IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SHERRY LAYTON,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 08C-10-150 JRJ
v.	)	
	)	
JOACHIM ELTERICH,	)	
	)	
Defendant.	)	

OPINION

Submitted: October 28, 2011
Decided: January 24, 2012

Upon Plaintiff's Motion for a New Trial and/or Additur: **GRANTED**
Upon Defendant's Motion for Costs: **DENIED AS MOOT**

Michael D. Bednash, Kimmel, Carter, Roman & Peltz, P.A., Plaza 273 Building, 56 W. Main Street, Fourth Floor, Newark, Delaware, 19702, Attorney for the plaintiff.

Daniel P. Bennett, Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, 1220 N. Market Street, Suite 300, Wilmington, DE 19801, Attorney for the defendant.

Jurden, J.

I. INTRODUCTION

The motions before the Court arise out of a "zero verdict" in a personal injury action brought by Sherry Layton ("Plaintiff") as the result of an auto accident. Plaintiff moves for a new trial arguing that she sustained "at least some type of injury" as a result of the accident, yet the jury awarded her $0 in damages.[1] In the alternative to a new trial, Plaintiff requests *additur*. In opposition to Plaintiff's motion, Joachim Elterich ("Defendant") argues that Plaintiff's lack of "objective signs of injury" entitled the jury to return a zero verdict.[2] Additionally, Defendant moves for costs because he served Plaintiff with an offer of judgment before trial in the amount of $15,001.00, plus costs.[3] For the reasons stated below, Plaintiff's Motion for New Trial is **GRANTED**, and Defendant's Motion for Costs is **DENIED AS MOOT**.

II. FACTS

On October 25, 2006, the Defendant rear-ended Plaintiff's car. Plaintiff claims that she sustained a lower back injury as a result of the collision, which required surgery to repair.[4] However, because Plaintiff sustained multiple prior back injuries, Defendant contested the veracity of Plaintiff's claim.[5] Experts for both parties offered contrasting opinions at trial as to whether Plaintiff's prior

[1] Plaintiff's Motion for a New Trial and/or Additur ("Pl.'s Mot.")(Trans. ID. 37769972) at ¶5.
[2] Defendant's Response to Plaintiff's Motion for a New Trial and/or Additur at ¶3-4.
[3] Defendant's Motion for Costs at ¶1.
[4] Pl.'s Mot. at ¶3.
[5] Defendant admitted liability for the accident. *Id.* at ¶2.

injuries, or injuries suffered in the auto accident, necessitated Plaintiff's surgery. After a two day trial, the jury returned a zero verdict against Plaintiff.

The jury heard from three experts at trial; two experts testified on behalf of the Plaintiff, and one testified for the Defendant. Plaintiff's first expert, Dr. Kartik Swaminathan, testified that in addition to other symptoms, Plaintiff showed signs of reduced mobility in her back and pelvis, increased prominence of the paraspinal muscles, tenderness to palpation over her bilateral posterior superior iliac spine, and tenderness in her bilateral sacroiliac joint.[6] Dr. Swaminathan also testified that Plaintiff's left side of her pelvis was lower than the right side and that "there . . . [were] taut bands and ropiness over the lumbar paraspinal muscles and the gluteal muscles."[7] Based upon his examination, Dr. Swaminathan opined that Plaintiff's injury was 100 percent causally related to the auto accident caused by the Defendant.[8] Dr. Bruce J. Rudin also testified on behalf of Plaintiff. At the time of the October 2006 accident, Dr. Rudin had already been treating Plaintiff for a pre-existing back injury. While treating Plaintiff for that prior injury, Dr. Rudin concluded that a prior spinal fusion had not healed, and the nerve roots in Plaintiff's back were compressed.[9] Dr. Rudin also testified that because of the

[6] Plaintiff's Reply Letter to the Court ("Pl.'s Rep.") (Trans. ID. 38994105) at Exhibit A-Part #1, pp. 8-9, 11.
[7] *Id*. at 9-10.
[8] *See id*. at 22.
[9] Pl.'s Rep. at Exhibit B-Part #1, p. 17.

October 2006 collision, Plaintiff required back surgery to alleviate the pain she was experiencing in her back.[10]

Defendant called Dr. Scott A. Rushton to testify on his behalf. Dr. Rushton testified:

> My opinion regarding the injuries to Ms. Layton's low back as a result of that motor vehicle accident would be a diagnosis we refer to as a lumbar strain and sprain, which would be a strain of the supporting soft tissue structures of Ms. Layton's low back, generally the muscles and ligaments.[11]

Dr. Rushton testified that Plaintiff's injury was temporary, and that Dr. Rudin's operation on Plaintiff was required to correct a preexisting work injury from 2004.[12] Despite their differing views as to whether the October 2006 accident necessitated Plaintiff's surgery, Plaintiff's experts *and Defendant's expert* agree that Plaintiff suffered an injury as a result of the October 25, 2006 auto accident.

III. STANDARD OF REVIEW

A motion for new trial is controlled by Superior Court Civil Rule 59, which provides, in relevant part:

> A new trial may be granted as to all of any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in Superior Court.[13]

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[10] *Id*. at 20.
[11] Defendant's Letter to the Court Enclosing Scott A. Rushton's Deposition as an Exhibit ("Def.'s Letter") (Trans. ID 40612402) at pp. 17-18.
[12] *Id*. at p. 19.
[13] Super. Ct. Civ. R. 59(a).

On review, the Court's presumes the jury's verdict was correct.[14] "Barring exceptional circumstances, the trial judge should set aside a jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand."[15]

A zero verdict is "inadequate and unacceptable as a matter of law," however, where medical testimony establishes that the plaintiff suffered an injury as the result of an accident.[16] Notwithstanding the deference afforded to the jury, it cannot totally ignore uncontroverted facts, and thus, "once the existence of an injury has been established as causally related to the accident, a jury is required to return a verdict of at least minimal damages."[17]

IV. DISCUSSION

Plaintiff's experts and Defendant's expert agree that the Plaintiff suffered an injury as a result of the accident caused by the Defendant. Although a disagreement exists as to the extent of the injury and the need for surgery, the experts nonetheless concluded there was an injury.[18]

In *Maier v. Santucci*,[19] the plaintiff was rear-ended by the defendant. The plaintiff claimed that as a result of the accident, he sustained permanent injuries to

[14] *Hagedorn v. State Farm Mut. Ins. Co.*, 2011 WL 2416737, at *3 (Del. Super.) (other citations omitted).
[15] *Id.* (citing *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997) (other citations omitted)).
[16] *Id.* (quoting *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).
[17] *Id.*
[18] Def.'s Letter (Trans. ID 40612402), Exhibit at pp. 17-18.
[19] 697 A.2d 747 (Del. 1997).

his head, neck, jaw, shoulder, arm, back and leg.[20] The defendant's expert conducted a defense medical examination of the plaintiff, and concluded that most of the plaintiff's injuries were the result of a preexisting arthritic condition.[21] Defendant's expert conceded, however, that the plaintiff probably sustained a cervical sprain as a result of the accident.[22] The defense expert's testimony was not contradicted.[23] Even so, the jury returned a verdict of $0 in damages.[24] The Delaware Supreme Court held that once an injury is established, and not contradicted, the jury must award at least minimal damages.[25] The Supreme Court also noted that although the parties sharply disputed the plaintiff's physical condition prior to the accident, as the parties do here, the aggravation of preexisting injuries are compensable under Delaware law.[26]

Following *Maier*, because the parties' experts agree that some injury exists as a result of the accident, the zero verdict returned by the jury is inadequate and unacceptable as a matter of law.[27] Plaintiff is entitled to at least minimal damages for her injury.[28]

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[20] *Id*. at 748.
[21] *Id*. at 749.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. (citing *Winder v. Frisby*, 1994 WL 45434, at *1 (Del. Super. 1994)).
[27] *Id*. at 749.
[28] *Id*.

Because Plaintiff is entitled to damages, the Court's next task is to decide whether a new trial is required to determine damages, or if the Court can make its own determination and grant *additur*. It is well settled that the Court is permitted to award *additur* where a jury returns a zero verdict.[29] The Court declines to do so in this case, however.

Where the jury returns an inadequate verdict, the Court "defers to the jury and reduces the jury's award to the absolute maximum amount that the record can support (in the case of *remittitur*) and increases the award to the absolute minimum amount that the record requires (in the case of *additur*)."[30] Determining the appropriate amount of *additur* where the jury returns a zero verdict is difficult in the context of personal injury litigation. Unliquidated damages, that is, damages that are not necessarily mathematically calculable, are the origin of that difficulty. Although the Court has awarded *additur* in cases where unliquidated damages are in dispute,[31] and the Delaware Supreme Court has "repeatedly approved the use of *additur* in personal injury claims,"[32] the Court finds that *additur* is inappropriate here. In this case, the "jury failed to provide a sufficient basis on which to determine the appropriate amount of *additur*" by returning a zero verdict, because

[29] *Hall v. Dorsey*, 1998 WL 960774 (Del. Super. 1998).
[30] *Reid v. Hindt*, 976 A.2d 125, 131 (quoting *Murphy v. Thomas*, 801 A.2d 11, *1 (Del. 2002).
[31] *Carney v. Preston*, 683 A.2d 47, 50 (Del. Super. 1997) (citations omitted).
[32] *Hagedorn*, 2011 WL 2416737, at *4. (citing *Reid*, 976 A.2d at 130).

in doing so, the jury disregarded the Court's valid instruction to award damages in the event that Plaintiff proved the existence of an injury the Defendant caused.[33]

V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for New Trial is **GRANTED**, and Defendant's Motion for Costs is **DENIED AS MOOT**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc: Prothonotary

[33] *Hagedorn*, 2011 WL 2416737, at *4.