verdict.

15 Madam Clerk.

16 DEPUTY CLERK: Please rise.

17 (Jury out for deliberation at 3:25.)

18 THE COURT: The correct procedure, so to
19 speak, of the Court is, at 5:00 to go back to the jury
20 room and just inquire as to whether they want to stay
21 or come back in the morning. The HVAC system
22 automatically shuts off in here at 5:00. So --
23 although I really don't think we'll get real
24 uncomfortable. That's what I would do, is just go
25 ask. I wanted to let you know that and see if anybody

1 has an objection to that.

2 MR. WOODFIN: No, Your Honor.

3 MR. ENGLISH: No, Your Honor.

4 THE COURT: All right. Then if you would
5 just -- let's take a recess and let me go and check
6 with the jury and see what they want to do. If they
7 want to go on home, we'll bring them in and excuse
8 them for the day.

9 DEPUTY CLERK: All rise. This Court is in
10 recess.

11 (Court in recess.)

12 THE COURT: The jury said that they were
13 almost finished and would like to have until about
14 5:15. So we won't go anywhere. We'll wait.

15 MR. ENGLISH: Thank you.

16 THE COURT: Thank you. Thank you, Madam
17 Clerk.

18 DEPUTY CLERK: Yes, Your Honor. The Court is
19 in recess.

20 (Court in recess.)

21 DEPUTY CLERK: All rise. This Court is again
22 in session. Please be seated.

23 (Jury in at 5:10.)

24 THE COURT: Will the foreperson of the jury
25 please stand.

1 Madam Foreperson, has the jury reached a
2 verdict?

3 MADAM FOREPERSON: Yes, we have.

4 THE COURT: And is it a unanimous verdict?

5 MADAM FOREPERSON: Yes, it is.

6 THE COURT: And have you signed the verdict
7 form?

8 MADAM FOREPERSON: Yes, I have.

9 THE COURT: All right then, if you would hand
10 it to the Clerk, please.

11 Madam Clerk, if you will take the verdict.

12 All right. At this time, the Court is going
13 to read the verdict. And the Court is going to then
14 ask the jurors whether this is a unanimous verdict of
15 all the jurors.

16 VERDICT

17 We, the jury, unanimously make the following
18 findings:

19 Question No. 1: Was the Defendant, Fox of Oak
20 Ridge, Inc. negligent?

21 And your answer is: Yes.

22 Question No. 2: Was the Defendant, Fox of Oak
23 Ridge, Inc.'s negligence a legal cause of the injuries to the
24 plaintiff Thomas Neely?

25 And your answer: No.

1 And you have gone on and answered No. 3.

2 I will read the answer (sic) of the verdict: What is the total
3 amount of compensatory damages that the plaintiff Thomas Neely
4 is entitled to recover?

5 And your answer is: Thirty thousand dollars
6 (\$30,000).

7 It is signed by Ms. Hensley. Is this verdict the
8 unanimous verdict of all members of the jury? If so, please
9 raise your right hand.

10 All right. The record will reflect that all the
11 jurors have raised their right hand signifying a unanimous
12 verdict.

13 At this time, I'm going to excuse the jury and
14 take up a matter with the attorneys. It will just take a
15 moment.

16 Mr. Marcus, if you will just have them wait for
17 me in the conference room.
18 (Jury out at 5:12.)

19 DEPUTY CLERK: Please be seated.

20 THE COURT: Would the attorneys like to see
21 the verdict form, because the Court has got a problem.

22 MR. ENGLISH: I'm sure that you read it
23 correctly.

24 THE COURT: No, I read it correctly. I just
25 think that maybe the verdict form should have been

1 more detailed.

2 Perhaps the verdict form should have said: If
3 your answer to No. 2 is yes, proceed to No. 3.

4 MR. WOODFIN: I don't know how to respond,
5 Your Honor, other than the fact that it appears that
6 they did not believe that all of the damages and
7 injuries were somehow related to the negligence of Fox
8 of Oak Ridge, and that's why they came up with the
9 number that they did.

10 The question may have said, Do you feel like
11 you are responsible for injuries? They may have felt,
12 no, but been able to award him damages for expenses
13 that he had as well as the injuries that he received.

14 MR. ENGLISH: It's just inconsistent, Judge.
15 If they answered no, then we should get no damages,
16 which they did. And the damages is an inconsistent
17 verdict. I don't see how it can stand.

18 THE COURT: The jury clearly has indicated the
19 intent to award monetary damages.

20 MR. ENGLISH: Sure.

21 THE COURT: And yet they did answer "No" to
22 Question No. 2. It indicates to the Court that either
23 the Court's jury verdict form could have been better,
24 which maybe it should have, and I'll look at it again;
25 or they didn't understand the jury instruction.

1 Now, we can bring the jury back in and
2 instruct them again on that and try to clarify this.
3 I'm open to any other suggestions.

4 MR. ENGLISH: Your Honor, in light of this
5 verdict, it's inconsistent. I think I would just move
6 for a judgment notwithstanding the verdict and a new
7 trial.

8 I don't think it can be cured by this jury
9 since they've said they didn't think Oak Ridge is --
10 Fox of Oak Ridge was the legal cause of plaintiff's
11 injuries even though they thought they were negligent,
12 and then they awarded damages.

13 MR. WOODFIN: And again, I think in reading
14 that verdict form, it may not be as inconsistent as we
15 think when the question is: Did the negligence cause
16 injury?

17 They answered that "No," but felt compelled to
18 award damages.

19 There was proof before this Court that
20 damages, medically, were approximately \$30,000. So I
21 don't see too much inconsistency in the verdict at
22 all.

23 The question was very specific. We all
24 approved the verdict form. And I think we are forced
25 to live with the decision of this jury.

1 MR. ENGLISH: But it's an inconsistent
2 judgment, Your Honor.

3 THE COURT: Well, let's take a minute. Let me
4 think about it. Let me think about what we're going
5 to do with this.

6 MR. WOODFIN: And that could be taken up,
7 perhaps on a motion for a new trial later. But I
8 think that's the verdict we have today.

9 THE COURT: Well, let me think about if
10 there's a way that this jury can fix this situation
11 before I let them go. Just give me a couple of
12 minutes.

13 (Court in recess.)

14 DEPUTY CLERK: This Court is again in session.

15 THE COURT: Okay. We've got several options
16 that we can pursue. And I've been going over those
17 options, weighing the pros and cons of them.

18 Obviously, there's an ambiguity in the wording
19 and/or inconsistency.

20 One option would be to revise the verdict form
21 and give it to the jury and tell them to start over.
22 I don't know that I can do that.

23 The other option is to bring the jury in and
24 make sure they are unanimous as to Question No. 2.
25 And if they are, then my intention would be to ask the

1 foreperson if they answered "No" to No. 2, then why
2 did they go on and answer No. 3?

3 And based on that information, if that clears
4 up the ambiguity -- perhaps it will. And if it
5 doesn't, then the Court is going to let the jury go
6 and proceed on.

7 MR. WOODFIN: Your Honor, obviously, you can
8 do whatever you see fit in this situation, but I don't
9 necessarily view the ambiguity, I guess, the way the
10 Court does.

11 THE COURT: I understand.

12 MR. WOODFIN: If they had been asked injuries
13 and damages and came up with that figure, I don't
14 think we have a question. But I'm thinking it's very
15 consistent for them to rule that the injuries were not
16 caused based on the proof that was presented, yet
17 awarded amounts for medical expenses that were proven
18 in this case, which is very close to the figure that
19 they arrived at.

20 If the Court sees a problem with the verdict,
21 I'm a little bit concerned about questioning the jury
22 further about why they came up with that number.

23 I guess we have to look it from the
24 perspective of the answer to the second question
25 should just prevent my client from being awarded

1 damages at all.

2 So if anybody has a problem here, it probably
3 should be me. But I'm not asking the Court for any
4 relief. I am asking the Court to allow this verdict
5 to stand, poll the jury on unanimity, and see if they
6 all agree with that number and the reason they arrived
7 at that.

8 And then if motions post trial are filed by
9 either side, for whatever reason, we can take those up
10 at that time. But I think the appropriate thing to do
11 would be to poll the jury and see if they're unanimous
12 in their decision.

13 If their decision is wrong, or some party
14 feels like they have been wronged by their decision, I
15 guess post trial motions would be appropriate.

16 I'm not prepared, and don't want to be
17 prepared to argue any post trial motions today. I
18 will say that no motion was made after the close of
19 plaintiff's proof, so I'm not sure they are entitled
20 to ask for a judgment notwithstanding the verdict of
21 this case on the damages issue, which is what we're
22 dealing with here.

23 So I think on behalf of my client, I would
24 just request the Court consider asking the jury their
25 opinion about whether or not this was unanimous.

1 If they say that they were, let the verdict
2 stand, and let us file motions to clear it up if it
3 needs to be cleared up.

4 THE COURT: Well, of course, either party can
5 file a motion in the nature of a mistrial even after
6 the verdict has been returned if the verdict is a
7 flawed one.

8 Is there anything else you want to add,
9 Mr. English?

10 MR. ENGLISH: Yes, Your Honor. It's obviously
11 an inconsistent verdict for them to find Fox negligent
12 and say that Fox did not cause the injuries, and then
13 to award damages, you just can't do that.

14 If they had said "Yes" to Question No. 2 and
15 given us thirty thousand dollars (\$30,000), we would
16 be stuck with it.

17 But to say "No," they're not liable for any
18 damages and to give thirty thousand dollars (\$30,000),
19 that's a very inconsistent verdict. And it just can't
20 stand, Your Honor.

21 I think I agree with Clint on that. I think
22 it would be very prejudicial to my client to bring the
23 same jury in here that has just held up their hand and
24 sworn that this was their verdict unanimously and ask
25 them again about it and try to break it down. I think

1 we need another jury to try this case.

2 THE COURT: All right. Well, I appreciate
3 those comments. It's difficult to know exactly what
4 to do. But we're going to ask one question and we're
5 going to see if we get some clarification, and then
6 we'll go from there.

7 Bring the jury in.

8 (Jury in at 5:30.)

9 DEPUTY CLERK: This Court is again in session.
10 Please be seated.

11 THE COURT: I'm sorry to keep you-all longer.
12 But before the Court can accept the verdict form, the
13 Court will need to make another inquiry with regard
14 to -- and the Court understands your response to
15 Question No. 1, being, "Yes."

16 Question No. 2: Was the Defendant Fox of Oak
17 Ridge, Inc.'s negligence a legal cause of injuries to
18 the Plaintiff, Tom Neely?

19 Your answer is "No."

20 And is that the unanimous verdict of everyone
21 on the jury? Please raise your right hand if it is.

22 All right then. All right hands were raised.

23 I must ask you, Madam Foreperson, given that
24 answer to Question No. 2, why did the jury proceed to
25 answer Question No. 3?

1 MADAM FOREPERSON: We felt like it was
2 appropriate for some compensatory to be given to the
3 plaintiff for what he has gone through so far, because
4 there was negligence on the part of Fox in Oak Ridge.

5 THE COURT: All right. Very good. I
6 appreciate your clarification on that response.

7 I'm going to let you go now. Thank you for
8 your service very much. Our jury system couldn't
9 exist without you, of course. You are the most
10 important element of it. We appreciate your service.

11 Your verdict and the reasons for your verdict
12 are your own. You do not have any obligation to
13 discuss them with anyone if you don't want to.

14 We have a local rule in the Eastern District
15 of Tennessee that the attorneys are not allowed to
16 contact you to discuss your verdict with you unless
17 they first receive permission in the Court to do that,
18 and the Court has not given these attorneys permission
19 to call or otherwise contact you to discuss your
20 deliberations or your verdict.

21 All right. Thank you very much.

22 Madam Clerk, if you will make sure the jury is
23 escorted to the proper place.

24 And you are to call Friday after 5:00 for
25 future service. Thank you.

1 (Jury out at 5:35.)

2 THE COURT: All right, Mr. English.

3 MR. ENGLISH: I will renew my motion for a
4 judgment notwithstanding the verdict.

5 She said, and I think I quote, "We felt it was
6 appropriate to give him something even though they
7 didn't think it was related causally to the negligence
8 of Fox."

9 It's just a very inconsistent verdict, and I
10 don't think it will stand.

11 THE COURT: All right. Well, I'm not going to
12 take up any oral motions at this time. Obviously,
13 you've made a motion on the record.

14 The Court is going to enter a verdict to the
15 plaintiff in the amount of thirty thousand dollars
16 (\$30,000).

17 I understand there may be motions, written
18 motions. The Court will take them up.

19 It's not the first time that we've had a jury
20 verdict form come back with inconsistent or ambiguous
21 findings in it. We do the best we can. Maybe the
22 verdict form should have been more clear. Maybe the
23 jury instructions should have been more clear. Maybe
24 they didn't understand the instructions. Who knows.

25 But the Court is going to find that the

1 testimony of the foreperson of the jury was that the
2 jury felt that the plaintiff was entitled to be
3 compensated in this case in the amount of thirty
4 thousand dollars (\$30,000). And so the Court is going
5 to enter a judgment in that amount.

6 MR. ENGLISH: Thank you, Your Honor.

7 MR. WOODFIN: Thank you, Your Honor.

8 THE COURT: Thank you, Counsel.

9 Madam Clerk.

10 DEPUTY CLERK: Please rise. This court is
11 adjourned until ten o'clock tomorrow morning.

12 END OF PROCEEDINGS
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REPORTER'S CERTIFICATE

STATE OF TENNESSEE)


COUNTY OF BLOUNT)

I, DANA HOLLOWAY, Notary Public in and for the
County of Blount, State of Tennessee, do hereby certify:

That I reported stenographically the proceedings
held in open court on the 21st day of June, 2006; that said
proceedings in connection with the hearing were reduced to
typewritten form by me; and that the forgoing transcript is a
true and accurate record of said proceedings to the best of my
skills and ability.

I further certify that I am not kin to any of the
parties involved herein nor their counsel, and I have no
financial or other interest in the outcome of these proceedings
whatsoever.

This the 19th day of February, 2012.


Dana Holloway

Dana Holloway, LCR #11, CCR #455
Expiration Date 7/1/2012
Notary Public Commission Expires 2/25/2014
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