

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

Thomas Neely,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No. 3:05-cv-304
	:	
Fox of Oak Ridge,	:	Jury Trial-Day 1
	:	
Defendant.	:	

Transcript of proceedings before the Honorable H. Bruce Guyton,
U. S. Magistrate Judge, on June 20th, 2006.

Appearances:

On behalf of the Plaintiff:

Robert J. English, Esq.
Michael C. Inman, Esq.
Knoxville, Tennessee

On behalf of the Defendant:

Clint J. Woodfin, Esq.
Jennifer M. Caywood, Esq.
Knoxville, Tennessee

Court Reporter:

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1 evidence that are brought before you in court. Your decision is to
2 be based strictly and solely on the evidence that is given to you
3 through the witnesses and the exhibits in this courtroom.

4 Mr. English, I think there's one witness in the courtroom. I
5 don't know if more have arrived, but is the rule requested at this
6 time?

7 MR. ENGLISH: Yes, your Honor, we request the rule.

8 THE COURT: All right. Anyone who is other than Mr.
9 Neely and Mr. Fox needs to step outside the courtroom at this time,
10 anyone who thinks you may be a witness in this case. Mr. Woodfin,
11 if you have any witnesses, ask them to step outside, please. Don't
12 go far, though, sir. We'll come get you when we need you.

13 All right. It is now the time for the opening statements by the
14 attorneys. Generally, we've agreed upon a 15-minute time limit for
15 opening statements, and I thank you for that.

16 Mr. English, or Mr. Inman, you may begin.

17 MR. ENGLISH: Ladies and gentlemen, two years ago,
18 on a warm, hot July day, Tom Neely's life was changed forever. He
19 was going to work, going to work to a job that he loved at the
20 Ridgeview Psychiatric Facility. Been working there for a year and
21 a half.

22 He lived in Kentucky, drove near 100 miles to work one way,
23 because he loved the job and it was the best job he had ever had. He
24 had worked at Scott County Hospital for about 12 years, security
25 and orderly, doing hard work.

1 Security work requires you to stand up and to walk nine to
2 five. Being an orderly, most of you have had healthcare experience
3 knows what that entails. It entails lifting. It's a hard job. His job as
4 a psychiatric technician who was working and where he was going
5 the day of this accident required him to be able to stand on his feet,
6 lift 75 pounds, to subdue unruly clients or patients that really might
7 have hurt themselves.

8 This was his job and this was his chosen profession. This is
9 what he had done for a year and a half. This is a job that he drove
10 100 miles one way each day to do because he loved it.

11 On the day of the accident, Tom was on Highway 61, which is
12 in Clinton or bypasses Clinton. He was going the same way he had
13 always gone. And he was driving and it started raining, and you
14 know what happens when it starts raining; the roads get wet. When
15 those roads get wet, they get slick.

16 And he was following another vehicle a safe distance behind,
17 in the slow lane, in Clinton. This vehicle slows down to turn into a
18 strip shopping mall there, and there's a big bump across the
19 sidewalk, and it had to slow down quite a bit. Tom was right
20 behind it, and he had to slow down quite a bit.

21 Mr. Curd, who is not a party to the lawsuit, the gentleman that
22 just stepped outside, he didn't slow down. He was picking up a big
23 van that was going into Fox of Oak Ridge to be serviced, some sort
24 of service. And he was going too fast, he was going too close, and
25 he was just not being aware of what the weather conditions dictated

1 that he should have done. He didn't do it.

2 He was following Tom Neely about 20 feet behind him, 35
3 miles an hour, on a rain-slick road. When the car in front of Tom
4 gave a signal, slowed down and stopped, Tom did the same thing.
5 When he did the same thing, he was hit in the rear by the Fox car,
6 the van that was being brought in for service.

7 And it hit him so hard, it totaled his car. He was driving a
8 small Kia, an economy car, gets good mileage. It hit him so hard it
9 not only totaled the car he was in, but it broke his seat. And when it
10 broke his seat, he was laying in the back seat after the impact, when
11 this occurred, laying there, looking up at the ceiling. He doesn't
12 know how fast Mr. Curd was going, but we know he was going too
13 fast, we know he was going too close, and we know he was going
14 much too fast on a rain-slickened road.

15 Fox of Oak Ridge has denied that they are responsible for this,
16 even in light of those three facts. Tom was hurt; he was taken by
17 ambulance. He immediately complained of his neck and his back.
18 And this is not a whiplash case, ladies and gentlemen. This man's
19 got three disc problems in his neck and three or four more in his
20 low back, according to MRIs that can verify this, according to Dr.
21 Tom Koenig, who is a board-certified orthopedic surgeon and a fine
22 doctor, and Dr. Joe Browder, who is a pain specialist, is going to be
23 treating this man for the rest of his life.

24 He's got a bulging disc in the middle of his neck, and on either
25 side of the bulging disc he's got two protruding discs. That means

1 that's worse than a bulging disc. In his low back he's got what Dr.
2 Koenig says is a congenital thing that he was born with, but then in
3 his low back he's got three or four bulging discs, according to the
4 MRI of his low back.

5 He had an MRI of his neck and he had an MRI of his low back,
6 and he's got either six or seven disc problems that were either
7 caused by or aggravated by this wreck. Dr. Koenig says that Mr.
8 Neely probably had some problems with his back before, because
9 he's a heavy man, weighs about 300 pounds.

10 He's tried to lose weight, he has lost some weight. This
11 exacerbates or this makes it worse to lose weight, because when
12 you're hurting, you can't exercise, you can't walk, you can't do the
13 things we all like to do to try to keep the weight off. This is a
14 problem.

15 But that made him more susceptible to the injury that he
16 suffered of these six or seven disc problems that he now has. He
17 hasn't worked a day since the 12th of July, 2004. Bearing in mind
18 this was a job that he dearly loved, this was a job that he drove 100
19 miles, 200 miles a day, to do.

20 He was taken by ambulance to the Oak Ridge hospital. They
21 x-rayed him. They didn't do an MRI at that time. They don't do
22 MRIs because they're very expensive. And then they said we'll
23 release you if you go see your family doctor the next day. And he
24 did, he went to his family doctor the next day. He immediately
25 ordered some physical therapy to his back and to his neck.

1 He tried to get him in to see an orthopedic surgeon. Tom's a
2 man of modest means, and he couldn't get him in to see an
3 orthopedic surgeon. At that time, he realized he needed some help
4 in this case, and he got Mr. Inman to help him, and Mr. Inman did
5 get him an appointment with an orthopedic surgeon here in
6 Knoxville, who is board-certified, Thomas Koenig. And you will
7 see his videotape deposition today or tomorrow.

8 As a result of that, Tom started treating first with Dr. Degnan,
9 and he really didn't feel like he was getting the best treatment from
10 Dr. Degnan, who is also an orthopedic surgeon, so he changed
11 doctors. And Mr. Inman got him an appointment with Dr. Koenig.

12 Dr. Koenig treats him for a year, 12 months. We took his
13 deposition. Dr. Koenig says that this man has an impairment that
14 was aggravated in this wreck; that probably had an impairment of
15 some sort before the wreck, but the lick was so hard and it did so
16 much damage to his back, notwithstanding the damage it did in
17 breaking his seat and totaling his car, that this man can't lift over
18 15 pounds now.

19 And as a result of his treatments with Dr. Koenig— Dr. Koenig
20 is an orthopedic surgeon— he ordered an MRI of his neck and then
21 an MRI of his back, because the man was having a lot of problems
22 with numbness and pains going down his arms and going down his
23 legs.

24 Those MRIs are going to be referred to in Dr. Koenig's
25 deposition, his videotape deposition, and he shows you what part of

1 the anatomy of his neck and his back where he's got discs that are
2 protruding, where these discs are bulging.

3 And he explains, I think, probably as well as I've ever heard
4 anyone explain an injury, how this impacts him. This man has not
5 been back to work. Dr. Koenig sent this man to Dr. Browder, and
6 we got the appointment. Mike and I got the appointment with Dr.
7 Browder because this man's a very— man of meager existence.

8 We sent him to Dr. Browder— or Mike sent him to Dr. Browder
9 to be treated, and he's still going to Dr. Browder. And Dr.
10 Browder's a good man and he treats people. He goes to Dr.
11 Browder every month, and he's probably going to go to Dr.
12 Browder for the rest of his life, take treatments, medication for
13 pain.

14 This man's not had his pain medication today. I asked him not
15 to take it because whenever he takes it he can't remember things,
16 and I want him to be as clear as he can whenever he talks to you so
17 he can honestly relate what he remembers about this wreck and how
18 it's impacted him.

19 Tom's only 48 years old now. He's got a life expectancy of
20 almost 33 more years. He's been through two years of pure torture
21 for the last two years since this wreck. He'll go through 33 more
22 years of pure torture if he lives out his life expectancy. Could die
23 tomorrow, could live 45 or 50 years. But however long he lives,
24 he's going to be hurting for the rest of his life as a result of this.

25 He's not a surgical candidate. No doctor can come in and cut

1 on him and make him well. This is something that he's going to
2 have to live with the rest of his life. He's not going back to the job
3 that he dearly loved that he drove 200 miles a day just to do,
4 because he can't.

5 He has a hard time sitting for a long period of time. He has a
6 hard time standing for a long period of time. He has problems
7 laying down. He sleeps two or three hours a night. This man's in
8 terrible pain.

9 Dr. Browder's a pain specialist. He doesn't operate on
10 people. He doesn't do anything. He injects them, and sometimes
11 the injections— they call ESIs, epidural steroid injections—
12 sometimes they help, and he tried that on Tom, didn't help at all.
13 He was going to do another one on his back. He got such a bad
14 result the first time, he didn't do that.

15 So now he's put him on a pain killer called methadone.
16 Methadone, he started him out on two pills a day, and now I think
17 he's up to four pills a day. And he's going to be on those,
18 according to Dr. Browder, who will testify by deposition, the rest
19 of his life.

20 Dr. Browder says that he will have to see either Dr. Browder
21 or another pain specialist on a monthly basis— because these are
22 medications that can be very addictive— for the rest of his life. And
23 Dr. Browder says he's never going back to work.

24 So that's our case. I think it's a very simple case. We haven't
25 sued for property damage. That's already— that's been resolved.

1 So the only thing we're suing for now is for the damages that this—
2 and the effect that these damages had on Tom.

3 We ask you to listen carefully and give us adequate
4 compensation. Thank you.

5 THE COURT: Okay. Thank you, counsel. Mr. Woodfin?

6 MR. WOODFIN: Good afternoon, everybody. Thank
7 you for being patient in listening to us as we make these opening
8 statements regarding what we think the evidence is going to prove
9 in this case. Judge Guyton will tell you also, what we say to you
10 here is not evidence. It's our role as an advocate for our client, and
11 also is a role as an advocate for the legal system itself.

12 What I mean by that is, it's my goal to make sure that you all
13 understand all of the evidence in this case, use the evidence and the
14 instructions that are given to you by the Court, and decide this case
15 in a fair and reasonable way. That's all that we're asking today.

16 You understand, as we've talked about during the initial
17 meetings that we've had, that the Plaintiff has the burden of
18 proving all of these things to you by that preponderance of the
19 evidence standard. The Defendant, Mr. Fox and I, we don't have to
20 prove anything. We don't even have to put any evidence on.

21 But what we do do is take a look at their evidence and bring
22 out points which reflect against the weight of that evidence. And
23 after doing that in this case, it's my opinion that it's very clear that
24 the Plaintiff has not met his burden of proving these things by any
25 measure whatsoever.

1 The first thing you're going to be asked to determine is
2 whether or not my client, through their employee, Mr. Curd, who
3 went outside a little bit earlier, caused this accident, did he act in a
4 way that was what will be defined to you as negligent. Did he do
5 something which was out of the ordinary context that other people
6 would do which caused this accident to happen?

7 You'll hear the facts about how the accident occurred, that
8 Mr. Curd was traveling behind Mr. Neely, that it began to rain, that
9 the street was slick, that Mr. Neely stopped, that Mr. Curd tried to
10 stop and skidded on the wet road, and his vehicle came into contact
11 with Mr. Neely's vehicle.

12 You will see pictures of the vehicles that both individuals
13 were driving. Mr. Neely's vehicle had damage to the right rear.
14 You can see in the back where the taillight was pushed in, and it's
15 pushed a little bit forward.

16 He says he also had a broken seat. You will see pictures of
17 that as well, where the seat is folded backward into the rear
18 compartment. It doesn't appear to be broken off in any way, but it
19 just appears that it's folded backward, as the picture indicates.

20 You will see the van that Mr. Curd was driving. The front
21 bumper of the van has a slight dent in it, and that is the only damage
22 that was done to the van. So the property damage in the pictures
23 that are reflective of that property damage in this case do not show
24 significant damage to these automobiles.

25 In addition to deciding whether or not Mr. Curd caused this

1 accident— and we don't dispute that he was working for us at the
2 time, so if you do find he did something wrong, that's attributable
3 to us. If you find he didn't do anything wrong, we don't have
4 anything that we did wrong separately. Our role here today is as his
5 employer defending actions that were made— or allegations against
6 us that our employee did something wrong.

7 So if you get past that hurdle and you found that they have met
8 their burden of proof, that despite the fact that this was a rain-
9 slickened road and Mr. Curd was acting reasonably, then you have
10 to find that Mr. Neely sustained damages that are directly a result
11 of what happened in that accident that occurred out there in Clinton
12 on that date.

13 We have been sued in this case for two and a half million
14 dollars. That is the number that was listed in the lawsuit which Mr.
15 Neely feels that he is entitled to. And his attorney has told you
16 today about the course of treatment that he has underwent and the
17 things that he has done since this accident occurred.

18 What I want to do is fill in a few more details about what
19 you'll hear, hear from Mr. Neely, as he testifies in accordance with
20 what he has told me before. I have taken his deposition. He has
21 sworn to me under oath that certain things occurred, and I suspect
22 he'll testify in accordance with those things today.

23 We already know what the doctors have said, because we've
24 preserved their testimony by deposition and by videotape or CD-
25 ROM, I guess they call it now. And you will see those doctors

1 testify on this video screen as if they were here today.

2 Mr. English alluded to it a little bit before, Mr. Neely was
3 referred to these doctors by his lawyers. They chose specific
4 doctors for him to go to. There was one doctor that Mr. Neely saw
5 before Dr. Koenig that he didn't like, so then they found somebody
6 else and sent him to Dr. Koenig. Then they sent him to the pain
7 specialist. These were all referrals that were made through the
8 lawyer's office.

9 Mr. Neely told his doctors, at the scene of the accident, that he
10 lost consciousness. He told me, in his deposition, that he did not
11 lose consciousness. The doctor reviewed an emergency room
12 record which showed he did not lose consciousness.

13 Mr. Neely is going to tell you he can't work, but he told me,
14 when I took his deposition, that he has applied for certain jobs and
15 he just has not checked back or heard back from those jobs that he
16 has applied for.

17 The symptoms that he is going to tell you about, when you
18 hear the doctors testify about these symptoms, are not confirmed by
19 the tests that Mr. English alluded to. He mentioned these MRI
20 examinations which were given to Mr. Neely on the various
21 occasions, they show these disc bulges. The doctors have said that
22 they can't really tell for sure if those things were caused by the
23 accident because they may be degenerative changes that exist in
24 people as they get older.

25 The doctor did say, in his opinion, that if these symptoms Mr.

1 Neely was talking about were true, based on a history given by Mr.
2 Neely, the doctor would attribute those things to the accident. So
3 you can see what we have to do here. We have to first believe what
4 Mr. Neely is saying before we can believe what the doctors are
5 saying about these symptoms.

6 Because there is no test that shows why Mr. Neely says he has
7 pain down his arms or down his legs. Mr. Neely told me he has pain
8 all the way down his arms, into his hands, into his fingers. He told
9 me he has pain down his legs, into his feet, into his toes. He told
10 me his eyes hurt, he told me his head hurts, he told me he has
11 memory problems.

12 You will listen to what these doctors say, and there is never a
13 report to the doctors that there are any memory problems. Mr.
14 Neely told me he told his doctors these things, but the doctors don't
15 confirm that, either.

16 Mr. Neely had a previous worker's comp. case when he was
17 working at Scott County Hospital, where he injured his knee. Some
18 of the tests that the doctors gave him, even according to the
19 doctors, confirmed that there was a symptom Mr. Neely was
20 reporting that was out of context with the test that he was being
21 given. You'll hear Dr. Koenig talk about that. He calls it a
22 Waddell test, and he will explain what that means as well.

23 Mr. Neely had a bruise on his back in October, 2004, that he
24 says happened at the accident and his doctor says was not there
25 until after the accident, with no explanation for it. He and his wife

1 had a child in November of 2005, after this accident. He takes care
2 of that child now to some extent.

3 His wife and he sell things at a flea market on the weekends.
4 He drives to pick these things up wherever they're located and
5 takes them to the flea market in his community, Strunk, Kentucky,
6 where he and his wife live. He drove to Virginia one time to pick
7 these things up.

8 These are all points that you're going to hear, and they're
9 going to impact your ability to decide how much weight all of this
10 evidence is to be given. All we're asking is that you take all of
11 these things into account in deciding whether or not Mr. Neely has
12 met his burden of proving these things by a preponderance of the
13 evidence.

14 He's asking for a lot of money, he's asking for a lot of
15 different damages. For example, he's asking for this award for lost
16 earning capacity. He doesn't think he's going to work again as a
17 result of this. You have to not only weigh that, but you have to
18 weigh the other things that you will hear about that as well.

19 Why doesn't he have a job now? Is it just because he didn't
20 hear back from the places he applied for? Is it because he's taking
21 care of a child? Is it because that he and his wife are getting
22 income from this flea market and from rental properties that they
23 have? That's for you to decide.

24 But those are the things that really destroy any weight of the
25 evidence that he will put on regarding his claim for lost earning

1 capacity. That one's easy for me. In my opinion, he has no claim for
2 lost earning capacity because of those other factors that I've said.

3 Other damages that he's going to be claiming require him to
4 meet that same burden, and if he can't meet that burden, you all
5 took an oath today saying you'd decide this case fairly and
6 impartially. While it may be difficult to award this man limited
7 damages, that's what you will have to do if you believe the
8 evidence does not meet the standards.

9 Our system works real well when the jurors listen to the
10 evidence and listen to the instructions that the Court gives, and I
11 suspect you're going to do that today.

12 I want to thank you all for taking the time to be here and
13 listening to what we have to say about it and letting us present the
14 case and letting me present the case on behalf of Fox of Oak Ridge
15 so that you can truly understand what's going on here. We'll try to
16 present this as clearly and concisely as possible so you can get to
17 the point where you can help us decide these issues. Thank you.

18 THE COURT: All right. Thank you, counsel. Members
19 of the jury, we're at the point now where we can begin taking
20 evidence in this case. Before we start taking evidence from any
21 witnesses, we're going to take a lunch break.

22 But I am going to tell you that there have been stipulations of
23 evidence or fact that have been made by the parties as part of the
24 preparation for this case. There are three stipulations of fact the
25 parties have agreed upon, and so I'm going to read these to you