IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANNA RODRIGUEZ,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. N10C-01 -270 MJB**
	)	
	)	
WAL-MART STORES, INC.,	)	
a Delaware Corporation,	)	
	)	
	)	
Defendant.	)	

Submitted: December 5, 2011
Decided: March 29, 2012

Upon Plaintiff's Motion for New Trial or Additur. **DENIED.**

OPINION

Gary S. Nitsche, Esq., and Michael B. Galbraith, Esq., Weik, Nitsche & Dougherty, Wilmington, Delaware, Attorneys for Plaintiff.

David G. Culley, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware, Attorney for Defendant.

BRADY, J.

I. INTRODUCTION

Anna Rodriguez ("Plaintiff") has filed a Motion for New Trial pursuant to Superior Court Civil Rule 59. Plaintiff urges the Court to grant a new trial or in the alternative award Plaintiff additur. Upon consideration of the evidence presented at trial, a review of Plaintiff's motion, and Wal-Mart Stores, Inc.'s ("Defendant") response, this court concludes Plaintiff's motion should be DENIED, because Plaintiff is entitled to neither additur nor a new trial.

II. BACKGROUND

This suit arises from an incident that occurred on August 3, 2008, in which Plaintiff slipped and fell on the floor in front of a water machine located on Defendant's premises. At the time of the incident Plaintiff was in the process of refilling a water container when she lost her footing and fell. Plaintiff claims that she fell because Defendant negligently permitted water to sit on the floor, which created the hazardous condition that proximately caused her to fall and injure herself. Plaintiff claimed to be suffering from extreme and unbearable pain as a result of Defendant's negligence. On January 29, 2010, Plaintiff filed an action against Defendant seeking compensation for personal injuries due to Defendant's alleged negligence. The jury heard from various witnesses, including Wal-Mart personnel, Plaintiff herself, and three medical experts. Following trial, on October 26, 2011, the jury returned a verdict in favor of Defendant and awarded Plaintiff zero dollars ($0). The jury found that Defendant was negligent, however, its negligence was not a proximate cause of Plaintiff's injury. On November 9, 2011, Plaintiff filed a motion requesting this Court to grant a new trial or in the alternative award additur. Defendants filed a response on December 5, 2011, requesting

that this Court deny Plaintiff's motion and not grant a new trial or award additur. As stated above, this court finds that the jury's verdict should not be disturbed and Plaintiff's motion, accordingly, is denied.

III. STANDARD OF REVIEW

Delaware law permits this Court to set aside a jury verdict if it is inadequate as a matter of law. One method to set aside a jury verdict is by ordering a new trial. A motion for a new trial is controlled by Superior Court Civil Rule 59, which states, in applicable part, "[a] new trial may be granted as to all or 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 the Superior Court."[1] A second mechanism of setting aside an inadequate jury verdict is by granting additur, which increases the plaintiff's award.[2] "The practice of additur is nothing more than making the denial of a plainitiff's motion for new trial contingent upon the defendant's willingness to accept a higher sum."[3]

When considering a motion for a new trial or additur, the Court begins with the fundamental principle that the jury's verdict is presumed to be correct;[4] therefore, jury verdicts will not be disturbed unless the verdict is against the great weight of the evidence such that a reasonable jury could not have reached the same verdict.[5] Moreover, in a jury trial, the function of fact-finding is reserved for the jury, not the court.[6] A jury verdict should be set-aside only in the unusual circumstances where the award is so grossly out

[1]Super. Ct. Civ. R. 59(a).
[2]*Hall v. Dorsey*, No. 96C-06-045, 1998 WL 960774, at *1 (Del. Super. Ct. Nov. 5, 1998).
[3]*Id.*
[4]*Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).
[5]*Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[6]*Caldwell v. White*, No. 03C-08-166, 2005 WL 1950902, at *3 (Del. Super. Ct. May 25, 2005).

of proportion to the injuries suffered as to shock the Court's conscience and sense of justice.[7] Accordingly, a motion for new trial or additur will be denied so long as there is a sufficient evidentiary basis supporting the jury's award of damages.[8]

IV. DISCUSSION

A. Plaintiff's Contentions

Plaintiff contends the jury erred by awarding zero dollars in damages because Plaintiff presented uncontroverted evidence that she sustained injuries that were proximately caused by Defendant's negligence. Plaintiff cites *Amalfitano v. Baker* in support of her position. *Amalfitano* held that "[w]here medical experts present uncontradicted evidence of injury, confirmed by objective medical tests supporting the plainitiff's subjective [complaints] . . . a jury award of zero damages is against the great weight of the evidence."[9] Plaintiff maintains, therefore, that once the jury determined that Defendant was negligent, as it did, the jury was required to award some damages because uncontroverted evidence supported by objective medical testing established Defendant's negligence was a proximate cause of her injuries. In support of her argument, Plaintiff argues that Defendant's medical expert, Dr. Richard Fischer, M.D., conceded during his deposition that Plaintiff sustained a soft tissue injury to her neck, lower back, and left knee as a result of the slip and fall. Plaintiff contends that even if the jury chose to accept the testimony of Defendant's one medical expert over both of Plaintiff's medical experts, the jury's zero dollar verdict went against the great weight of the evidence because all three experts agreed that Plaintiff sustained *some* injury as a result of the 2008 slip and

[7] *Young*, 702 A.2d at 1236-37.
[8] *See Phillips v. Loper*, No. 02C-06-029, 2005 WL 268042, at *1 (Del. Super. Ct. Jan. 27, 2005) (citing *Young*, 702 A.2d at 1237).
[9] *Amalfitano v. Baker*, 794 A.2d 575, 576 (Del. 2001).

fall. Further, Plaintiff maintains that objective medical testing, specifically the presence of muscle spasms, indicated that she sustained injuries. Therefore, Plaintiff contends that since all experts testified that she sustained some injury and their testimony was supported by objective medical testing, the jury's verdict is against the great weight of the evidence. Accordingly, Plaintiff argues the court must grant a new trial or in the alternative award additur.

B. Defendant's Contentions

In opposition to Plaintiff's motion, Defendant argues the jury was not presented with uncontroverted evidence that established Plaintiff was injured as a proximate cause of Defendant's negligence. Therefore, Defendant contends the jury's verdict must be affirmed. Defendant maintains that Dr. Fischer's impression that Plaintiff had likely sustained a lumbar strain as a result of her fall was based entirely upon Plaintiff's subjective complaints, as, according to Dr. Fischer, there was no objective evidence of injury. Defendant argues that, because Dr. Fischer testified that there was no objective evidence of injury at any time after the accident, the jury was free to conclude that the experts, including Dr. Fischer, based their conclusion on Plaintiff's subjective complaints. Further, Defendant contends that the jury was free to believe Dr. Fischer's testimony over Plaintiff's experts, and conclude that there was no objective evidence of injury because Dr. Fischer testified that Plaintiff would make herself "rigid"[10] during examination which undermined the significance of finding Plaintiff suffered from muscle spasms.

[10]Dr. Fischer's Dep. 11-12, 41, 54-55, (Oct. 20, 2011).

C. Verdict Awards of Zero

The Delaware Supreme Court has explained that "[t]he law . . . does not compensate for every loss and the jury serves as the conscience of the community, sending a message to exaggerating and overly litigious claimants."[11] Additionally, Delaware law is clear that "[w]hen experts, in the process of formulating an opinion, rely upon the subjective representations of the plaintiff, determination of the credibility of the plaintiff's representations is solely within the province of the jury and the jury may accept or reject these representations as they see fit" and award zero damages.[12] Furthermore, it is equally clear that "where uncontested medical evidence links an injury to its proximate cause and is *confirmed by independent objective testing*, a jury award of zero damages is against the weight of the evidence."[13] Additionally, as explained by the Delaware Supreme Court in *Walker v. Campanelli*, when the jury is presented with an expert's medical opinion that is based substantially on the patient's subjective complaints and is confirmed by objective evidence, but the significance of the objective evidence is "hotly contested," the jury may disregard that expert's testimony.[14]

Walker involved facts similar to the instant case. At trial, the jury heard conflicting testimony from the defendant's and plaintiffs' medical experts regarding the significance of MRI findings.[15] The plaintiffs' expert opined that Walker, as a result of auto accident, sustained multiple injuries evidenced by an abnormal EMG study that

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[11] *Walker v. Campanelli*, 860 A.2d 812, No. 78,2004, 2004 WL 2419104, at *2 (Del. Oct. 12, 2004).
[12] *Gier v. Kananen*, 628 A.2d 83, No. 522,1992, 1993 WL 227390, at *2 (Del. June 7, 1993) (citing *Debernard v. Reed*, 277 A.2d 684, 685-86 (Del. Super. Ct. 1971); *see also Phillips*, 2005 WL 268042, at *2.
[13] *Walker*, 2004 WL 2419104, at *2 (emphasis added); *see also Amalfitano*, 794 A.2d at 578.
[14] *Walker*, 2004 WL 2419104, at *4 ("This was not a case where *uncontested* medical evidence confirmed by objective testimony causally linked the injury to the accident. Here, the significance of the objective tests was hotly contested. The trial judge correctly ruled that the jury could freely disregard medical opinion based on [the plaintiff's] subjective complaints.").
[15] *Walker*, 2004 WL 2419104, at *3.

"correlated with the abnormal MRI."[16] One of the defendant's experts, however, refuted the plaintiffs' expert's testimony by stating that the positive finding on the MRI was not "clinically relevant."[17] Further, a second defense expert testified "Walker exacerbated his pain symptoms during examination" and "he noted a 'dramatic overreaction of pain behavior,' an 'overreaction and exaggeration' by Walker, and signs of 'possibly even malingering.'"[18] The jury returned a zero dollar verdict and the plaintiffs moved for a new trial.[19] This Court denied the plaintiffs' motion[20] and the plaintiffs appealed to the Delaware Supreme Court, which affirmed.[21] The Supreme Court recognized that, at trial, all medical experts agreed that Walkers suffered *some* injury.[22] However, the Court reasoned that "the jury could have concluded that [the defendant's] experts based their opinion on Walker's subjective complaints" because they contradicted the plaintiffs' experts' regarding the significance of the MRI findings—the only objective evidence that supported Walker was injured.[23] The Supreme Court went on to state "[t]his is not a case where *uncontested* medical evidence *confirmed by objective testing* causally linked the injury to the accident. Here, the significance of the objective tests was hotly contested."[24]

V. ANALYSIS

In the present case, Plaintiff presented objective evidence that she sustained an injury—muscle spasms.[25] However, the jury heard conflicting testimony from three

[16] *Walker*, 2004 WL 2419104, at *3.
[17] *Walker*, 2004 WL 2419104, at *3.
[18] *Walker*, 2004 WL 2419104, at *3.
[19] *Walker*, 2004 WL 2419104, at *1.
[20] *Walker*, 2004 WL 2419104, at *1.
[21] *Walker*, 2004 WL 2419104, at *4.
[22] *Walker*, 2004 WL 2419104, at *3.
[23] *Walker*, 2004 WL 2419104, at *4.
[24] *Walker*, 2004 WL 2419104, at *4 (second emphasis added).
[25] *Reid v. Hindt*, 976 A.2d 125, 127 (Del. 2009); *Burkett-Wood v. Haines*, 906 A.2d 756, 766 (Del. 2005); *Anderson v. Silicki*, 925 A.2d 503, 2007 WL 1345449, at *2 (Del. 2007).

medical experts regarding the significance of muscle spasms. Dr. DuShuttle and Dr. Covelski were both medical experts for Plaintiff. Dr. DuShuttle testified that upon examining Plaintiff he found muscle spasms. When questioned about whether a muscle spasm can be faked Dr. DuShuttle responded that a muscle spams is "something that's pretty involuntary."[26] Dr. Covelski also testified that he found muscle spasms when examining Plaintiff,[27] and that he thought "it would be difficult to kind of show [spasms] time after time."[28] Defendant's expert, Dr. Fischer, testified that during his examination of Plaintiff he did not find any muscle spasms.[29] When questioned about muscle spasms, Dr. Fischer explained that, unlike both of Plaintiff's experts, he does not consider them as an objective finding because patients can reproduce muscle spasms voluntarily by making themselves rigid.[30] Further, Dr. Fischer testified that in his medical opinion he could not tell the difference between a fake and a true muscle spasm.[31]

Although Dr. Fischer does not consider muscle spasms as objective evidence of injury, Delaware courts disagree.[32] However, while the Delaware Supreme Court has made clear that finding a muscle spasm is considered objective evidence of injury, as previously stated, the Court has also made clear that when a jury is presented with an expert medical opinion that is based on the patient's subjective complaints, but is confirmed by "hotly contested" objective testing, the jury may disregard that expert's

[26]Dr. DuShuttle's Dep. 9, (Oct. 21, 2011).
[27]Dr. Coveleski's Dep. 38, (Oct. 13, 2011).
[28]Dr. Coveleski's Dep. 53.
[29]Dr. Fischer's Dep. 31, (Oct. 20, 2011).
[30]Dr. Fischer's Dep. 52-53.
[31]Dr. Fischer's Dep. 53.
[32]*Burkett-Wood v. Haines*, 906 A.2d 756, 766 (Del. 2005); *Anderson v. Silicki*, 925 A.2d 503, No. 207,2005, 2007 WL 1345449, at *2 (Del. 2007); *Khader v. Khader*, No. 08C-06-029, 2010 WL 2280586, at *3 (Del. Super. Ct. 2010).

testimony.[33] As in *Walker*, the objective evidence in the instant case, muscle spasms, was indeed "hotly contested." Defendant's medical expert testified that muscle spasms could be reproduced voluntarily; therefore, they can be faked. On the other hand, Plaintiff's experts testified that muscle spasms are "pretty involuntary" and "would be difficult to show . . . time after time." Although it is without question that Delaware courts consider muscle spasms to be objective evidence of injury,[34] the jury was free to believe the expert they found more credible on the issue of whether spasms could be produced voluntarily.

In addition to the jury being faced with conflicting testimony regarding the significance of muscle spasms, Dr. Fischer's presented testimony that could have reasonably caused the jury to question Plaintiff's credibility. The jury heard testimony that most of Plaintiff's pain was inexplicable. Dr. Fischer explained that Plaintiff would flinch at even the lightest touch of the skin in a "poorly-defined diffuse area"[35] and that there was no physiological mechanism for the pain that Plaintiff alleged she suffered.[36] Dr. Fischer testified that independent medical providers had placed notations in Plaintiff's file such as, "questionable reproduction of pain,"[37] "give-way weakness,"[38] "rigidity."[39] Dr. Fischer explained the significance of these findings as indicating that Plaintiff may be exaggerating her condition.

Most significantly, Dr. Fischer testified concerning the straight-leg and finger-to-nose tests he performed when evaluating Plaintiff. Dr. Fischer explained that he conducted a straight-leg test twice with Plaintiff, once while she was lying flat and not

[33] *Walker v. Campanelli*, 2004 WL 2419104, at *4.
[34] *Reid v. Hindt*, 976 A.2d 125, 127 (Del. 2009); *Burkett-Wood*, 906 A.2d at 766; *Anderson*, 2007 WL 1345449, at *2.
[35] Dr. Fischer's Dep. 31.
[36] Dr. Fischer's Dep. 41.
[37] Dr. Fischer's Dep. 43.
[38] Dr. Fischer's Dep. 44.
[39] Dr. Fischer's Dep. 11-12, 41, 54-55.

distracted, and a second time while she was sitting upright and distracted by another procedure.[40] Dr. Fischer testified that when he performed the straight-leg test the first time with Plaintiff laying back, Plaintiff complained of worsened pain with as little at thirty degrees elevation on both sides of her body. Dr. Fischer decided to repeat the test while Plaintiff was lying down and distracted. When he did so, Plaintiff showed no sign of discomfort even when her hip was flexed at ninety degrees to her body. Dr. Fischer testified that the results of the straight-leg test should have been consistent because both supplied the same amount of tension being put on the lumbosacral nerve roots.[41] In addition to the suspiciously inconsistent straight-leg test results, Dr. Fischer explained that while examining Plaintiff he conducted a finger-to-nose test; the results of which he described as "extremely" unusual.[42] When performing the finger-to-nose test Plaintiff brought her fingertip within several inches of her nose only to miss it entirely. She did this with both hands. Dr. Fischer testified that this result was extremely unusual because "if you truly have difficulty with finger-to-nose testing . . . you're pretty much wobbly all the way and may worsen as you get near the target. But it doesn't go smoothly to a point and then get deflected."[43] Plaintiff left unrebutted Dr. Fischer's damaging testimony regarding the suspicious findings of both the straight-leg and finger-to-nose tests.

Finally, Defendant pointed out multiple inconsistencies between Plaintiff's deposition and trial testimony. During her deposition, Plaintiff testified that she did not pay attention to whether or not wet floor signs were present on the day she fell. However, at trial Plaintiff testified that she is sure there were no wet floor signs. Additionally, at

[40]Dr. Fischer's Dep. 32, 34-35.
[41]Dr. Fischer's Dep. 35.
[42]Dr. Fischer's Dep. 35.
[43]Dr. Fischer's Dep. 35-36.

trial, Plaintiff testified that she had water on her jeans after she fell, however, in her deposition testimony when asked whether any part of her clothes were wet after the fall, she stated not that she could remember. When questioned about this inconsistency Plaintiff admitted she did not state her pants leg was wet when specifically asked during her deposition. Both of these inconsistencies could be considered by the jury as they saw fit, and the jury could have determined they undermined Plaintiff's credibility.[44]

In sum, the instant case is very analogous to *Walker* because the objective evidence was hotly contested and Plainitiff's credibility was seriously questioned. Plaintiff did not present uncontroverted medical evidence that was supported by objective medical findings. In fact, the jury was presented with testimony from all three medical experts that could not explain why Plaintiff continued to complain of such intense pain. Moreover, the objective evidence—muscle spasms—presented in support of Plaintiff's position, was highly controverted. Defendant's expert, Dr. Fischer, testified how the significance of finding a spasm is undermined because a patient, here Plaintiff, can voluntarily reproduce or fake them. Furthermore, both of Plaintiff's experts indicated, at least implicitly, that muscle spasms could be faked.[45] Given that neither of Plaintiff's medical experts definitively testified that muscle spasms can not be faked, and Dr. Fischer's testimony that spasms can be faked, along with the aforementioned testimony that could have caused Plainitff's credibility to be questioned, the jury may have concluded that Plaintiff was faking the spasms; therefore, the only evidence of injury left was Plaintiff's subjective complaints.

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[44] *Poon v. Delaware*, 880 A.2d 236, 238 (Del. 2005) ("We . . . recognize that it is the sole province of the fact finder to determine witness credibility, resolve conflicts in testimony and draw any inferences from the proven facts. . . . We will not substitute our judgment for the fact finder's assessments in these areas.").
[45] *See supra* notes 26-28 and accompanying text.

VI. CONCLUSION

For the above reasons, the court finds that the jury's verdict was not against the great weight of the evidence so as to warrant a new trial or additur. Plaintiff's motion is **DENIED**.

_____/s/_____
M. Jane Brady
Superior Court Judge