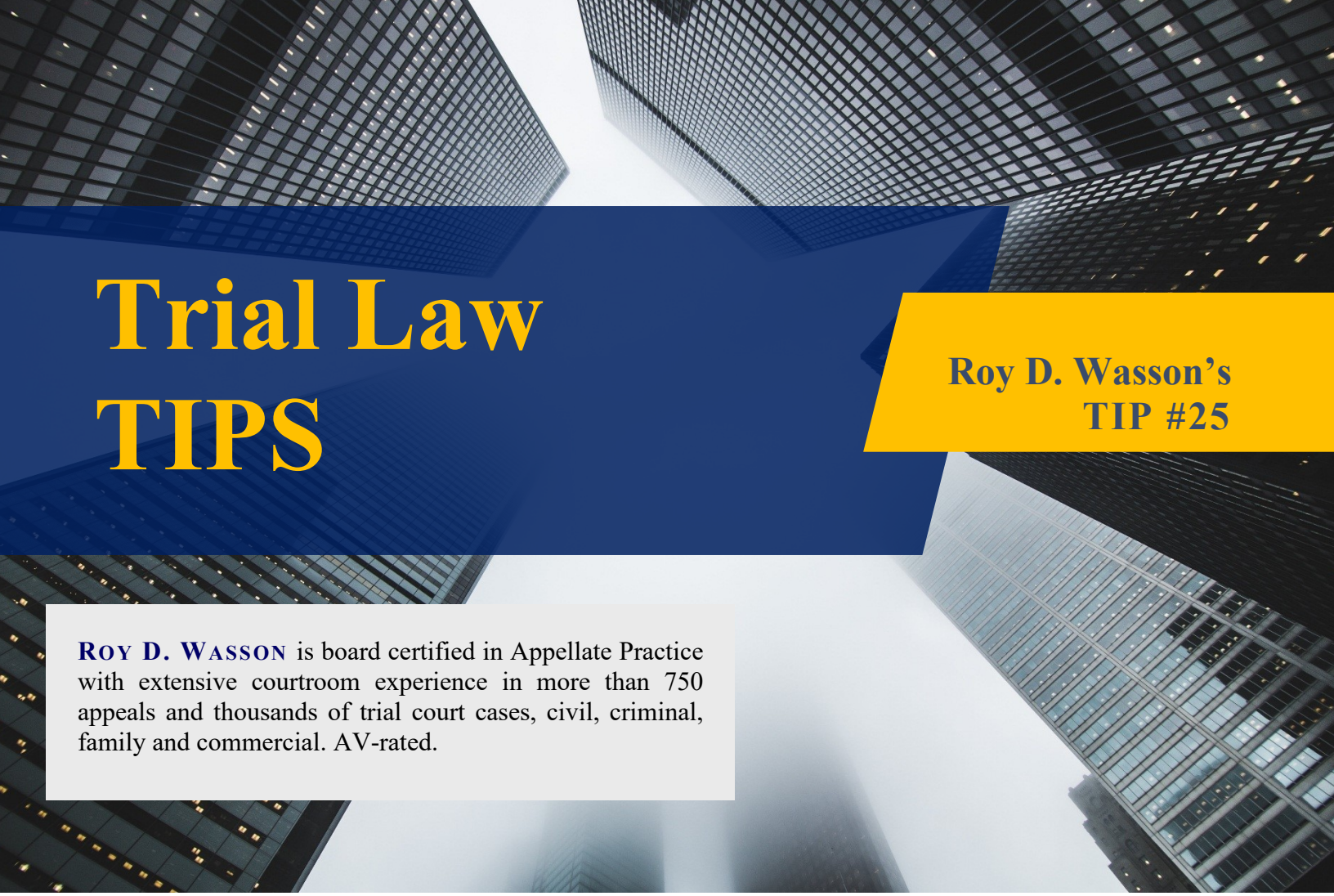

Trial Law TIPS

Roy D. Wasson's TIP #25

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.

Release and Dismissal of Active Tortfeasors Simple Steps to Preserve Claims Against Defendants Who Are Vicariously Liable — Another False Courthouse Legend Bites the Dust

Introduction

Old habits—and courthouse legends—die hard. That's why many of us still follow outdated practices we never really understood, like saying "COMES NOW THE PLAINTIFF" in the first paragraph of a Complaint. That was the way the senior partner in the first firm you worked for had done it, and he (rarely "she," until recently) always did it that way, because that's the way he learned it, way back before Xerox machines and personal computers took the fun out of telling your secretary: "I changed my

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mind about that argument on page two [of a twenty-page brief]. Move it to page five instead."

Most of us learned in a similar hand-me-down fashion that the release of one joint tortfeasor released all joint tortfeasors, so we devised elaborate structures for partial settlements involving "loans" and secret *Mary Carter*-esque[1] agreements to get some money before trial without "releasing" one or more of the defendants.

A similar lesson young trial lawyers (in my day at least) learned was not to dismiss one of several defendants with prejudice, lest that defendant's employer or another vicariously liable defendant plead *res judicata* effect of the dismissal. Defendants had previously successfully argued that a dismissal was a final order which forever precluded a finding that the driver was liable, so how could the employer be liable? Can you imagine being the first lawyer who took a small settlement from the defendant driver to finance your claim against the employer/ owner, then having your remaining case dismissed before trial because you had dropped the employee?

It has been more than forty years since the common law rule started to change for the better, and more than twenty years since the courts solidly changed their approach on the effect of a release of the active tortfeasor. The issue of the effect of voluntary dismissals and dismissal orders took a few years longer to become settled in a positive way. But now you can rest easy and tell the new lawyers that it is safe to settle with, and dismiss, an actively liable tortfeasor without screwing-up your claim against the more solvent/well-insured principal. It's time to bury the Courthouse Legend, but carefully, so you don't throw dirt from the grave on your shoes in the process. There is still a thing or two to think about in drafting your settlement documents.

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[1]In a *Mary Carter* agreement, the plaintiff would secretly settle with one defendant, but that defendant would still go to trial and pretend to defend itself, while pointing the finger at the non-settling defendants. *See Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967), overruled, *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993).

Early Tort "Reform" That Helped Plaintiffs—*Honest*!

The need for circumspection and carefulness in crafting such a partial settlement is a result of a long common law history under which a settlement with one tortfeasor usually was held to constitute a discharge of the liability of other tortfeasors. But the change in that common law did not come from the courts; it came from the capitol in Tallahassee. "At common law and ***before the enactment of statutes*** to the contrary, a release of one joint tortfeasor released the other, *Louisville & N.R.R. v. Allen*, 67 Fla. 257, 65 So. 8 (1914)." *Safecare Health Corp. v. Rimer,* 620 So. 2d 161, 164 (Fla. 1993)(McDonald, J. dissenting)(emphasis added). Few among us (save, perhaps, Roy #1), are ancient enough to remember the Florida Legislature fixing something the courts had gotten wrong.

Way back in 1957, when I had a crush on Miss Farley at Flato Elementary,

Chapter 57-395, Laws of Florida, was enacted to provide:

> AN ACT to permit the releasing of one tort-feasor without its effect being to release all tort-feasors, and providing for set-off in actions against other tort-feasors.
>
> Be it Enacted by the Legislature of the State of Florida:
>
> Section 1. A release or covenant not to sue as to one tort-feasor for property damage to, personal injury of, or the wrongful death of any person ***shall not operate to release or discharge the liability of any other tort-feasor*** who may be liable for the same tort or death.
>
> Section 2. At any trial, if any defendant shall make it appear to the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm or corporation in partial satisfaction of the damages sued for, the court shall, at the time of rendering judgment,

> set-off such amount from the amount of any judgment to which the plaintiff would be otherwise entitled and enter judgment accordingly.
>
> Section 3. The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court, shall not be made known to the jury.

(Emphasis added).

The first good appellate decision applying that new law was *Hertz Corp. v. Hellens,* 140 So. 2d 73 (Fla. 2d DCA 1962). That was a case in which the plaintiff sued the driver of a rental car and the rental company for damages in an ordinary motor vehicle collision case. The plaintiff settled with the driver and executed a covenant not to sue. Hertz took the position that a predecessor to the above-referenced statutes did not apply, because Hertz was not a "joint tortfeasor" in the traditional sense of the word but was only vicariously liable for the negligence of its permissive user, the driver. In affirming a judgment against Hertz entered after a jury verdict, the Second DCA stated: "We hold that the act applies to all tort-feasors, whether joint or several, ***including vicarious tort-feasors***." *Id.* (emphasis added).

Evolution of Modern Statutes and Common Law Rule on Releases

There were three later statutory sections which apply to this question, all of which now make it clear your clients may settle with, release, and dismiss one defendant without impairing the plaintiff's remaining claims against the other defendants. First is section 46.015, Fla. Stat., entitled **"Release of Parties."** Subsection (1) of that statute provides: "A written covenant not to sue or release of a person who is or may be jointly and severally liable with other persons for a claim shall not release or discharge the liability of any other person who may be liable for the balance of such claim."

The second statutory provision pertinent to this question is section 768.041, Fla. Stat., entitled **"Release or Covenant Not to Sue."** That provision is similar to Section 46.015, in that it provides as follows: " A release or covenant not to sue as to one tortfeasor

for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death."

The reason there are two statutes so similar is that this section is limited to actions in tort for personal injury, property damage, or wrongful death, while section 46.015 is applicable to any and all causes of action. The broader statute was necessitated by the Supreme Court's puzzling ruling in 1977 in *Penza v. Neckles*, 344 So. 2d 1282 (Fla. 1977), which was a commercial case against two defendants in which the plaintiff settled with one of them, named Resnick and executed a " standard general release form which was modified to provide specifically that the other obligor, respondent Neckles, was *not* released in any manner. . . . [T]he trial court ruled that the document operated to discharge Neckles, as well as Resnick, from liability to petitioner on the final judgment." *Id.* at 1283(emphasis in original).

The Fourth DCA and the Supreme Court affirmed that ruling in *Penza*, holding that the "release Penza gave Resnick discharged Neckles from liability because, under the law in Florida, the common law rule still prevails and a release of one joint and several obligor releases all others." The Supreme Court held that the plaintiff was not aided by section 768.041, Florida Statutes, "which provides that a release or covenant not to sue as to one *tortfeasor* shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death, [because that statute] extends only to the full limits of causes of action in tort." *Id.*

Section 46.015 came along to apply to all causes of action and cure the *Penza* problem. The Supreme Court expressly disavowed *Penza* and receded from the old common law rule in *Stephen Bodzo Realty, Inc. v. Willits International Corp.*, 428 So. 2d 225 (Fla. 1983).

The third statute involved in this inquiry is the infamous "*Fabre*" statute, entitled **"Contribution Among Tortfeasors."** *See* § 768.31Fla. Stat. Subsection (5) of that statute provides as follows:

> ***(5)RELEASE OR COVENANT NOT TO SUE.***— When a release or a covenant not to sue or not to

> enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a.) It ***does not discharge any of the other tortfeasors from liability from the same injury or wrongful death*** unless its term so provide, but it reduces the claim against the others to the extent of any amounts stipulated by the release or the covenant, or the amount of the consideration paid for it, whichever is greater; and,
>
> (b.) It discharges the tortfeasor to whom it is given for all liability for contribution to any other tortfeasor.

(Emphasis added).

There are a number of cases which have been decided interpreting those statutes, which have held that the release or dismissal of one joint tortfeasor—or even the ***only*** actively-negligent tortfeasor—will not operate to bar a plaintiff's remaining claims against other joint tortfeasors or parties only vicariously liable for the negligence of the released defendant.

The Third District in 1974 applied Section 768.041 and cited the *Hertz v. Hellens* case with approval to hold that "Section 768.041, Florida Statutes, F.S.A. applies to all tortfeasors, whether joint or several, ***including vicarious tortfeasors.***" *Florida TomatoPackers, Inc. v. Wilson*, 296 So. 2d 536, 538 (Fla. 3d DCA 1974)(emphasis added). That was a case in which the plaintiff settled before trial and executed a release in favor of the only active tortfeasor and his employer, leaving as the only defendant, the employer's business partner. The Third District found that the statute meant what it said, and that the employer's partner could not claim any benefit from the release and remained liable to the plaintiff.

More and more of us are using releases which expressly state that they are limited to the named defendant who is settling. I generally like to add something to the effect that "This release is not intended to constitute a release of any claims against any other

person or entity, including but not limited to [the vicariously liable defendant, such as the vehicle owner/employer]."

Be careful about language in a release which releases both the settling defendant "and his insurer, State Farm Insurance Company." In some situations that insurance company also will insure the remaining, vicariously liable defendant (either on a different policy or on the same policy). I can also imagine a scenario where the settling defendant's carrier is your client's UM or PIP carrier. You don't want to release one of your funding sources for your verdict against the remaining defendant, and don't want to release a first party or UM claim. So if the DA insists on mentioning the insurance company in the release, make it a release of "only the Defendant Mr. X, and his insurance company, State Farm, but only in its capacity as liability insurer for Mr. X."

More Good Changes in Law—The Dismissal/*Res Judicata* Cases

The *Hertz Corp. v. Hellens*, case was cited with approval by the Supreme Court in a somewhat different procedural context which deals with another of the common law situations in which settlement with one tortfeasor prevented further litigation against remaining defendants. In *JFK Medical Center, Inc. v. Price*, 647 So. 2d 833 (Fla. 1994), the plaintiff sued a doctor who was actively negligent, and the hospital where the malpractice occurred based upon a theory of vicarious liability. The plaintiff and the doctor entered into a settlement agreement which provided that the lawsuit against the doctor would be dismissed with prejudice, but that the claim against the hospital would not be affected. After that dismissal, the hospital moved for summary judgment, which was granted by the trial court under the theory that the claim against the hospital was barred—not by the release given to the doctor—but by the *res judicata* effects of dismissing the active tortfeasor with prejudice.

The Fourth District reversed the dismissal and the Supreme Court approved the Fourth District's decision, citing authorities including *Hertz Corp. v. Hellens*. The Court held "***that a voluntary dismissal of the active tortfeasor,*** with prejudice, entered by agreement of the parties pursuant to settlement, ***is not the***

equivalent an adjudication on the merits that will serve as a bar to continued litigation against the passive tortfeasor." 647 So. 2d at 834 (emphasis added).

One thing I used to do before the *Price* case was decided, was to file a pleading entitled "Notice of Dropping Defendant with Prejudice," instead of a Notice of Voluntary Dismissal. I generally would file such a pleading without even emphasizing the phraseology difference to the settling defendant, and do not recall ever having anyone argue that it was not as good as a Notice of Voluntary` Dismissal. However, I felt somewhat better in phrasing the pleading as one "dropping defendant" as a party rather than "dismissing" that defendant. That should not be necessary now that the *Price* case has been decided, although I still generally do it that way if I can get away with it.

The holding of *Price* was reaffirmed by the Supreme Court in *Crosby v. Jones,* 705 So. 2d 1356, (Fla. 1998). That case held that a plaintiff's attorney was not guilty of malpractice for entering into a settlement with the driver of a motor vehicle, and filing a joint motion for dismissal as to the driver and the owner, where the release specifically provided that the plaintiffs were not releasing the driver's employer. The sad thing about *Crosby* is that the trial court's erroneous dismissal of the driver's employer was affirmed by the Second District in *Jones v. Gulf Coast Newspaper, Inc*., 595 So. 2d 90 (Fla. 2nd DCA 1992). The Second District erroneously affirmed that judgment, because it had not yet had the benefit of the *Price* decision.

The *Crosby* case involved a release and a dismissal of the actively-negligent tortfeasor with prejudice, so all of the prior bases for holding that a vicariously-liable tortfeasor could benefit from a settlement with an actively-liable defendant were clearly disapproved by the Supreme Court in *Crosby*. But just in case you worry about the law changing against you, try to include a provision in your release to the effect that you are releasing the settling defendant in reliance on the existing law, to give you a shot at overturning the release if the law changes for the worst.

Effect of Indemnification Claims Preserved in Release

Once you take care of drafting a release to preserve your client's remaining claims against other defendants directly, you need to lock the "back door." That is the route some defense attorneys may try take to double cross you out of having a collectible case against a vehicle owner or employer. In short, be careful about agreeing to indemnification provisions in releases. They can defeat your effort to recover from the vicariously liable tortfeasor.

Before addressing how to phrase the release, I would suggest that you want to make every effort to establish active negligence on the part of the remaining defendants, and not just their vicarious liability. To begin with, if the other defendants are held to be solely vicariously liable, they will enjoy a full credit for 100% of the settlement amount you have negotiated in the prior settlement. *See Gouty v. Schneple,* 795 So. 2d 959 (Fla. 2001). On the other hand, if all of the entities go on the verdict form and there is some apportionment of liability which includes active negligence on the part of the remaining defendants, the non-settling defendants will receive a setoff only in the amount of the part of the settlement which reflects the percentage of the settlement attributable to the economic damages, using the jury verdict to determine the percentage of the settlement which was economic and which was non-economic (as opposed to any apportionment made between the settling parties). *See Wells v. Tallahassee Memorial Regional Med. Ctr.,* 659 So. 2d 249 (Fla. 1995).

Further, if you are able to establish some active negligence on the part of the remaining Defendants (even a small percentage), then they will not be entitled to seek indemnity from the settling Defendants. See *Houdaille Inds., Inc. v. Edwards,* 374 So. 2d 490 (Fla. 1979). On the other hand, if the verdict is returned against other Defendants solely on the basis of their vicarious liability for the negligence of the settling Defendants, then any amount that you recover from the non-settling Defendants over and above the set-off amount of this settlement can be sought from the settling defendants under indemnity. *See Price, supra*, 647 So. 2d at 834 ("It would be unconscionable to require a passive tortfeasor to

compensate an injured party, while at the same time barring indemnification from the active party").

Often the settling defendants ask for a provision in the release whereby the plaintiff will cover any indemnity claim made later by the non-settling defendants. Such an agreement would seem to have the practical effect of precluding the plaintiff from recovering any damages for which the non-settling defendant was only vicariously liable, over and above the settlement amount. If a plaintiff agrees to indemnify the settling defendant for claims to indemnify the non-settling defendant, then the verdict amount over and above the settlement would just seem to go from one pocket to the other in a big circle, until it got back to where it started.

Of course, that would not be a problem if the release you are giving to the settling defendant does not contain a provision to indemnify it for ***any*** claims brought by the non-settling defendants, as opposed to merely indemnifying it from claims for impairment of hospital liens, etc. Often the release will just require the plaintiff to hold the settling defendant harmless from any and all claims or liens which may be asserted against it in the future, "*arising from benefits provided* to or on behalf of the releasee(s) or which are related to the incident giving rise to this claim." Damages which you hope to recover in the future from a non-settling defendant would not seem to me to be "benefits provided to" the plaintiffs in the same sense as are Medicare, Medicaid, first party insurance and so forth.

Sometimes I have encountered the situation where the settling defendant's attorney will allow me to tailor such an indemnification provision more narrowly to more clearly cover only things like insurance subrogation rights, hospital liens, federal benefits, and so forth. Sometimes they are more concerned with a particular lien and do not give much thought to the prospect of later being called upon to pay indemnity to the vicariously-liable tortfeasor. Proceed accordingly.

Preserving First Party Claims

Another area of concern in these cases is in avoiding the problem raised by *Connecticut General Life Ins. Co., v. Dyess,* 569 So. 2d 1293 (Fla. 5th DCA 1999). That was the case where the

plaintiff lost tens of thousands of dollars' worth of first party insurance benefits by signing a settlement agreement which did not state that the settlement was for only a portion of the plaintiff's damages. Always insist on something like: "The parties acknowledge that the plaintiff's general and special damages exceed the amount of this settlement," or at least: "The parties by this agreement acknowledge that the plaintiff may have additional damages, any claims for which against persons or entities not covered by this release are not extinguished by this settlement."

Conclusion

Say "rest in peace" to another Courthouse Legend. Take their money. And keep it.

Keep Tryin!

Roy

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