**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| MARIE MILLER C/O CENTURY 21 ALLIANCE, INC., CENTURY 21 MARIE MILLER AND ASSOCIATES, MILLER ALLIANCE, INC., d/b/a CENTURY 21 ALLIANCE, INC., and MILLER, SHORE & GUERRA, INC., d/b/a CENTURY 21 & ASSOCIATES, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellants | : | |
| v. | : | |
| CONTINENTAL CASUALTY COMPANY and JONATHAN D. HERBST, ESQUIRE and MARGOLIS EDELSTEIN, | : | |
| Appellees | : | No. 2542 EDA 2005 |

Appeal from the Judgment entered on August 10, 2005
in the Court of Common Pleas of Philadelphia County,
Civil Division, No. 003592 February Term 2001

BEFORE: MUSMANNO, GANTMAN and PANELLA, JJ.

MEMORANDUM: **FILED OCTOBER 5, 2007**

Marie Miller C/O Century 21 Alliance, Inc., Century 21 Marie Miller and Associates, Miller Alliance, Inc., d/b/a Century 21 Alliance, Inc., and Miller, Shore & Guerra, Inc., d/b/a Century 21 & Associates (collectively "Miller") appeal from the Judgment entered in favor of Continental Casualty Company ("CNA") and Jonathan D. Herbst ("Herbst"), Esquire and his law firm, Margolis Edelstein.[1] We reverse the Orders granting judgment n.o.v.

[1] CNA, Herbst and Margolis Edelstein are referred to herein collectively as "Defendants."

This case involves claims brought by Miller against its liability insurer, CNA, and its insurance defense attorneys, Herbst and Margolis Edelstein, arising out of a commercial defamation claim brought against Miller.

The underlying defamation claim arose when one of Miller's employees issued a letter stating that a certain mortgage company was "going under." The mortgage company initiated suit against Miller and several other companies which had also made statements to the effect that the mortgage company was having financial difficulties. However, no other company suggested that the mortgage company was facing dire financial problems as did Miller's employee.

Upon being sued, Miller submitted the claim to CNA. CNA appointed Herbst and Margolis Edelstein to represent Miller in the defamation action. During the course of the defamation lawsuit, Miller's employee admitted that he had known that the statement in the letter at issue was false when he wrote and published the statement. Despite the difficulties faced in defending this suit, Herbst engaged in questionable conduct during the course of the litigation, including reading golf magazines during depositions, walking out of the most important deposition and thereby leaving Miller unrepresented, failing to file a motion for summary judgment with respect to the punitive damages claim, failing to retain an expert who could rebut the mortgage company's expert, and relying on the defense of the other defendants, whose conduct was not as culpable as that of Miller's employee.

Moreover, Herbst failed to adequately assess the settlement value of the defamation case and never offered more than $25,000 to settle the case prior to the trial. Due to the possible personal exposure beyond her one million dollar policy limit, Miller repeatedly requested that Herbst settle the case within the policy's limit. The other defendants settled their claims prior to trial for $100,000.00 and $200,000.00. However, Herbst did not inform Miller of this fact until the eve of trial.

During trial, the trial court denied certain motions filed by Miller. In fact, the trial court entered rulings that precluded Miller from introducing any evidence in defense of the defamation claim. Moreover, the trial court ruled that Miller could not present expert testimony because the accountant whom Herbst had retained was not qualified to rebut the plaintiff's expert who was an economist.

Throughout the trial, Miller continued to request that Herbst attempt to settle the case within the policy limit. However, Herbst only increased the settlement offer to $75,000.00. CNA's claim representative, who attended the trial, recognized the likelihood of Marie Miller's personal liability beyond her policy limit and entered a claims note suggesting that CNA reissue its reservation of rights letter with stronger language directing Miller to seek outside counsel. The jury eventually returned a verdict in the amount of $11 million for the plaintiff and against Miller.

Thereafter, Miller initiated the instant action against CNA, Herbst and Margolis Edelstein. Miller raised three claims: (1) common law breach of the insurance contract brought against CNA; (2) legal malpractice brought against Herbst and Margolis Edelstein; and (3) bad faith action pursuant to 42 Pa.C.S.A § 8371 brought against CNA. All three claims were tried together during a 42-day trial. Miller's breach of contract and legal malpractice claims were tried before a jury, with the trial court hearing the statutory bad faith claim.

On January 15, 2004, the jury found in favor of Miller on both claims and awarded damages in the amount of three million dollars. The jury apportioned the damages as follows: 70% to CNA and 30% to Herbst and Margolis Edelstein. The trial court later issued its findings and conclusions on the statutory bad faith claim, finding in favor of CNA.

Following the trial court's ruling, all parties filed post-trial motions. Miller's post-trial Motion challenged the trial court's finding that CNA did not act in bad faith when it failed to settle the defamation action within Miller's policy limit. CNA, Herbst and Margolis Edelstein also filed post-trial Motions, seeking a judgment n.o.v. On August 10, 2005, the trial court entered three Orders relative to the parties' post-trial Motions. The trial court denied Miller's post-trial Motion. However, the trial court granted the other two post-trial Motions and vacated the jury's verdict in favor of Miller. Miller filed this timely Notice of appeal on September 9, 2005. On the same day, Miller

also filed a Motion with the trial court seeking the recusal of the trial judge. No action was taken on that Motion.

On appeal, Miller raises the following issues:

> 1. Did the trial court err as a matter of law when – absent any objection from any party; contrary to the binding precedent of this Court; and after a 42-day jury trial throughout which [Miller] introduced overwhelming evidence to support the jury's verdict that CNA breached its contract with [Miller] – the [trial] court set aside the jury's verdict in favor of [Miller] on [its] breach of contract claim, ruled that the jury should not have heard a claim in assumpsit arising out of an insurance contract, and instead substituted the trial court's own view of the evidence based upon the trial judge's own finding of facts?
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> 2. In the face of overwhelming evidence of legal malpractice that plaintiffs introduced at the 42-day jury trial of this case, did the trial court err when it granted judgment notwithstanding the verdict on [Miller's] legal malpractice claim based on the trial court's unsupportable view that all three of [Miller's] expert witnesses were not competent to provide the opinions [that] they offered?
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> 3. Did the trial court err in ruling that [Miller's] proof of damages resulting from defendants' breach of contract and legal malpractice was impermissibly speculative, when this Court has endorsed as proper the very method of proving damages that [Miller] utilized?
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> 4. Did the Common Pleas Court Judge Allan L. Tereshko abuse his discretion in failing to recuse from presiding over the post-trial motions despite being actually biased against [Miller's] trial counsel?

> 5. Did the trial court err in granting nonsuit that dismissed [Miller's] personal claim of breach of contract?

Brief for Appellant at 3.

In its first issue, Miller challenges the trial court's Order that granted CNA's post-trial Motion and set aside the jury verdict as it related to Miller's claim of breach of contract against CNA. The trial court based its Order upon its determination that Miller was not entitled to a jury trial on its claim of breach of insurance contract arising out of CNA's bad faith conduct as there is only one cause of action for such a claim under 42 Pa.C.S.A. § 8371. Trial Court Opinion, 1/26/06, at 6. CNA did not raise this claim as a basis for its post-trial Motion. Motion for Post Trial Relief On Behalf Of Continental Casualty Company, Pursuant to Pa.R.Civ.P. 227.1, 4/4/05. Rather, the trial court raised this issue *sua sponte* on the theory that the issue concerns a question of subject matter jurisdiction. Trial Court Opinion, 1/26/06, at 2. Upon review, we disagree.

A court may, at any time, raise the issue of subject matter jurisdiction *sua sponte*. ***See LeFlar v. Gulf Creek Industrial Park # 2***, 515 A.2d 875, 879 (Pa. 1986) (holding that the issue of subject matter jurisdiction may be raised at any time by parties or *sua sponte* by appellate court); ***Daly v. School District of Darby Township***, 252 A.2d 638, 640 (Pa. 1969) (same). However, the trial court in this matter mischaracterized the concept of subject matter jurisdiction in an effort to reach an issue that was not

properly preserved or presented by CNA. In this case, the trial court improperly interchanged the concept of subject matter jurisdiction with the concept of the power to resolve the matter and reach a verdict.

> Jurisdiction and power are not interchangeable . . . . Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result.

***Riedel v. Human Relations Com'n of City of Reading***, 739 A.2d 121, 124 (Pa. 1999) (citations omitted); ***see also Commonwealth v. Mockaitis***, 834 A.2d 488, 495 (Pa. 2003) (explaining the distinction between a court's jurisdiction, which relates "solely to the competency of the particular court" to address a general class of controversies and a court's power to act which is "the ability of a decision-making body to order or effect a certain result").

The court of common pleas clearly had subject matter jurisdiction in this breach of contact action. This Court has previously explained:

> Article 5, [section] 5 of the Pennsylvania Constitution provides that the court of common pleas shall have "unlimited original jurisdiction in all cases except as may otherwise be provided by law." The constitutional provision was implemented by the General Assembly of Pennsylvania when [section] 931 of the "Judicial Code" was enacted. 42 Pa.C.S.A. § 931. The legislature provided that the courts of common pleas of the Commonwealth "shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings *heretofore cognizable by law or usage* in the courts

> of common pleas." [emphasis supplied.] The jurisdiction of the common pleas courts established therein is exclusive. There can be no doubt that the courts of common pleas have for years had the authority granted by law and usage to enforce contracts and fashion remedies for the breach thereof. . . . In other words, if the [plaintiffs'] complaint asserts rights, with corresponding duties and obligations on the defendants, the courts of common pleas have jurisdiction to hear and decide controversies concerning those rights, duties and obligations unless such jurisdiction has been specifically removed by a statute or rule of law.

***Martino v. Transport Workers Union of Philadelphia Local 234***, 447 A.2d 292, 299 (Pa. Super. 1982).

In this case, the trial court reasoned that the trial judge had "exclusive subject matter jurisdiction to decide the issue of bad faith and that this was the basis for its Judgment n.o.v., thereby removing the jury's contradictory verdict on this issue." Trial Court Opinion, 1/26/06, at 2. The trial court's reasoning in this matter is flawed. Subject matter jurisdiction does not involve issues concerning who, within the court of common pleas, has the ability to order or effect a certain result. Rather, subject matter jurisdiction is conferred upon the court of common pleas as a whole. Subject matter jurisdiction is the authority by which the court, as a whole, may entertain certain types of cases. The question of whether the jury had the power to sit as a factfinder and render a verdict does not implicate the subject matter jurisdiction of the court of common pleas and would not divest the court of common pleas of subject matter jurisdiction over this type of case. Because

this issue did not invoke the trial court's subject matter jurisdiction, the trial court could not reach this issue *sua sponte*. It was incumbent upon CNA to assert a timely and specific objection in order to preserve this issue for appellate review.

"In order to preserve an issue for review, a party must make a timely and specific objection." ***Commonwealth v. Duffy***, 832 A.2d 1132, 1136 (Pa. Super. 2003) (internal citations omitted). Pennsylvania Rule of Appellate Procedure 302 provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). An objection is timely when the trial court is given "the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal." ***Gustine Uniontown Assocs., Ltd. v. Anthony Crane Rental, Inc.***, 892 A.2d 830, 835 (Pa. Super. 2006).

In this case, CNA failed to assert an objection to Miller's request for a jury trial on her breach of contract claim. Despite this fact, CNA asserts that the issue is not waived. According to CNA, Pennsylvania Rule of Civil Procedure 227.1(b), governing post-trial motions, has been relaxed. Therefore, CNA reasons that an issue is preserved for appellate review where the trial court raised the issue on its own accord. CNA misstates the law.

As we have discussed, the trial court lacked authority to raise this issue *sua sponte*. Accordingly, the fact that the trial court addressed this

issue does not, in and of itself, preserve the issue for appellate review. Moreover, the cases cited by CNA in support of its proposition that Rule 227.1(b) has been relaxed are inapplicable to the present matter. The cases cited by CNA generally involve a situation wherein a party has attempted to raise an issue in its post-trial motion, but failed to do so properly. In this case, CNA did not raise the issue defectively, but failed to raise it at all. Accordingly, we conclude that the issue of whether the jury had the authority to act as the fact finder with respect to the breach of insurance contract claim was not preserved for appellate review.

For the foregoing reasons, we conclude that the trial court erred when it *sua sponte* raised the issue of whether Miller's breach of contract claim was properly tried before a jury. Accordingly, we reverse the trial court's Order entering judgment n.o.v. in favor of CNA on the breach of contract claim, and reinstate the jury's verdict.

In its second issue, Miller challenges the trial court's Order granting Herbst and Margolis Edelstein's Motion for judgment n.o.v. on Miller's legal malpractice claim. In granting Herbst and Margolis Edelstein's Motion for judgment n.o.v., the trial court concluded that it had improperly permitted each of Miller's three experts to testify and, consequently, struck their testimony.

Our standard of review of the grant of judgment n.o.v. is as follows:

> In reviewing a trial court's decision whether or not to grant judgment in favor of one of the parties,

> we must consider the evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner. Our standard[s] of review when considering motions for a directed verdict and judgment notwithstanding the verdict are identical. We will reverse a trial court's grant or denial of a judgment notwithstanding the verdict only when we find an abuse of discretion or an error of law that controlled the outcome of the case. Further, the standard of review for an appellate court is the same as that for a trial court.
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> There are two bases upon which a judgment N.O.V. can be entered; one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that, even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in his favor. Whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

***Janis v. AMP, Inc.***, 856 A.2d 140, 143-44 (Pa. Super. 2004) (quoting ***Capital Care Corp. v. Hunt***, 847 A.2d 75, 81-82 (Pa. Super. 2004)). "It is further well-settled that a judge should not reach his decision on how he would have voted if a member of the jury, but on the facts as they present themselves through the sieve of the jury's deliberations." ***Jones v. Constantino***, 631 A.2d 1289, 1293 (Pa. Super. 1993) (citations omitted). We note that the entry of judgment n.o.v. is a "drastic remedy;" "any doubts must be resolved in favor of the verdict winner." ***Education Resources Institute, Inc. v. Cole***, 827 A.2d 493, 497 (Pa. Super. 2003).

Miller contends that the entry of judgment n.o.v. in favor of Herbst and Margolis Edelstein was improper. Miller argues that, contrary to the trial court's post-trial conclusions, Miller's experts were competent to testify and their testimony was sufficient to prove that Herbst committed malpractice.[2]

In granting the judgment n.o.v., the trial court concluded, for the first time, that Miller's liability experts were not competent to provide expert testimony. At trial, Miller presented three liability experts: James Schwartzman, Esquire, ("Schwartzman") a lawyer who participated in the drafting of the Rules of Professional Conduct; Stephen Grose, Esquire, ("Grose") a lawyer with an extensive background of serving as trial counsel in insurance defense arrangements; and Judge Arlin M. Adams, ("Judge Adams") a retired judge who served on the United States Court of Appeals

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[2] Miller also asserts that the post-trial Motion filed by Herbst and Margolis Edelstein was untimely filed. Herbst and Margolis Edelstein filed their post-trial Motion following the entry of the trial court's findings and conclusions concerning Miller's statutory bad faith claim. Miller contends that any post-trial motions filed pursuant to the jury's verdict on the malpractice claim, were required to be filed within 10 days of the jury verdict. Accordingly, Miller argues that Herbst and Margolis Edelstein's post-trial Motion is untimely. We need not address the merits of this issue because the trial court may nonetheless choose to consider an untimely motion. ***See Behar v. Frazier***, 724 A.2d 943, 945 (Pa. Super. 1999) (holding that the trial court has the discretion to entertain an untimely post-trial motion). Miller also asserts that Herbst and Margolis Edelstein failed to preserve the basis upon which the trial court granted their request for judgment n.o.v. by failing to raise the issues in their post-trial Motion. Upon review of Herbst and Margolis Edelstein's post-trial Motion, we conclude that the issues are preserved within the Motion. ***See*** Motion of Defendants, Jonathan D. Herbst, Esquire and Margolis Edelstein, For Post-Trial Relief Pursuant To Pennsylvania Rule of Civil Procedure 227.1, 4/4/05.

for the Third Circuit and who has also worked extensively in the field of dispute mediation. The trial court initially found each of these individuals to be qualified to render expert testimony. However, upon consideration of Herbst and Margolis Edelstein's post-trial Motion, the trial court reconsidered its earlier ruling. We conclude that the trial court erred in doing so.

The admission or exclusion of testimony from an expert witness is within the sound discretion of the trial court. ***Turney Media Fuel, Inc. v. Toll Bros., Inc.,*** 725 A.2d 836 (Pa. Super. 1999). This Court may only reverse the trial court's decision on such an issue "upon a showing that the trial court clearly abused its discretion or committed an error of law." ***Id.*** at 839. "To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." ***Id.***

To be considered qualified to testify in a given field, a witness need only possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience. ***Flanagan v. Labe***, 690 A.2d 183, 185 (Pa. 1997). Therefore, the test to be applied is whether the witness has a reasonable pretension to specialized knowledge on the subject matter in question. ***Id.*** The standard by which a witness may be qualified as an expert is a liberal one. ***Joyce v. Boulevard Physical Therapy and Rehabilitation Center, P.C.***, 694 A.2d 648 (Pa. Super. 1997). A witness may be qualified to render an expert opinion based upon training and

experience; formal education on the subject matter is not required. ***Miller v. Brass Rail Tavern, Inc.***, 664 A.2d 525 (Pa. 1995).

Upon our review of the record, we conclude that each of the three liability experts proffered by Miller were competent to render expert opinions in this matter and that the trial court clearly abused its discretion and committed an error of law when it reversed its earlier ruling to the contrary. ***See*** N.T., 12/10/03 a.m., at 5-29 (*voir dire* of Schwartzman); N.T., 12/10/03 p.m., at 67-90 (*voir dire* of Grose); N.T., 12/11/03 p.m., at 5-18 (*voir dire* of Judge Adams).[3] Accordingly, we reverse the trial court's August 10, 2005 Order granting Herbst and Margolis Edelstein's post-trial Motion on this basis.

Miller next argues that the trial court erred when it concluded that the evidence was not sufficient to support the verdict. In order to prevail in a legal malpractice action, a plaintiff-client must demonstrate the following: (1) employment of the defendant-attorney or other basis of duty owed to the plaintiff-client by the defendant-attorney; (2) the failure of the defendant-attorney to exercise ordinary skill and knowledge in the exercise of that duty; (3) such failure was the proximate cause of actual damages to the plaintiff-client. ***See Curran v. Stradley, Ronon, Stevens and Young***, 521 A.2d 451, 457 (Pa. Super. 1987).

[3] Furthermore, we note that Herbst and Margolis Edelstein did not object to the fact that the Judge Adams was qualified to render an expert opinion in this matter. N.T., 12/11/03 p.m., at 17.

The trial court found that Miller failed to establish that Herbst's conduct fell below the applicable standard of care and that his conduct was causally related to the publishing of the verdict. Trial Court Opinion, 1/26/06, at 40, 42, 44, 47-48. In reaching its conclusion, the trial court analyzed the testimony of each of Miller's three liability experts and concluded that their opinions were based upon speculation and conjecture. Upon our review of the record, it is clear that the evidence does not support the trial court's conclusions.

The trial court improperly determined that Schwartzman's testimony was legally insufficient because Schwartzman did not state "that Mr. Herbst's conduct fell below the standard of care for practitioners in the area of insurance defense attorneys [sic]." Trial Court Opinion, 1/26/06, at 37. While it is true that Schwartzman did not specifically testify concerning the standard of care for "insurance defense attorneys," Schwartzman provided expert testimony concerning the standards to which all attorneys are subjected. Contrary to the trial court's suggestion, insurance defense attorneys are not relieved of those minimum standards to which all attorneys are held, nor are they held to a separate and unique standard.

The trial court also found that Schwartzman did not "state[] that even if Mr. Herbst's conduct was negligent [sic], [it] was [] causally related to the publishing of the verdict and the alleged damages that ensued." ***Id***. at 37. Upon review of the record, we conclude that Schwartzman did render his

opinion regarding the causal connection of Herbst's conduct and the harm suffered by Miller. ***See*** N.T., 12/10/03 a.m., at 103-07.[4]

With respect to Grose, despite the fact that the trial court initially found him to be competent to render an expert opinion in the areas of professional conduct and the standard of care of an insurance defense attorney, the trial court subsequently concluded that Grose was incompetent due to the fact that he had not practiced in the area of insurance defense for ten years. Trial Court Opinion, 1/26/06, at 41.

Contrary to the trial court's assertion, Grose testified that he had continued to practice in the insurance defense area, on a limited basis, up through the time of trial. N.T., 12/10/03 p.m., at 70. Moreover, even if he no longer practiced in the insurance defense area, that would not render him incompetent to provide expert testimony. A witness need only possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience to be an expert witness. ***Flanagan***, 690 A.2d at 185. Grose's testimony established that he clearly possessed more expertise than is within the ordinary range of training, knowledge, intelligence, or experience, even if he was not actively practicing in the area of insurance defense at the time of trial. Because Grose's testimony

[4] We further note that counsel for Herbst and Margolis Edelstein has not directed this Court to the place in the record where trial counsel asserted any objections to Schwartzman's testimony on the basis that his expert opinions were speculative or lacked proper foundation.

established that he had a reasonable pretension to specialized knowledge on the subject matter in question, the trial court improperly determined that he was not competent to testify. ***Id.***

The trial court also concluded that Grose's testimony failed to establish that Herbst's conduct was below the requisite standard of care and that his conduct was the proximate cause of Miller's harm. Upon review of Grose's testimony, it is clear that Grose did identify the standard of ordinary care with which Herbst was required to have acted, explained how Herbst failed to act accordingly, and opined regarding how his conduct caused Miller's harm. ***See*** N.T., 12/10/03 p.m., at 94-118. Accordingly, the trial court erred when it concluded that Grose was not competent to render expert testimony and that his testimony was not sufficient.

Similarly, we conclude that the trial court erred when it found that Judge Adams's expert testimony was not legally sufficient. The record evidence demonstrates that Judge Adams testified concerning various duties that Herbst owed to Miller and that Herbst had violated those duties. N.T., 12/11/03 p.m., at 18-38. The fact that Judge Adams did not provide causation testimony did not render his expert testimony incompetent. Judge Adams was one of three liability experts. As we have previously discussed, the two other experts provided sufficient testimony concerning Miller's theory of causation.

Based upon the foregoing, we conclude that the trial court erred when it found that Miller's three liability experts were incompetent and rendered inadequate expert testimony. Accordingly, the trial court erred in granting judgment n.o.v. in favor of Herbst and Margolis Edelstein on this basis.

In its third issue, Miller argues that the trial court erred when it granted CNA, Herbst, and Margolis Edelstein judgment n.o.v. with respect to damages. In doing so, the trial court held that Miller's proof of damages resulting from each defendant's breach of insurance contract and legal malpractice was impermissibly speculative. The trial court reasoned that Miller's damages expert, Dr. Jerome M. Staller ("Staller"), opined regarding a theory of liability based primarily upon the statements of Marie Miller and her daughter, Kathy Opperman. In reaching this conclusion, the trial court declined to accept Staller's testimony concerning the comparisons between the earnings of the Blue Bell and Audubon offices of Miller's company. We conclude that the trial court erred when it granted each of the Defendants' Motions for a judgment n.o.v. on the basis of damages.

> As with all determinations of damages, the question of whether and what amount of lost profits are recoverable is for the jury, and a reviewing court must accord great deference to the jury's determination. Although the plaintiff bears the burden of proving damages by a preponderance of the evidence, [the plaintiff] is required only to provide the jury with a reasonable amount of information so as to enable the jury fairly to estimate damages without engaging in speculation. Damages need not be proved with mathematical certainty.

***Bolus v. United Penn Bank***, 525 A.2d 1215, 1225-26 (Pa. Super. 1987) (citations and quotations omitted).

In this case, Miller's damages theory is based upon lost profits. The Pennsylvania Supreme Court has long recognized the difficulty in proving this type of damages.

> In ***Massachusetts Bonding & Insur. Co. v. Johnston & Harder, Inc.***, 343 Pa. 270, 22 A.2d 709 (1941), the Court stated that the following types of evidence are permissible to establish such damages:
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> > "(1) ... (2) evidence of past profits in an established business furnish a reasonable basis for estimating future profits. (3) *Profits made by others or by a similar contract, where the facts were not greatly different may also afford a reasonable inference of the plaintiff's loss.* (4) The evidence of experts if based on anything more than individual opinion or conjecture has also been admitted."
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> ***Id***. at 279-80, 22 A.2d at 714 (quoting Williston on Contracts). The Court concluded that the allowance of these types of proof demonstrates the "difficulty" or even "impossibility" of more certain proof of future lost profits. Thus, the law requires only that the "evidence shall with a fair degree of probability establish a basis for the assessment of damages." ***Id***. at 280, 22 A.2d at 714.

***Bolus***, 525 A.2d at 1226 (emphasis added).

In this case, Staller properly employed the third method of proving lost profits as established by the Pennsylvania Supreme Court in ***Massachusetts Bonding***. Staller testified about the similarities between the real estate

offices, Blue Bell and Audubon, owned by Miller. N.T., 12/17/03 a.m., at 153-56. In reaching the basis for the differing performance between the two offices, Staller noted that only the Blue Bell office had been linked with the $11.4 million defamation verdict. ***Id***. at 49-55, 148-49. Accordingly, Staller properly applied the damages analysis outlined in ***Massachusetts Bonding***. When the trial court discounted this analysis, it improperly reached its decision based upon how it would have decided if it were on the jury.

The trial court also repeatedly emphasized that Staller relied heavily upon statements made by Marie Miller and Opperman. This fact does not negate the theory of damages employed by Staller. Rather, this fact would be relevant to the weight afforded by the jury when considering Staller's credibility. The Defendants aggressively cross-examined Staller and brought to light certain facts for the jury to consider when it assessed Staller's credibility. It was within the jury's providence to weigh these facts. ***Wilkins v. Marsico***, 903 A.2d 1281, 1287 (Pa. Super. 2006) (holding that it is the responsibility of the jury to resolve any inconsistencies and to assess the credibility of the witnesses and evidence). Because we conclude that Miller presented sufficient evidence of damages to enable the issue to be determined by the jury, we conclude that the trial court erred in granting CNA, Herbst and Margolis Edelstein judgment n.o.v. and reverse the trial court's August 10, 2005 Order on this basis.

In its fourth issue, Miller argues that the trial judge erred in failing to recuse himself from this case. Miller asserts that the trial judge issued its August 10, 2005 Orders in retaliation based upon the fact that Miller's trial counsel filed a motion for recusal against the judge in an unrelated case in which the judge's wife participated in a lawsuit that the trial judge heard.

As an appellate tribunal, we are bound to resolve only those issues properly preserved for our review. In this matter, Miller's recusal Motion is not properly before us.

> As a general rule, [t]he proper practice on a plea of prejudice is to address an application by petition to the judge before whom the proceedings are being tried. He may determine the question in the first instance, and ordinarily his disposition of it will not be disturbed unless there is an abuse of discretion.

***Commonwealth v. Whitmore***, 912 A.2d 827, 833 (Pa. 2006) (citation and quotations omitted). A request for a judicial recusal always requires a timely, specific objection. ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116, 1126 n.7 (Pa. 2000).

In this case, Miller filed the motion for recusal on the 30th day following the entry of judgment. Miller also filed its Notice of appeal on the same day. The trial court did not respond to the recusal Motion because it was divested of jurisdiction pursuant to Pennsylvania Rule of Appellate Procedure 1701(a). In its appellate brief, Miller argues that it is necessary for this Court to address this issue and direct that another judge be assigned

to this case in order to consider whether to award additional statutory remedies provided for in section 8371 of the bad faith statute. Brief for Appellant at 67.

We conclude that this matter is premature and not properly before this Court because Miller did not raise its recusal Motion in a timely manner in the court below, allowing the trial judge to address the matter before he was divested of jurisdiction. Miller now seeks to have this Court proactively recuse the trial court. ***See Whitmore***, 912 A.2d at 834 (holding that the *sua sponte* removal of the trial court judge on remand for sentencing exceeded the authority of the Superior Court). We note that our decision on this issue does not preclude Miller from seeking recusal in the trial court should the need arise.[5]

In its final claim of error, Miller argues that the trial court erred in granting a nonsuit that dismissed Marie Miller's personal claim of breach of contract. Pursuant to her individual claim of breach of an insurance contract, Marie Miller sought damages for emotional distress and harm to her reputation.

Marie Miller has failed to provide any citation to the record regarding the trial court's grant of a nonsuit relative to her individual damages claim,

[5] Miller suggests in its recusal argument that it may be entitled to remand and additional remedies on its statutory bad faith claim. ***See*** Brief for Appellant at 67. However, we note that Miller has not raised this claim on appeal. ***See*** Brief for Appellant at 3.

as required by Pennsylvania Rule of Appellate Procedure 2119(c). When defects in a brief impede our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived. Pa.R.A.P. 2101.

In the instant case, Marie Miller's failure to provide pertinent citations to the record hampers our review and results in waiver of this claim. The trial in this case lasted 42 days and is contained within 9 three-inch binders. Moreover, the trial court's Opinion does not address this issue, but rather indicates that this issue may not have been properly preserved. Trial Court Opinion, 1/26/06, at 68-69 n.9. Without the appropriate citation to the record, we are unable to determine the trial court's basis for the grant of nonsuit or ensure that this issue has been properly preserved. Accordingly, Miller has waived this issue.

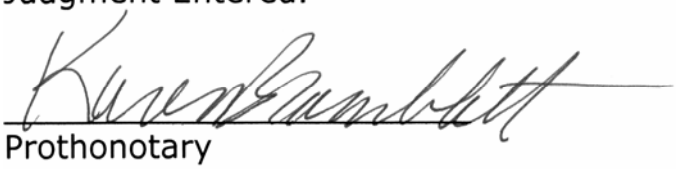
Based upon the foregoing, we reverse the trial court's Order of August 10, 2005 granting judgment n.o.v. in favor of CNA, as well as the Order of August 10, 2005 granting judgment n.o.v. in favor of Herbst and Margolis Edelstein.[6]

Reverse Order entering judgment n.o.v. in favor of CNA on Miller's breach of insurance contract claim; reverse Order entering judgment n.o.v. in favor of Herbst and Margolis Edelstein on Miller's legal malpractice claim;

[6] We note that the trial court's third Order entered on August 10, 2005, which denied Miller's post-trial Motion to the trial court's Findings and Order of March 23, 2005, was not at issue in this appeal.

remand for reinstatement of the jury's verdict. Judgment shall thereafter be entered by the prothonotary in accordance with the jury's verdict.

Judgment Entered.



Prothonotary

Date:_____