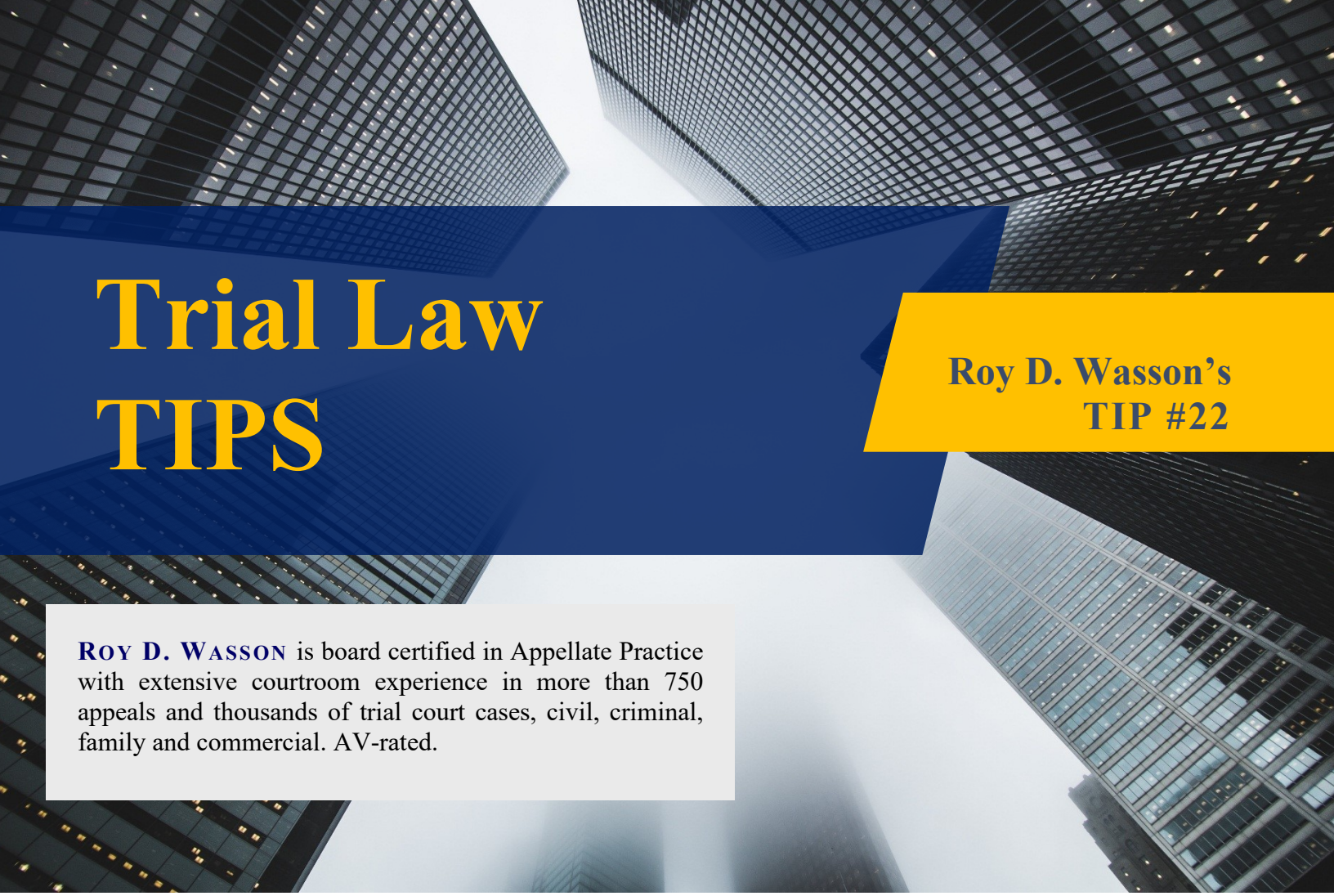

# Trial Law TIPS

**Roy D. Wasson's TIP #22**

**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.

## Enforcement of Settlements

### Introduction

More and more often these days, defense attorneys are settling cases with trial lawyers, and then making-up all kinds of excuses to delay remitting payment, or are attempting to interject new material terms into the settlement (such as confidentiality provisions) after the amount of payment has been agreed to. This article provides a framework for moving to enforce the settlement you have reached without succumbing to unexpected conditions.

### Public Policy of Florida Regarding Enforcement of Settlements

There is a strong public policy in Florida which recognizes the value of negotiated settlements. The courts of Florida have long recognized the public policy in favor of settling cases will be furthered by enforcement of such settlements upon appropriate motion. "Settlements are highly favored as a means to conserve

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judicial resources, and will be enforced when it is possible to do so . . . ." *Long Term Management, Inc. v. University Nursing Care Center, Inc.,* 702 So. 2d 669, 673 (Fla. 1st DCA 1997).

## No Requirement of a Written Settlement Agreement

There is no requirement that most settlement agreements be in writing. "An enforceable settlement agreement may be reached orally. All that is required is that the terms be clear, definite, and capable of proof." 9 Fla. Jur. 2d *Compromise Accord, and Release* § 22 (1997). However, it is safer to obtain a confirming letter from the defense attorney that it is simply to write a letter yourself confirming the terms of the settlement.

In *Roggio-Wilgus v. Marlin* 699 So. 2d 1050 (Fla. 4th DCA 1997), the court held that there was no enforceable settlement when a letter from one attorney to the other purported to confirm their telephone conversation about settling the case but which stated that the other attorney should call if the letter is inaccurate, and the other attorney ***did*** call to correct a part of the letter which was inaccurate.

Note that where there is a written settlement agreement prepared, normal rules of contract apply to require it to be signed by both parties. *See Lickert v. Pike*, 736 So. 2d 724 (Fla. 2d DCA 1999).

Further, if there is a confirming letter which indicates that there remain further details about the settlement to be negotiated, the settlement will not be enforced. *See Belcher Partnership Inc. v. Ferguson*, 704 So. 2d 653 (Fla. 2d DCA 1998). If, on the other hand, the case is a simple personal injury case involving the offer of an amount of money in exchange for a general release, those terms alone can be agreed to verbally and documented by a confirming letter and the settlement will be enforceable.

A settlement reached at mediation must be reduced to writing at the mediation in order to be binding, because the confidentiality requirement applicable to mediations will not permit verbal testimony about what took place at the mediation in the absence of such a writing. *See Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 515 (Fla. 3d DCA 1994).

## Legal Standards for Enforceable Settlement Agreements

All that is required to reach a binding and enforceable settlement is an offer and acceptance of the essential terms, just as with any simple contract. *E.g., Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985).

In response to arguments by the defendant that a settlement is not enforceable because there remained unstated details concerning the settlement to be worked out, it is ***not*** the law of Florida that every single detail be expressly agreed upon, prior to there being an enforceable settlement. A settlement is judicially enforceable where it is "sufficiently specific and mutually agreeable as to every ***essential element."*** *Williams v. Ingraham,* 605 So. 2d 890, 893 (Fla. 1st DCA 1992). The most essential elements of any settlement are the amount and terms regarding payment. *See Giovo v. McDonald*, 791 So. 2d 38 (Fla. 2d DCA 2001).

Once the material terms have been agreed upon, a settlement will be enforced, even if the parties have yet to negotiate some of the minor points of the settlement, and even if the court must be called upon to determine how some details will be resolved. "Uncertainty as to nonessential terms or small items will not preclude the enforcement of a settlement agreement." *Spiegel v. H. Allen Homes, Inc.*, 834 So. 2d 295 (Fla. 4th DCA 2002). A party may not avoid its duties under a settlement agreement by claiming lack of agreement on every detail. "Where the parties have agreed to the essential terms of a settlement, ***it will be enforced.***" *State Farm Mut. Auto Ins. Co. v. InterAmerican Car Rental, Inc.,* 781 So. 2d 500, 502 (Fla. 2001) (emphasis added).

## Failure to Agree to Details of Release Does Not Bar Enforcement

Often the defendant will argue that there is no enforceable settlement because the parties have not yet come to terms on all the elements to be contained in the release. However, the lack of agreement as to the specific terms of a release will not bar enforcement of a settlement.

There is no need for parties to a settlement to expressly reach an agreement about executing a release because furnishing a release which is consistent with the settlement is an implicit term. *Erhardt v. Duff*, 729 So. 2d 529 (Fla. 4th DCA 1999). *Accord, e.g., Wong v. Bailey*, 752 F.2d 619 (11th Cir. 1985)(failure to contemplate specific language of release does not constitute lack of meeting of minds sufficient to deny enforcement of settlement, applying Georgia law).

Your client will not be able to accept a settlement without signing a general release, however, in the absence of some specific understanding reached through negotiations that eliminates the implied agreement to sign a general release. *See Grimsley v. Inverrary Resort Hotel, Ltd.,* 748 So. 2d 299 (Fla. 4th DCA 2000).

## Need for Evidence of *Objective* Agreement on All Essential Terms

Should the defendant and its insurer attempt to put on evidence that their attorneys and claims representatives believed that the terms of the settlement were to include some unstated provision, the court can and should disregard such evidence as immaterial, even if it finds that the defendant's witnesses are sincere. Such an assumed subjective belief which is not reflected in the letters and other expressions of the parties' agreement cannot be incorporated into the settlement after the material terms have been agreed upon.

The expressions of the terms used in the conversations and letters between the parties must be enforced objectively. "[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of ***external signs***—not on the parties having ***meant*** the same thing, but having ***said*** the same thing." *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.,* 302 So. 2d 404, 407 (Fla. 1974)(emphasis added).

## Requirement of Express Authority from Client to Settle

One change which has occurred in the law in the last couple of decades is that counsel of record for a party no longer has the implicit authority of his or her client to settle a case. That change in the law has permitted parties to change their mind about settling,

by convincing the trial judge that they had not given their attorney the authority to accept a settlement offer.

In *Lechuga v. Flanigan's Enterprises, Inc.,* 533 So. 2d 856 (Fla. 3d DCA 1988), the court reversed an order enforcing a settlement agreement on the ground that the attorney did not have express authority of his client to enter into the settlement. The court held that "[t]he employment of an attorney does not, of itself, give the attorney authority to compromise the client's cause of action or settle the client's claim . . . , absent an emergency situation . . . . It follows that an attorney has no authority to settle a client's claim on conditions other than those unequivocally approved by the client." *Id.* at 857. Thus, it would be worthwhile for you to gather evidence before you need it that the defense attorney has his or her client's authority to enter into the settlement agreement, such as by his or her failure to contradict your confirming letter that the negotiated settlement is with his client's authority.

The mere fact that the defendant denies that its attorney had settlement authority will not preclude the trial judge from finding that such authority was given. As with any other contested issue of fact, the trial court will need to conduct an evidentiary hearing to determine the issue of the attorney's authority, when that issue is controverted. *See Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204 (Fla. 5th DCA 1998)(affirming order enforcing settlement based upon conflicting evidence of counsel's authority from client to settle). "A party seeking to compel enforcement of a settlement bears the burden of proving that an attorney has the clear and unequivocal authority to settle on the client's behalf." *Sharick v. Southeastern University of the Health Services,* 891 So. 2d 562, 565 (Fla. 3d DCA 2004).

## Effect of the Parol Evidence Rule

While it is usually the defense which raises the parol evidence rule against the plaintiff, you can use the doctrine to enforce a settlement and keep out evidence of preliminary discussions of other terms which are not contained in the letters which confirm the settlement. Make the argument that the most recent letters exchanged between counsel for the parties or the insurers' claims personnel are complete integrations, and that any

other term which may have been discussed in preliminary negotiations are so significantly different from, and inconsistent with, those terms which ***were*** agreed to, that any attempt to establish them as a part of the settlement contract would fail as a matter of law.

The appellate courts of Florida have applied the parol evidence rule specifically in the context of settlement agreements to bar attempts to add or vary terms of such a settlement. In *Ghahramani v. Guzman*, 768 So. 2d 535 (Fla. 4th DCA 2000), the court affirmed a summary judgment enforcing a settlement as originally written, rejecting one of the party's efforts to add terms not originally agreed to, holding as follows:

> The parol evidence rule bars claims arising out of prior extrinsic agreements, oral or written, which vary, alter, or modify the terms of a clear, unambiguous, and fully integrated document. . . . Because the settlement agreement is otherwise clear and unambiguous on its face, we hold that Ghahramani failed to rebut Guzman's motion for summary judgment. See, generally, Sun Microsystems of California v. Engineering and Mfg. Systems, C.A., 682 So. 2d 219, 220 (Fla. 3d DCA 1996) (holding settlement agreements are generally favored as a matter of public policy). Accordingly, we affirm the summary judgment.

*Id.* at 537-38.

## Courts' Lack Power to Impose New Terms Under "Fairness"

In ruling on a motion to enforce a settlement, the courts should not be tempted to condition enforcement of the settlement upon Plaintiffs' acceptance of some new terms sought by the defense out of a sense of fairness and equity. It is reversible error to include in an order enforcing a settlement terms and conditions not originally agreed-to by the parties, no matter how well-meaning such an action would be by a court. *See Sinclair v. Clay Elec. Co-Op, Inc.,* 584 So. 2d 1065 (Fla. 5th DCA 1991).

## Costs and Attorneys' Fees in Enforcement Proceedings

There is not much law on the subject of recovering costs and attorneys' fees incurred in proceedings to enforce a settlement agreement. Of course, such costs and fees are recoverable where the settlement agreement itself provides for such relief in enforcement proceedings. *See Hallenbeck v. Range Lines Supply Corp.* 697 So. 2d 876 (Fla. 4th DCA 1997). Other cases have recognized that attorneys' fees and costs are recoverable where the settlement is of a contractual claim involving a contract provision which permitted recovery of fees. *See Mickesue, Inc. v. DSR Group, Inc.*, 691 So. 2d 56 (Fla. 4th DCA 1997). Attorneys' fees and costs may be recovered in proceedings to enforce settlement agreements reached at mediation. *See* Fla. R. Civ. P. 1.730.

One case recognizing the recoverability of attorneys' fees as a sanction in a wrongful death case where fees would not appear to have been ordinarily recoverable in the case itself is *Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204 (Fla. 5th DCA 1998). In such a case it would appear that the party seeking enforcement of the settlement would need to establish bad faith or grounds such as those contained in §57.105, Fla. Stat.

Section 627.4265, Fla. Stat. (2002) provides that the carrier of an insurer to tender payment of settlement funds no later than twenty days after a settlement agreement has been executed will permit the recovery of interest at the rate of twelve percent. That statute applies only to settlement agreements which are "agreed in writing." Further, "if a tendered payment is conditioned upon the execution of a release, the interest shall not begin to accrue until the executed release is tendered to the insured." If you begin to get the idea that defense counsel is dragging his/her feet about concluding the settlement, go ahead and have your client execute a release (there is a decent form on the Florida Bar Trial Lawyers' section website) and provide it to defense counsel to start the interest clock ticking.

## Conclusion

Nothing feels worse than settling a case and waiting for a settlement draft that never comes or is preceded by an onerous release filled with terms never discussed. This article should help

you enforce the original agreement and get paid without further delay.

***Keep Tryin!***

***Roy***

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