MICHAEL WESLEY MIRANDY AND HIS WIFE SHERRY D. MIRANDY	*	**NO. 2017-CA-0011**
		COURT OF APPEAL
VERSUS	*	
		FOURTH CIRCUIT
GARY WATERS, JR., HIS EMPLOYER, VARIETY WHOLESALE INC., AND THEIR INSURER NORTH CAROLINA INSURANCE	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-02113, DIVISION "E"
Honorable Clare Jupiter, Judge
* * * * * *
JAMES F. MCKAY III
CHIEF JUDGE
* * * * * *

(Court composed of Chief Judge James F. McKay III, Judge Terri F. Love, Judge Rosemary Ledet)

LEDET, J., CONCURS WITH REASONS

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REVERSED AND RENDERED

SEPTEMBER 13, 2017

On January 7, 2014, Michael Mirandy's vehicle was rear ended by a vehicle driven by Gary Waters, Jr. on Interstate 10 in New Orleans. At the time of the accident, Mr. Mirandy was on his way home from a visit to Dr. Chad Domangue, Mr. Mirandy's treating physician for injuries that Mr. Mirandy received in another motor vehicle accident in March of 2013. On January 10, 2014, Mr. Mirandy returned to Dr. Domangue with complaints of injuries to his mid-back (thoracic), neck (cervical spine), and aggravation of a prior lower back injury. Dr. Domangue ordered a lumbar MRI, which was performed on January 14, 2014, to determine what additional problems may have been caused by the January 7, 2014 accident. Dr. Domange then compared this MRI with a prior MRI that was performed on July 31, 2013.

The July 31, 2013 MRI showed a normal disc at the L3-4 whereas the January 14, 2014 MRI showed a bulging or herniated disc at the L3-4 level. At the L4-5 level, the July 31, 2013 MRI showed a two millimeter retrolisthesis of the vertebrae as compared to the January 14, 2014 MRI, which showed that his retrolisthesis had doubled to four millimeters. In addition, at the L4-5 level, the January 14, 2014 MRI showed edema.

On February 24, 2014, Mr. Mirandy and his wife, Shelly Mirandy, filed a lawsuit seeking damages for personal injuries resulting from the January 7, 2014 accident. The matter was tried before a jury during the week of May 16, 2016. At trial, Dr. Domangue testified that on his January 10, 2014 examination of Mr. Mirandy, Mr. Mirandy had complaints of neck and mid-back pain which were not present prior to the January 7, 2014 accident. This testimony was not controverted. Also, Dr. K. Samer Shamieh, plaintiff's orthopedic surgeon, testified that the lumbar fusion surgical procedure he recommended was directly related to the January 7, 2014 accident. There was no indication in the medical records that plaintiff needed surgery prior the January 7, 2014 accident.

Near the end of trial, a jury charge conference was held in open court. Prior to the conference, the trial court supplied copies of the proposed jury instructions to all counsel. During the jury charge conference, plaintiffs' counsel objected to the language in special jury charge number 4, (trial court's # 12) which had been offered by the defendant. The proposed charge read as follows: "And number twelve, the question of whether a minimal or minor collision between the two vehicles involved in the accident sued upon can cause the kind of injuries plaintiffs have alleged is a factual question that you the jury, must decide." Plaintiffs objected on the grounds that jury charge number 4 (trial court's # 12) as written, would have the effect of the trial court suggesting to the jury that the accident in question was a "minimal or minor collision." The trial court agreed, stating: "I think that's well taken, and let's modify it." The defendant did not object to this modification. However, when the jury instructions reached the jury, this charge had not been changed or modified. The plaintiffs also submitted their own

requested jury charge number 7, which addressed minimal impacts and damages, but the trial court did not present it to the jury.

Following four days of trial, the jury returned a verdict, finding that Gary Waters, Jr. was at fault in causing the motor vehicle accident which occurred on January 7, 2014, but finding that plaintiff, Michael Mirandy, was not injured in the accident. Accordingly, the jury awarded no damages. A final judgment entering the jury's verdict was rendered by the trial court on June 14, 2016. On August 26, 2016, the trial court denied the plaintiffs' motion for judgment notwithstanding the verdict, or, in the alternative, motion for a new trial. It is from this judgment that plaintiffs now appeal.

On appeal, the plaintiffs raise the following assignments of error: 1) following a jury charge conference, wherein the court and all counsel agreed on a modified jury charge, the jury was improperly instructed as a result of an error on the part of the trial court, which suggested to the jury that the court felt the accident in question was a minimal or minor collision, which directly resulted in the jury's finding plaintiff was not injured in the January 7, 2014 accident; 2) it was error for the court to deny plaintiff's requested jury charge No. 7 which was central to the jury's determination that plaintiff was not injured in the accident at issue; 3) the jury's finding that plaintiff, Michael Mirandy, was not injured in the January 7, 2014 automobile accident is clearly wrong; and 4) the jury erred in failing to award damages.

Louisiana Code of Civil Procedure Article 1793(B) states: "The court shall inform the parties of its proposed action on the written requests and shall also inform the parties of the instructions it intends to give to the jury at the close of the evidence within a reasonable time prior to their arguments to the jury."

The Louisiana Supreme Court, in Wooley v. Lucksinger, 2009-0571 (La. 4/1/11), 61 So.3d 507, 577-78, considered the prejudicial effect of a violation of La, C.C.P. art. 1793(B) in stating: "the error is not found within the jury instructions given, or the failure to give a certain instruction, but in violation of a codal provision regarding the parties' right to know which charges are to be given to the jury before presenting argument.

The Wooley court considered three ways a party might be prejudiced under the circumstances: "First, counsel would be unable to tailor closing arguments to conform to the jury instructions given by the court." Id. at 578. "The other two ways prejudice could result from a litigant having to present closing arguments without knowledge of the contents of the jury instructions are: (1) counsel would not be permitted to object to the court's failure to include certain instructions in the charge, and (2) counsel would not be able to object to perceived errors in the instructions before the jury heard them. When objections to jury charges are considered before closing argument, and are found valid, a district court may avoid error by either including the valid but omitted instruction, or by amending the court's charge to exclude an erroneous charge." Id.

All three of these scenarios are present under the facts of this case, thereby resulting in prejudice to the plaintiffs. In this case, counsel for the plaintiffs placed objections on the record during the charge conference, before the closing arguments. After all parties and the court agreed to the instruction to be used, the court instructed the jury with the original prejudicial instruction. Due to this error, counsel for the plaintiffs was unable to tailor closing arguments to conform to the jury instructions given by the court. Further, due to the lack of knowledge that the inappropriate charge would be presented, the plaintiffs were not permitted to object

to the court's failure to include the agreed upon instructions in the charge and was not able to again object to the error in the instruction before it was read to the jury. The charge at issue was considered before closing arguments and the trial court found it to be improperly suggesting that the accident was minor or minimal, and decided that the wording should be modified. The trial court committed a legal error when it failed to modify the erroneous jury charge, which was prejudicial to the plaintiffs.

It is well settled that "[w]hen a jury is erroneously instructed and the error probably contributed to the verdict, the verdict must be set aside on appeal." Todd v. Sauls, 94-10 (La.App. 3 Cir. 12/21/94), 647 So.2d 1366, 1371; Smith v. Travelers Insurance Company, 430 So.2d 55 (La. 1983). In such cases, "the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts de novo." Lasha v. Olin Corp., 625 So.2d 1002, 1006 (La. 1993); Rosell v. ESCO, 549 So.2d 840 (La. 1989); Ragas v. Argonaut Southwest Ins. Co., 388 So.2d 707 (La. 1980). Under the particular facts and circumstances of this case, the trial court 's failure to give a balanced instruction on the subject of the magnitude of the collision and causation, after agreeing to do so was error, which indicates the need for a de novo review of the facts.

The jury's finding that Mr. Mirandy suffered no injuries as a result of the automobile accident is clearly wrong. The uncontroverted medical evidence established that the trauma of a rear-end collision would necessarily have aggravated Mr. Mirandy's pre-existing conditions and caused an increase in his symptoms. Accordingly, we reverse the judgment of the court below finding that Mr. Mirandy suffered no damages as a result of the January 7, 2014 accident.

We have a complete record of the case before this Court and we are in a position to review the evidence and reach our own conclusions concerning Mr. Mirandy's injuries and/or damages. While it is true that that Mr. Mirandy had suffered injuries in an earlier automobile accident and the impact of the collision on January 7, 2014 may have been lesser than many automobile accidents, it is also true that a defendant takes a plaintiff as he finds him. Therefore, based on the testimony and evidence presented in this case, we find that Mr. Mirandy did suffer some injuries as a result of the January 7, 2014 accident. Accordingly, we now award Mr. and Mrs. Mirandy an *in globo* damage award of $2,500.00.

REVERSED AND RENDERED