

**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: September 13, 2011
Decided: December 6, 2011

On Plaintiffs' Motion to Vacate Previous Orders Granting Defendants'
Motions in Limine.

GRANTED. ORDERS VACATED AND REISSUED.

On Plaintiffs' Motion to Strike Defendants' Motions in Limine.
DENIED AS MOOT.

Dear Counsel:

I. INTRODUCTION

In this dental negligence action, Plaintiffs seek to strike Defendants' three motions in limine filed June 7, 2010 and to vacate related orders that denied these motions which were issued on August 30, 2010. Plaintiffs seek this relief because the motions and orders occurred during the automatic stay provided by Defendant Fisher's filing for personal bankruptcy on May 3, 2010. The Court and counsel in

this case were unaware that Dr. Fisher had filed for bankruptcy; he was represented by other counsel in that matter.

The Court must determine the validity of both the filing of the motions and the issuance of related orders during the automatic stay and also whether fresh consideration of the motions in limine is merited. The Court finds that the automatic stay that was at the time in effect requires that the orders be **VACATED**. However, the Court reissues the orders without change because fresh consideration is not merited. It follows that Plaintiffs' Motion to Strike the three motions in limine is **DENIED** as **MOOT**.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs bring this dental malpractice action alleging claims of negligence and lack of informed consent regarding the extraction of Richard Bell's wisdom teeth during surgery occurring in January of 2007.¹ Plaintiffs originally filed this case *pro se* on January 16, 2009; current counsel for Plaintiffs first entered their appearances on April 9, 2009. The case proceeded relatively routinely. Defendants ultimately filed three motions in limine on June 8, 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 on September 8, 2010 in connection with the anticipated trial date of October 25, 2010. However, by letter dated September 30, 2010, Dr. Fisher's counsel in this case notified the Court and

¹ Jennifer Bell's only claim is for loss of consortium.

² *Bell v. Fisher*, 2010 WL 3447694 (Del. Super. Aug. 30, 2010).

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 his counsel in this case of his May 3, 2010 bankruptcy filing.

Upon a bankruptcy filing, Section 362 of the United States Bankruptcy Code enforces an automatic stay of actions to create or enforce claims against a debtor or property included within a bankruptcy estate.³ As such, an automatic stay was implemented May 3, 2010 and remained in effect until June 9, 2011 when the Bankruptcy Court lifted the automatic stay and allowed such actions to proceed.⁴ Defendants' motions in limine and the orders granting the motions occurred after the automatic stay became effective but prior to the stay's lifting. After the stay was lifted, the Court held a scheduling conference, and, among other dates and deadlines, set a new trial date of May 29, 2012.

For the reasons that follow, this Court **GRANTS** Plaintiffs' Motion to Vacate Previous Orders, but **REISSUES** those prior orders without change. Plaintiffs' companion Motion to Strike the three motions in limine is **DENIED** as **MOOT**.

III. THE PARTIES' CONTENTIONS

A. Plaintiffs' Contentions

Once an automatic stay is effective, judicial proceedings against a debtor are stayed and no party to a suit may pursue judicial action.⁵ To proceed with a judicial proceeding, relief from the automatic stay must be authorized by the Bankruptcy Court.⁶ The automatic stay is in effect partially to "forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it."⁷ Acts taken in violation of the automatic stay are void.⁸ Plaintiffs contend that Defendants'

³ See 11 U.S.C. §362(a)(1).

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 See *Assoc. of St. Croix Condominium Owner v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982)(holding automatic stay barred debtor from appealing in action for breach of lease); See also *Borman v. Raymark Indus., Inc.*, 946 F. 2d 1031, 1035 (3d Cir. 1991)(holding automatic stay barred debtor's appeal of judgment in product 's liability action).

⁶ *St. Croix Condominium Owner*, 682 F.2d at 448.

⁷ *Id.*

⁸ *Accu-Fire Fabrication, Inc. v. Corrozi-Fountainview, LLC*, 2009 WL 537152,*4 (Del. Super. March 3, 2009)(holding automatic stay bars enforcement of Delaware mechanic's lien).

motions in limine should be stricken and the orders granting the motions likewise vacated. In Plaintiffs' original motion, Plaintiffs argued only that the Motions to Strike and to Vacate must be granted as a matter of law, and did not argue that any further considerations were warranted.

Plaintiffs argue that Dr. Fisher violated the stay by failing to (1) advise the Court of the automatic stay, and (2) by filing motions in limine during the pendency of the stay. Plaintiffs claim that relief is appropriate on account of Dr. Fisher's violations and apparently wish to bring before the Court "new evidence" and to "reargue the issues" raised by the three motions in limine.⁹ Plaintiffs contend that because the "Defendant[s] sought the protection of the bankruptcy laws... [Defendants] cannot then seek to take advantage of the Courts in violation of the very laws [] invoked."¹⁰

Plaintiffs further argue they were prejudiced by Defendants' violation of the automatic stay because they "incurred substantial time and expense as a result of the conduct of the Defendant."¹¹ The plaintiffs seek the opportunity to present "new evidence" in renewed opposition to the three motions in limine.¹² Notably, Plaintiffs' claims of a right to present "new evidence" and a right of reargument (with new facts) are raised for the first time in the Defendants' Reply to Plaintiffs' Response.¹³

B. Defendants' Contentions

Defendants argue that the Court has fully considered the motions from prior briefing and oral argument and reached a well-reasoned decision. Defendants assert that there is no new evidence presented or proffered in support of the plaintiffs' desire to revisit the August 30, 2010 ruling.¹⁴ Therefore, the defendants argue, that even if the Court were inclined to vacate the previously issued orders as a matter of procedure, the orders should simply be reissued since there has been no substantive evidentiary change.

⁹ Pl.'s Reply Br. 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ As stated above, at the time Defendants filed their Response, Plaintiffs had not argued for the opportunity to adduce "new evidence" and have reargument.

IV. DISCUSSION

The Court agrees with the plaintiffs to the extent that an automatic stay requires the halt of actions performed by both parties to a lawsuit. Although the automatic stay is in place for the debtor's protection, the stay operates to foreclose even the debtor from continuing legal proceedings in actions that might "deplet[e] the debtor's assets."¹⁵ The Court agrees that the motions in limine and the orders granting those motions should be voided because of the automatic stay.

However, the Court is not persuaded that reopening discovery on the motions and reargument of them is warranted. Defendants argue that they were prejudiced because the motions and orders occurred during the automatic stay. However, at no point in Defendants' briefing did Defendants 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.¹⁶ Additionally, Plaintiffs in their Reply argue that they must be given the opportunity to present "new evidence."¹⁷ 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. To this latter point, the Court believes that the plaintiffs' litigation expenses and invested time would be identical regardless of whether it occurred during the automatic stay or after it was lifted. Furthermore, if the Court chose to vacate the orders as sought and reopen full consideration of the motions, the costs of the litigation would absolutely increase because of the repetitive argument. Secondary repetitive argument is judicially inefficient since Plaintiffs have failed to proffer any reason why reargument would offer any new evidence.

Also, and notably, Plaintiffs raise the prejudice claim for the first time in their Reply. "The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim in connection with a matter under submission to the court."¹⁸ "Moving parties must provide adequate factual and legal support for their positions in their [original] moving papers in order to put the opposing parties

¹⁵ *St. Croix Condominium Owner, supra*.

¹⁶ Pl's Reply Br. 2.

¹⁷ *Id.*

¹⁸ *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del.1958).

and the court on notice of the issues to be decided.”¹⁹ Defendants understandably did not rebut Plaintiffs’ claims that appeared for the first time in the Reply. It follows therefore, that it is possible to deny Defendants’ proposed relief on this independent ground as well.

Striking the motions in limine and the permanent vacating of the Court’s August 30, 2010 order is not required. Instead, the Court grants the Motion to Vacate Previous Orders, and reissues the Orders. The Court hereby reissues its August 30, 2010 opinion.

CONCLUSION

The Motion to Vacate Previous Orders is **GRANTED**. The Court hereby reissues its August 30, 2010 opinion. The Motion to Strike is **DENIED** as **MOOT**. The Orders previously issued granting Defendants’ motions in limine are contemporaneously reissued.²⁰

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary

¹⁹ *In re Asbestos Litig. (Lagrone)*, 2007 WL 2410879, *4 (Del.Super.Aug.27, 2007).

²⁰ Defendants also responded to Plaintiffs’ instant Motions by arguing that the automatic stay is established to protect the property of the bankruptcy estate and that therefore, Defendants have no standing to vacate the orders since the Court’s rulings effectively preserved the estate. In other words, Defendant argues that only they have standing to vacate such an order because the automatic stay is in place for their own protection.

It is not necessary to reach this issue. Furthermore, the Court notes that Defendants cited no case for this proposition; therefore, it is deemed abandoned. *See Flamer v. State*, 953 A.2d 130, 134 (Del.2008)(failure to cite authority for a legal argument constitutes waiver).