

**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 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