

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD H. BELL, III and	§	
JENNIFER BELL,	§	No. 371, 2012D
	§	
Plaintiffs Below,	§	Court Below: Superior Court of
Appellants,	§	the State of Delaware, in and for
	§	New Castle County
	§	
v.	§	C.A. No. 09C-01-211
	§	
BRUCE D. FISHER, M.D., D.M.D.,	§	
and SOUTHERN DELAWARE	§	
ORAL AND MAXILLOFACIAL	§	
SURGERY ASSOCIATES, P.A.,	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: March 6, 2013
Decided: March 18, 2013

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 18th day of March 2013, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Richard Bell (“Bell”) and Jennifer Bell, the plaintiffs-below, appeal from several Superior Court orders relating to Bell’s medical malpractice and informed consent action against Dr. Bruce Fisher and Southern Delaware Oral and Maxillofacial Surgery Associates, P.A., the defendants-below (collectively,

“Fisher”). Fisher also cross-appeals from certain Superior Court orders. We affirm.

2. This case arises out of Fisher’s removal of Bell’s four wisdom teeth on January 18, 2007. After the dental surgery, Bell allegedly experienced severe and permanent neck and spinal pain. On January 16, 2009, Bell filed a malpractice and informed consent action in Superior Court, claiming that Fisher’s use of excessive force during the removal of Bell’s wisdom teeth caused Bell’s injuries.

3. Under the Superior Court’s trial scheduling order, Bell’s expert reports were due by January 15, 2010, and the discovery deadline was May 9, 2010. On or before January 15, 2010, Bell filed timely expert reports from Dr. John Postlethwaite (a chiropractor), Dr. Tara Moore (a biomechanical expert), Ms. Maria Babinetz (an economic expert), and Dr. Samuel Kursh (another economic expert). On June 7-8, 2010, Fisher’s counsel moved to exclude those experts’ reports.

4. Dr. Postlethwaite was the only expert prepared to testify for Bell on the issue of causation, specifically, that Fisher’s actions during the surgery caused Bell’s permanent neck and spinal pain. Dr. Postlethwaite’s conclusions and expert report rested on his belief that Bell had not suffered from any neck pain before the surgery. In fact, Bell had preexisting pain in his neck that predated the surgery. After being informed of that fact, Dr. Postlethwaite submitted an affidavit on July

16, 2010 (after the discovery deadline) stating that his medical opinion remained unchanged despite the new information about Bell's preexisting neck pain. On August 30, 2010, the Superior Court granted Fisher's motions to exclude.

5. Two months earlier—on May 3, 2010, unbeknownst to either party's counsel or the Superior Court—Fisher had filed for bankruptcy. An automatic bankruptcy stay immediately issued and remained in force until June 8, 2011, *i.e.*, for 13 months. When Fisher's counsel learned of the automatic stay, he immediately notified the Superior Court. As a result, on December 6, 2011, after the automatic stay had terminated, the court granted Bell's motion to vacate its earlier August 30, 2010 order that was issued during the automatic stay. The court then immediately reissued its August 30, 2010 order, unchanged.

6. On April 16, 2012, the Superior Court denied Bell's motion for reargument on its December 6, 2011 order. On June 7, 2012, a jury rendered a verdict for Fisher on all counts. Bell appealed and Fisher cross-appealed.

7. On appeal, Bell raises six claims. His first three arguments concern whether the Superior Court properly excluded the testimonies of Dr. Postlethwaite, Dr. Moore, Ms. Babinetz, and Dr. Kursh. Bell's fourth claim is that the trial court erred by denying his motion for reargument. His fifth claim is that the trial court erred by prohibiting his counsel from cross-examining one of Fisher's expert witnesses with certain documents that would arguably have impeached the expert

witness' testimony. Bell's sixth claim is that the trial court's jury instruction was improper. On his cross-appeal, Fisher claims that the court abused its discretion by permitting Bell to introduce evidence of Fisher's personal assets at trial. Fisher also claims that, in the event of a retrial, the court should permit him to introduce evidence of Bell's previous neck injury that predated his oral surgery.

8. The first issue presented—whether the Superior Court correctly excluded Dr. Postlethwaite's expert medical report and affidavit—is dispositive of the remaining issues. We therefore address only that issue.

9. We review a trial court's decision to permit or to exclude expert testimony for abuse of discretion.¹ If the trial court's exclusion of Dr. Postlethwaite's testimony was legally erroneous, it also constituted an abuse of discretion, because that testimony was critical to Bell's negligence claim against Fisher. Dr. Postlethwaite was Bell's only expert who would have opined that Fisher's surgery caused Bell's permanent neck and spinal injuries.²

10. On appeal, Bell first claims that the Superior Court should not have excluded Dr. Postlethwaite's expert report, because the report was “based upon sufficient facts and data” under Delaware Rule of Evidence (“DRE”) 702. Second, and alternatively, Bell argues that the court should not have excluded Dr.

¹ *Bowen v. E.I. duPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006) (citation omitted).

² *See Bell v. Fisher*, 2010 WL 3447694, at *3, 6 n.47 (Del. Super. Aug. 30, 2010).

Postlethwaite’s affidavit curing any underlying informational defect in the expert report, because Dr. Postlethwaite’s medical opinion remained unchanged after he learned of Bell’s preexisting neck injuries. Third, Bell contends that the trial court abused its discretion by reissuing its earlier (August 30, 2010) order without first affording him an opportunity to be heard.

11. We determine that the Superior Court properly excluded Dr. Postlethwaite’s expert report under DRE 702 and *Perry v. Berkley*,³ because that report was not “based upon sufficient facts or data” as DRE 702 requires. In *Perry*, we held that where an expert’s “opinion is not based upon an understanding of the fundamental facts of the case, . . . such testimony must be excluded.”⁴ Here, Dr. Postlethwaite’s conclusion—that Fisher’s surgery caused Bell’s neck and spinal injuries—was predicated on his belief that Bell had no history of neck and spinal injuries before the dental procedure. That erroneous factual premise rendered Dr. Postlethwaite’s medical opinion (and expert report) about the cause of Bell’s injuries (in the language of *Perry*) “completely incorrect.”⁵ The Superior Court also properly excluded Dr. Postlethwaite’s tardy affidavit as procedurally and substantively inadequate for the reasons set forth in its August 30, 2010 order

³ 996 A.2d 1262 (Del. 2010).

⁴ *Id.* at 1271.

⁵ *Id.* (emphasis omitted).

and opinion.⁶ Finally, Bell did not advance any persuasive argument before the trial court, why the court should not immediately reissue its August 30, 2010 order after the expiration of the automatic stay.

12. Most of Bell's remaining claims depend on the admissibility of Dr. Postlethwaite's opinion testimony. Because that testimony was properly excluded, we conclude that Bell's remaining arguments are without substantive merit. Because we affirm the judgment for Fisher, we also need not address the claims on Fisher's cross appeal.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁶ *Bell v. Fisher*, 2010 WL 3447694, at *6 (Del. Super. Aug. 30, 2010).