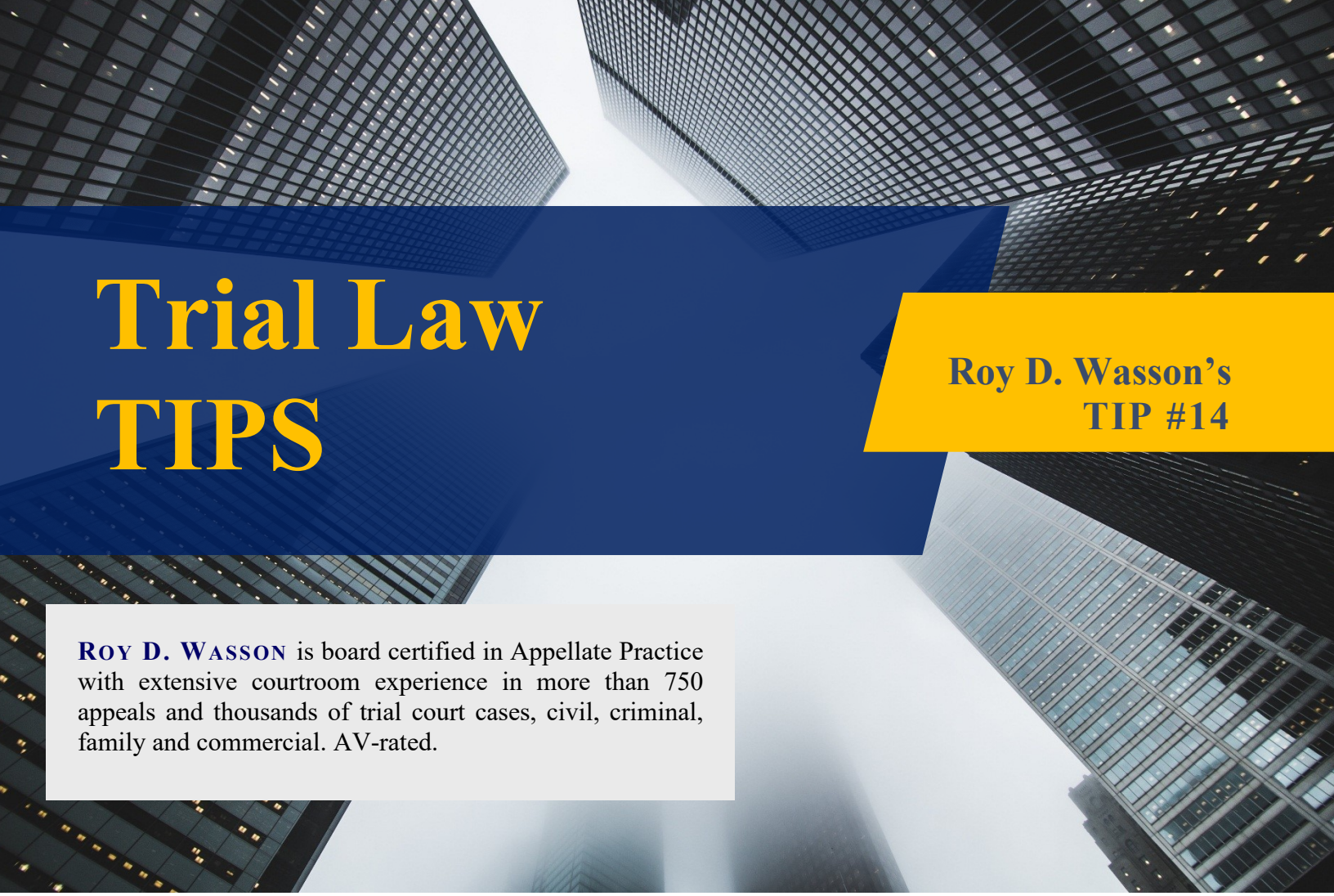

Trial Law TIPS

Roy D. Wasson's TIP #14

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Motions "to Strike" or "for Partial Summary Judgment"? –A Rose is not a Rose

Introduction

Titles of motions don't mean much, do they? When is the last time you spent more than five seconds of your valuable time deciding what to call a routine motion? Okay, then more than 5 minutes? Most of us look so little at the title of a legal document that we overlook errors which can be humorous (if made by the other side) or embarrasing (if made by us). I still laugh about the motion I received from a guy who must have wanted the judge to "needle" my client, because he filed a Motion for In Camera "In**je**ction" rather than In**sp**ection.

We learn from day one in practice that the courts should consider a motion on its merits, even if the title is not altogether correct. But there are times when a rose by any other name does

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not smell as sweet. One such time is in deciding what to call a motion directed at the defendant's affirmative defenses.

Choice of Nomenclature on Motion Is Yours to Make

The choice of the title of a motion directed to insufficient affirmative defenses is up to you, as the courts will entertain the motion with either title. For nearly fifty years under Florida law, people have been filing motions "to strike" affirmative defenses, and most of you probably learned to do it that way. *E.g., Vandercar v. David*, 96 So. 2d 227 (Fla. 3d DCA 1957). Then, a generation later, folks started calling such motions ones "for partial summary judgment" on the affirmative defenses. *E.g. Couch Constr. Co. v. Florida Dept. of Transp.*, 537 So. 2d 631 (Fla. 1st DCA 1989). But either title will get the motion heard, and an order granting or denying either sort of motion is equally ***non***-appealable.

The trend for the last ten or fifteen years has been the "belt and suspenders" approach: to use ***both*** titles for such motions, calling them "motion to strike or for partial summary judgment," which seems fine with all the courts. *E.g., Valk v. J.E.M. Distributors*, 700 So. 2d 416 (Fla. 2d DCA 1997); *Cohen v. DeYoung*, 655 So. 2d 1265 (Fla. 5th DCA 1995). (I personally have not filed such a motion with both titles in almost an entire week, which was directed to a bogus *Fabre* defense).

"Why?" you may be asking yourself, "does Roy #2 give a [bleep] what I call my motion, so long as the judge will hear it and I get the right ruling?" Fair question, mates. But I have an answer (and if I didn't, I would make one up).

Don't Screw Up Your Choice and Make the "Wrong" One

There are two reasons why you should entitle a motion directed to an insufficient (or unprovable) affirmative defense a Motion for Partial Summary Judgment. One is to allow you to get and keep a quicker trial date. The other is to take away some arguments for the defense to make on appeal after that trial nets you and your client a huge verdict.

The choice you make for the title of your motion may well make the difference in getting your case set for trial quickly,

because a case with a motion to strike affirmative defenses which is pending is not "at issue" and ready to be set for trial. In *Fallschase Dev. Corp. v. Sheard*, 655 So. 2d 214, 215 (Fla. 1st DCA 1995)("The first notice for trial was filed while a motion previously filed by appellant to strike affirmative defenses remained outstanding and unruled on. Accordingly, the action was not at issue, and the notice for trial was a nullity."). You would hate like hell for your trial date to be delayed or lost by a pending motion to strike, and hate it worse if you tried the case when it was not "at issue" and had the trial declared null and void on appeal by the DA.

Even if your trial was not yet set when you filed your Motion to Strike Affirmative Defenses, by using a different title you can take away some other appellate arguments which the defense might try to use later on. One of those is that there is a twenty-day time deadline for filing a Motion to Strike Affirmative Defenses under the civil rules, but no such time deadline applicable to a partial summary judgment motion. See Fla. R. Civ. P. 1.140(b)(last sentence).

I know what you're thinking: "I'll make my motion to strike under Rule 1.140(f) instead of (b)," because subsection (f) says the motion can be made "at any time." Wrong, Traverosarus. A motion to strike under subdivision (f) can only be made where the offending matter is "redundant, immaterial, impertinent, or scandalous." The courts have held that the mere legal insufficiency of an affirmative defense does not support its being stricken under Rule 1.140(f). *Bay Colony Office Bldg. V. Wachovia Mortgage Co.*, 342 So. 2d 1005 (Fla. 4th DCA 1977).

Conclusion

The purpose of this TIP is not to advise you which sort of motion to file. It is instead just a suggestion that you think for a minute about the title and the potential implications of one or the other.

Keep Tryin!

Roy

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