SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Richard H. Bell, III and Jennifer Bell v. Bruce D. Fisher, M.D., D.M.D. and Southern Delaware Oral and Maxillofacial Surgery, P.A.
C.A. No. 09C-01-211 RRC

Submitted: April 16, 2012
Decided: April 16, 2012
Written Opinion: May 21, 2012

On Plaintiffs' Motion for Reargument on Plaintiff's Motion to Vacate Previous Orders Granting Defendants' Motions in Limine.
DENIED.

Dear Counsel:

Before the Court in a dental malpractice case is a Motion for Reargument filed by Plaintiffs Richard and Jennifer Bell pursuant to Superior Court Civil Rule 59(e). Plaintiffs seek to reargue the Court's December 6, 2011 order which procedurally granted Plaintiffs' motion to vacate prior orders, but reissued the orders substantively without fresh consideration. The orders that Plaintiffs seek to vacate granted Defendants' earlier motions in limine, and excluded three expert witnesses. In its December 6 order, the Court determined the orders must be procedurally vacated because the orders were entered during the automatic stay in Defendant Fisher's bankruptcy, but the Court held that fresh consideration of the motions in limine was not required. On the current Motion for Reargument, Plaintiffs advance new arguments that should have been raised in Plaintiffs' underlying motion to vacate orders. Accordingly, Plaintiffs' Motion for Reargument is **DENIED**.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs' dental malpractice action alleges negligence and a lack of informed consent regarding Richard Bell's wisdom teeth extraction surgery occurring in January 2007.[1] Plaintiffs originally filed this case *pro se* in January 2009; current counsel for Plaintiffs first entered their appearances in April 2009. The case originally proceeded relatively routinely. Defendants filed three motions in limine in June 2010. The motions sought to exclude: (1) the testimony of Plaintiffs' expert Dr. Tara Moore; (2) the testimony of Plaintiffs' expert Dr. John Postlethwaite, D.C.; and (3) Plaintiff's Future Lost Wage Claim.

Dr. Moore, a biomechanical engineer, proposed to testify that Dr. Fisher used "excessive force" in removing Plaintiff's wisdom teeth contributing to nerve damage. Dr. Postlethwaite was Plaintiff Richard Bell's chiropractor and was prepared to testify regarding the causation of Plaintiff's injury. Lastly, Defendants sought to eliminate Plaintiff's future lost wage claim by excluding the testimony of vocational expert Maria Babinetz and Dr. Samuel Kursh, the latter a specialist in economic damages. Babinetz and Kursh's testimony would together address the validity and worth of Plaintiff's lost wage claim.

The Court granted each of the motions in limine by memorandum opinion on August 30, 2010.[2] The Court conducted a pretrial conference in September 2010 in preparation for the October 25, 2010 anticipated trial date. However, by letter dated September 30, 2010, Dr. Fisher's counsel in this case notified the Court and Plaintiffs' counsel that Defendant Fisher had filed for bankruptcy on May 3, 2010 in the United States Bankruptcy Court for the District of Delaware. For reasons that are not clear to the Court, neither Dr. Fisher nor his bankruptcy counsel notified either counsel in this case of the bankruptcy filing.

Upon a bankruptcy filing, Section 362 of the United States Bankruptcy Code automatically stays actions to create or enforce claims against a debtor or property included within a bankruptcy estate.[3] An automatic stay was implemented in this case beginning May 3, 2010 and remained in effect until June 9, 2011 when the

[1] Jennifer Bell's only claim is for loss of consortium.
[2] *Bell v. Fisher*, 2010 WL 3447694 (Del. Super. Aug. 30, 2010).
[3] *See* 11 U.S.C. §362(a)(1).

Bankruptcy Court lifted the automatic stay.[4] Defendants' motions in limine and the orders granting the motions occurred during the automatic stay.

After the bankruptcy stay was lifted, the Court held a scheduling conference on August 30, 2011. At the conference, Plaintiffs' counsel argued that discovery was necessary to update the record with information developed during the stay.[5] Plaintiffs' counsel stated his expectation that an expert's health would prevent the expert from testifying. Therefore, Plaintiffs' counsel wished to substitute an expert.[6] Furthermore, Plaintiffs' contended that the motions in limine must be reargued because the argument and the order occurred during the stay.[7] During the scheduling conference, the Court entered a briefing schedule for Plaintiffs' proposed motion to vacate the orders granting Defendants' motions in limine.[8]

Defense counsel advised the Court at that August 30, 2011 scheduling conference that Defendants opposed the identification of several new experts during the new discovery period and feared this would result in the case's complete relitigation. Defense counsel explained, "I don't have a problem with substituting an expert based on a representation of counsel [that a prior expert was not healthy enough to testify] but I would have an objection to having three new experts identified on different specialties."[9] The Court agreed with defense counsel and urged the parties to "live with the existing record as much as possible."[10] Plaintiffs' counsel stated, "I would certainly be prepared to submit to [defense counsel] and to the Court an explanation as to why I would be substituting the new person. I am not going to go out and get a new expert wholesale. I am only concerned who for whatever reason might not be able to testify."[11]

The Court set a new expert deadline and required Plaintiffs' counsel to explain why any purported new expert was required.[12] Defense counsel explained that such an explanation would "give [defense counsel] an opportunity to then say to the Court I object —if substitution is based on somebody's illness or they can't

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[4] *In re Bruce D. Fisher*, No. 10-11501-CSS (Bankr. D. Del. June 8, 2011)(Order Authorizing Motion for Relief from the Automatic Stay).
[5] Status Conference Tr. at 5 (Aug. 30, 2011).
[6] *Id.*
[7] *Id.*
[8] *Id.* at p. 9-10.
[9] *Id.* at p. 12.
[10] *Id.*
[11] *Id.* at 13.
[12] *Id.*

participate, I am not going to have an objection to that. If it's because well, I am going to get new experts, I am going to have an issue with that and I obviously want to be able to address that with the Court."[13]

The Court entered a trial scheduling order which included a right to identify expert witnesses until November 30, 2011.[14] Additionally, the scheduling order set September 30, 2011 as the deadline for Plaintiffs to submit a proffer regarding Plaintiffs' expected use of experts.[15] In September 2011, Plaintiffs submitted the motion to vacate the previous orders occurring during the automatic stay. On September 29, 2011, Plaintiffs submitted a letter which provided:

> "Pursuant to the Trial Scheduling Order . . . this letter serves as Plaintiffs' status report regarding the expected use of witnesses at trial, which is scheduled to begin on May 29, 2012. Plaintiffs intend to call all of the witnesses identified in the Joint Pre-trial Stipulation and Order filed with this Court on September 3, 2010. Specifically, Jay W. Friedman, DDS MPH and David Sirois, D.M.D., Ph.D. will be testifying in person at the trial. The remaining witnesses will either be available to testify in person, or be deposed by video deposition."[16]

Plaintiffs timely produced two new expert report disclosures by the deadline for experts Dr. David Sirois, D.D.S., PhD and Robert Appleby D.O. ("Updated Expert Reports")

On December 6, 2011, the Court granted Plaintiffs' motion to vacate previous orders because they occurred during the automatic stay, but reissued the orders without change.[17] The Court reasoned that while the automatic stay required both parties to halt action in this case, the stay only required that the orders be procedurally voided.[18] The Court determined the substance underlying the motions did not require fresh consideration.[19] Specifically, the Court found Plaintiffs failed to articulate how they were prejudiced by the orders' occurrence during the stay and failed to proffer proposed new evidence.[20] Plaintiffs timely filed a Motion for

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[13] *Id.* at 16.
[14] Trial Scheduling Order, (Aug. 30. 2011).
[15] *Id.*
[16] *Id.*
[17] *Bell v. Fisher*, 2011 WL 6400277 (Del. Super. Dec. 6, 2011).
[18] *Id.* at *3-4
[19] *Id.*
[20] *Id.*

Reargument on the motion to vacate orders and briefing was completed in January 2012. Oral argument was held April 16, 2012. At the conclusion of oral argument, the Court **DENIED** Plaintiff's Motion for reargument with a written Opinion to follow. This is that Opinion. Trial is scheduled for May 29, 2012.

II. The Parties' Contentions

Plaintiffs' seek to reargue the underlying motions in limine and assert the Court failed to consider the updated expert reports when the Court reissued the orders granting Defendants' motions in limine. Plaintiffs contend they were denied the opportunity to respond because the motions in limine were *sua sponte* deemed re-filed without permitting Plaintiffs opportunity to argue that the updated expert reports affect the underlying motions in limine. Plaintiffs assert it was legal error for the Court to *sua sponte* reissue the motions in limine, while depriving Plaintiffs' opportunity to respond. Plaintiffs seek to produce the updated expert reports and respond anew to Defendants' previous motions in light of the updated expert reports' findings. Plaintiffs contend that both experts were timely identified as treating physicians during the initial discovery period and that the updated reports support the three excluded experts' testimony. Therefore, Plaintiffs assert the Court must reevaluate the three previously granted motions in limine to determine whether the updated expert reports compel the opposite result.

Defendants contend that in the September 29, 2011 letter, Plaintiffs only mentioned their intent to call witnesses identified in the joint pre-trial stipulation, and identified Drs. Friedman and Sirois, but failed to include a new expert, Dr. Robert Appleby. Defendants argue that if Plaintiffs indicated an intention to identify a new expert, Defendant would have objected. Defendants anticipated that expert testimony would be limited to the opinions previously expressed by Drs. Friedman and Sirois. Defendants argue that Plaintiffs now seek to re-open discovery and moot the prior discovery and the Court's previous deadlines. Defendants contend that the Court's scheduling order represented a final binding order and only provided a limited new discovery period. Defendants contend that the updated discovery does not compel reconsideration of the previous motions in limine.

III. DISCUSSION

A motion for reargument will be denied unless the Court "overlooked a precedent or legal principle that would have controlling effect, or that it has

misapprehended the law or the facts such as would affect the outcome of the decision."[21] Motions for reargument should not be used merely to rehash arguments already decided by the Court.[22] Superior Court Civil Rule 59(e) allows a party to file a motion for reargument following a Court opinion or decision and, "[t]he Court will determine from the motion and answer whether reargument will be granted."[23] Delaware litigants cannot use Rule 59(e) to raise new arguments.[24] Similarly, federal case law interpreting the similar federal rule provides that a motion for reargument cannot be used to raise arguments that "could have been raised prior to the Court's opinion or decision."[25]

Plaintiffs' essentially contend the Court erred when it reissued its order granting the motions in limine without considering the updated expert reports. Plaintiffs seemingly assert that the Court misapprehended the facts and that such misapprehension affected the Court's decision. However, the arguments raised by

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[21] *Gass v. Truax*, 2002 WL 1426537 (Del. Super. June 28, 2002).
[22] *Norfleet v. Mid-Atlantic Realty Co., Inc*., 2001 WL 695547 (Del Super. Apr. 20, 2001).
[23] Delaware Superior Court Civil Rule 59(e).
[24] *Plummer v. Sherman*, 2004 WL 63414 (Del. Super. Jan. 14, 2004). *Bd. of Managers of the Del.Crim. Justice Info. Sys. v. Gannett Co.*, 2003, 2003 WL 1579170 (Del.Super.Ct.) (holding that a motion for reargument is not a device for raising new arguments or stringing out the length of time), *rev'd on other grounds Gannett Co. v. Bd. of Managers of the Del.Crim. Justice Info. Sys.*, 2003 Del. LEXIS 644, 2003 WL 23104811 (Del.Supr.); *Carlozzi v. Fidelity and Casualty Company*, 2001 Del.Super. LEXIS 217, *3-4, 2001 WL 755941 (Del.Super.Ct.) (holding that motions for reargument will be denied where they rely on grounds not raised in the original proceeding or where they merely advance the same matters that were already considered in the original proceeding).
[25] *FDIC v. World University, Inc.*, 978 F.2d 10 (1st Cir.1992) (holding that parties should not use Rule 59(e) motions to raise arguments which "could, and should," have been made before a judgment is issued); *Moro and Kahuna, Inc. v. Shell Oil Company*, 91 F.3d 872 (7th Cir.1996) (holding that Rule 59(e) does not allow a party to advance new arguments that "could and should" have been presented to the district court prior to judgment); *Steele v. Young*, 11 F.3d 1518 (10th Cir.1993) (holding that Rule 59(e) cannot be used to expand a judgment to encompass new issues which "could" have been raised prior to issuance of the judgment). *See also* Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 2810.1 ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment"); *cf.* 12 *Moore's Federal Practice*, § 59.30 (Matthew Bender 3d ed.) ("[A] motion to alter or amend [i.e., a motion for reargument] may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment"). The cases cited by Wright, Miller & Kane, and Moore in support of the principle of law at issue contain two lines of language in their holdings: "could and should [have raised]," or just "could [have raised]." This Court believes that the standard is best expressed by the phrase "could have raised," which phrase is also used in the text of the two above treatises.

Plaintiffs are raised for the first time in this Motion. Nothing prevented Plaintiffs from raising the current arguments in either their motion to vacate orders or in their reply to Defendant's response. As the Court mentioned specifically in its December 6 Opinion:

> [A]t no point in [Plaintiffs'] briefing did [Plaintiffs] demonstrate how they were prejudiced (other than that they had been unsuccessful in their opposition to the motion) simply because the motions and the orders occurred during the stay. Plaintiffs argue that they incurred substantial time and expense because of the defendants' conduct. Additionally, Plaintiffs in their Reply argue that they must be given the opportunity to present new evidence. Nevertheless, Plaintiffs fail to proffer what potential new evidence they would seek to present or how expenses were greater because the motions were handled during the automatic stay[26]

Each of the arguments Plaintiffs currently advance were absent from Plaintiffs' motion to vacate orders. The absence of these arguments was expressly contemplated by the Court when reaching its conclusion. On reargument, Plaintiffs now argue particulars as to how the prior order was prejudicial, and for the first time, the purported detrimental impact of the orders reissuance. Plaintiffs were aware the Court might *sua sponte* reissue the orders and were given opportunity to respond appropriately. In Defendants' response to Plaintiff's motion to vacate orders, Defendants suggested that a possible alternative was for the Court to reissue its orders granting of Defendants' motions in limine after procedurally vacating them.[27] Yet, despite Defendants explicitly raising that argument, Plaintiffs only casually responded by mentioning purported "new evidence" and "substantial time and expense" without more detail.[28]

When the automatic stay was lifted, discovery was only opened to allow for limited additional discovery. The Court expressly required Plaintiffs to provide explanations for additional experts. No replacement experts were named and no objection was made by defense counsel. Separately, Plaintiffs were permitted to update expert reports where the facts underlying the previous reports changed during the stay. No objection was made by Defendants to any updates made to expert reports. However, despite the permissible updates, it does not follow that

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[26] *Bell v. Fisher*, 2011 WL 6400277 *3 (Del. Super. Dec. 6, 2011) (emphasis, internal quotations and citations omitted).
[27] Def's. Response to Plaintiffs' M to Vacate Orders at 2.
[28] Pl's Reply Br. at 2.

the Court's analysis of the excluded testimony differs simply because the updates support the excluded testimony.

The Court's task of addressing the orders and motions unknowingly entered during a bankruptcy automatic stay was an issue of apparent first impression before the Court. Neither party cited any directly relevant precedent. Plaintiffs provided terse briefing focused almost entirely on the procedural reasons why the automatic stay forbade the entered orders. Despite being prompted by Defendants' response, Plaintiffs provided no specific substantive reason why the underlying reasoning granting those motions must differ. Plaintiffs never asserted in their motion or reply that the updated expert reports would modify the analysis of the excluded expert testimony. Plaintiffs attempt to assert that the Court erred by not considering the updated expert reports when Plaintiffs did not argue that previously or even specifically mention the updated reports in their original papers. While as Plaintiffs have asserted, the updated expert reports may "materially change the state of the record,"[29] Plaintiffs' failed to provide any support for that position in their motion to vacate orders.

Because the arguments Plaintiffs presently offer were not argued in the motion to vacate orders, Plaintiffs are barred from raising these new arguments in their Motion for Reargument. Therefore, the Court need not reach the merits of Plaintiffs' argument and accordingly, Plaintiffs' Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary

[29] Office Conference Tr. at 11-12 (Apr. 16, 2012)