

Family, entertainment attorney marks 20 years of 'Due Process'

When he graduated law school, Birmingham attorney Henry Baskin hung out a shingle in downtown Detroit, hoping to earn fame and fortune in the home of Motown.



HENRY BASKIN: Prides himself on sharing legal expertise with clients, public

But the luxe life proved to be more elusive than he'd thought. So, to make ends meet in those lean, early years, Baskin taught high school chemistry part-time and clerked for a federal judge.

"The rewards are not as great initially, but if you are a solo practitioner, you are free to do what you want, in whatever area of law you would like to practice," Baskin recalled. "It's quite a bit different than what people ordinarily do."

As it turned out, it was quite a bit different and far from ordinary indeed. Through a set of highly unusual circumstances, Baskin met Marvin Gaye, Smokey Robinson and The Temptations. Instantly, the entertainment law bug bit.

"I spent 10 years of my life in recording studios listening to my people," Baskin told *Lawyers Weekly*. "You have to be there to know what you are talking about. You have to be in the radio stations and in the television stations — one side or the other of the camera — to understand the industry. It's so niche-y."

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Little-known rule yields \$47K in offer of judgment sanctions

Verdicts & Settlements Plus

Can a PIP claimant who won a \$35,000 verdict recover \$47,000 in sanctions, even though she never made a counteroffer to her insurance carrier's \$15,000 offer of judgment?

An order by an Oakland County Circuit judge indicates the answer is "yes."

Bingham Farms attorney David L. Moffitt, who represents the plaintiff, said the key to winning such a ruling was knowing the ins and outs of the 42-day rule of MCR 2.405, which exposes parties to liability for the other side's attorney fees and costs if their offer of judgment — which is made within 42 days of trial — is rejected and fails to surpass the verdict.

"This whole MCR 2.405 thing is a trap for the unwary," he declared. "It's not unusual to see offer of judgment sanctions, but when I mentioned the 42-day rule to my colleagues, they all looked at me blankly."

Moffitt elaborated on what the rule means, explaining that "if you make an offer of judgment within 42 days of trial and the

other side doesn't respond with a counteroffer, then you — the offeror — are subject to sanctions if you don't beat the verdict."

In this case, that meant the verdict needed to be less than \$15,000.

would be in the clear, he noted.

Moffitt pointed out the only other prerequisite for invoking sanctions under the 42-day rule was that the case evaluation award be non-unanimous, a requirement that applies to all offer



DAVID L. MOFFITT: Practitioners need to be on guard for the 42-day rule of MCR 2.405

However, keeping everything else the same, if the offer of judgment was made more than 42 days before trial, then the offeror

of judgment sanctions under the court rule.

Moreover, the plaintiff's attorney

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Offer of judgment sanctions surpass jury verdict

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ney explained it was this non-unanimity factor that distinguished offer of judgment sanctions from regular case evaluation sanctions under MCR 2.403.

"If a case evaluation is non-unanimous, it doesn't provide the sanction trigger that a unanimous evaluation would," he stated. "There's no sanction trigger against either side if it's non-unanimous."

According to Moffitt, the important points for both plaintiffs' and defense attorneys to remember about sanctions under the 42-day rule are:

- there must have been a non-unanimous case evaluation award;
- the offer of judgment must have been made during the 42 days before trial started;
- the offeree must avoid making a counteroffer; and
- the verdict must "exceed" the amount offered.

Counsel for the defense could not be reached for comment.

A Verdicts & Settlements Report of the case, *Durham v. Bristol West Insurance Company*, can be found on page 5 of this issue, and on our website, www.milawyersweekly.com.

Offer of judgment

Before being involved in a car accident in September 2003, plaintiff Darlene Durham had suffered for years from lower back pain and had even undergone a lumbar laminectomy.

After the accident, she experienced additional lower back pain and, ultimately, underwent a cervical laminectomy.

Because her insurance carrier, defendant Bristol West Insurance Company, refused to pay personal injury protection (PIP) benefits — claiming that all post-accident treatment related to her pre-existing back injuries — the plaintiff sued for reimbursement of her treatment costs.

After the case was evaluated at \$15,000 in a non-unanimous award, the defendant

42-day rule of MCR 2.405

If an offer is rejected and the verdict is more favorable to the offeree than the ... offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action, plus "a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment" so long as the offeree has not made a counteroffer and the offer of judgment was made within 42 days of trial.

made an offer of judgment in the same amount on Jan. 27, 2005.

However, by filing no counteroffer or written rejection by Feb. 17, 2005, the plaintiff effectively rejected the defendant's offer.

As such, the case proceeded to trial in early March 2005 and concluded on March 14, 2005, with the jury returning a verdict for the plaintiff in the amount of \$35,090, excluding attorney fees and costs.

Pursuant to the 42-day rule of MCR 2.405, the plaintiff successfully moved for offer of judgment sanctions against the defendant, seeking attorney fees and costs incurred from the date the offer of judgment was rejected through the present.

At an evidentiary hearing to determine the amount, the plaintiff's evidence established the defendant owed \$46,974 in sanctions — \$33,950 in attorney fees and \$13,024 in expert witness-related costs.

The trial court concluded the plaintiff had "submitted ample evidence in support of the claim for attorney fees" and "was entitled to recover the fees sought."

Nevertheless, the parties resolved the matter on June 2, 2005 when the plaintiff, in return for \$75,000, released the defendant from all PIP claims arising from her car accident in September 2003.

Responding to offer

According to subsection (D)(2) of MCR 2.405, one of the critical ingredients for an offeree pursuing sanctions under the 42-day rule is the offeree having made no counteroffer to the offer of judgment.

Moffitt said refraining from making a counteroffer was the cornerstone of his strategy.

"I had realized that [the offer of judgment] had been made within the 42 days," he recounted. "Therefore, it was unnecessary to respond to have the advantages of the rule cut in our favor."

Moreover, he suggested the common-sense rule of thumb for offerees in a 42-day rule situation bears repeating.

"If someone makes an offer of judgment that you feel effectively sets a problematic hurdle for them, one does not reply if you're within the 42 days," he urged.

Additionally, Moffitt explained that even if he had wanted to make a counteroffer, the machinations for doing so highlight precisely why offers of judgment and counteroffers are so problematic.

"They're a useful weapon in a litigator's armory, but they require careful analysis and close calculation to avoid backfiring," he observed. "It's difficult to calculate your post-verdict position and determine your offer of judgment strategy accordingly."

Fees and costs

Moffitt noted the primary roadblock the defense used to challenge his sanctions motion was to argue that the plaintiff intended all along to proceed to trial and, thus, the fees and costs requested would have been incurred regardless of the plaintiff's rejection of the offer of judgment.

The plaintiff's lawyer recalled the defense relied on the language of MCR 2.405 itself, which provided that sanc-

tions included both costs and "a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment."

In response, Moffitt presented evidence to the court detailing not only the services that he and various experts had provided the plaintiff — subsequent to the plaintiff's rejection of the offer of judgment on Feb. 17, 2005 — but also the fees and costs associated with the same.

As for what was necessary and what wasn't, he explained that if the defendant's offer had "more realistically reflected the compiled benefits and the likely costs, trial might not have been necessary."

Making the offer

Looking at things from the other side, Moffitt — whose client was the offeree in this case — said there are many factors to consider before arriving at an amount for the offer of judgment.

He advised that, although some people base offer of judgment numbers on the amount of first-party benefits owed, practitioners should take the longer view because first-party benefits is only one consideration.

"One has to also take into account what the opposing side's trial costs will be because, if a verdict is entered, that could substantially increase the number," Moffitt cautioned.

Moreover, he added that in PIP cases like this, there are a slew of figures to factor in.

For example, Moffitt ticked off the amount of benefits due, medical bills, mileage, prescription costs, interest and the other side's costs.

He stressed that, not only must the offeror think about the other side's attorney fees under MCR 2.405, but also statutory attorney fees under the No-Fault Act — which were not at issue in this case.

"If any benefits are found to be overdue, interest is assessed and that triggers no-fault attorney fees," Moffitt stated.

— BY TODD C. BERG

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