[J-235-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DEBORAH L. PRICE AND HARRY F. PRICE,	:	30 M.D. Appeal Dkt. 1998
	:	Appeal from the Order and Memorandum
Appellants,	:	Opinion of the Superior Court entered July
	:	30, 1997 at No. 557 HBG 1996, affirming
	:	the judgment entered August 20, 1996 in
v.	:	the Court of Common Pleas of Centre
	:	County, Civil Division, at No. 1994-1905.
	:	
ANTHONY B. GUY AND THOMAS R. STINE,	:	
	:	
	:	
Appellees.	:	ARGUED: November 17, 1998

CONCURRING OPINION

MADAME JUSTICE NEWMAN **DECIDED: JULY 23, 1999**

I concur and write separately to emphasize our standard and scope of review when reviewing a request for a new trial because of an error in a jury charge. In examining the instructions, we must determine "whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case." Stewart v. Motts, 539 Pa. 596, 605, 654 A.2d 535, 540 (1995) (citing Williams v. Philadelphia Transportation Company, 415 Pa. 370, 374, 203 A.2d 665, 668 (1964)). Further, we have long held that an appellate court will not grant a new trial on the ground that a jury instruction is inadequate unless the error:

> is such that the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error.

Voitasefski v. Pittsburgh Railways Co., 363 Pa. 220, 226, 69 A.2d 370, 373 (1949) (emphasis added). See also Von der Heide v. Commonwealth Department of Transportation, 563 Pa. 120, 718 A.2d 286 (1998) (error if jury "palpably" misled); Stewart v. Motts, supra, (same). In deciding whether the instruction of the trial court was inadequate, I believe that the proper inquiry is not whether the jury was "probably" misled, as the majority states. Instead, the focus of our review is whether the jury was "palpably" misled. In other words, is the conclusion that the jury was misinformed readily apparent, obvious, or evident from the record? Further, our previous jurisprudence has placed the burden of establishing prejudice upon the party requesting a new trial. See, e.g., Carter v. United States Steel Corporation, 529 Pa. 409, 420, 604 A.2d 1010, 1016, cert. denied, 506 U.S. 864 (1992) (burden to show prejudice in order to grant new trial on moving party). Thus, I believe that it is improper to conclude that reversible error occurs whenever the appellate court is unable to discern whether prejudice has occurred, as suggested by the Majority Opinion. Instead, prejudice to the moving party must be readily discernable and there must be a reasonable likelihood that it affected the outcome of the case.

With this standard in mind, I find that the instructions of the court directing the attention of the jury to the insurance options of the Plaintiff palpably misled the jury, and reasonably could have affected the verdict in this matter. I agree with the conclusion of the Majority that the inclusion of insurance issues into the case is as prejudicial to a plaintiff as it is to a defendant. Consequently, the general prohibition against the infusion of a defendant's insurance coverage into a case, as set forth for example in Trimble v. Merloe, 413 Pa. 408, 410, 197 A.2d 457, 458 (1964), is equally applicable to the direct reference of the plaintiff's insurance matters. Accordingly, the instruction of the trial court was reversible error.