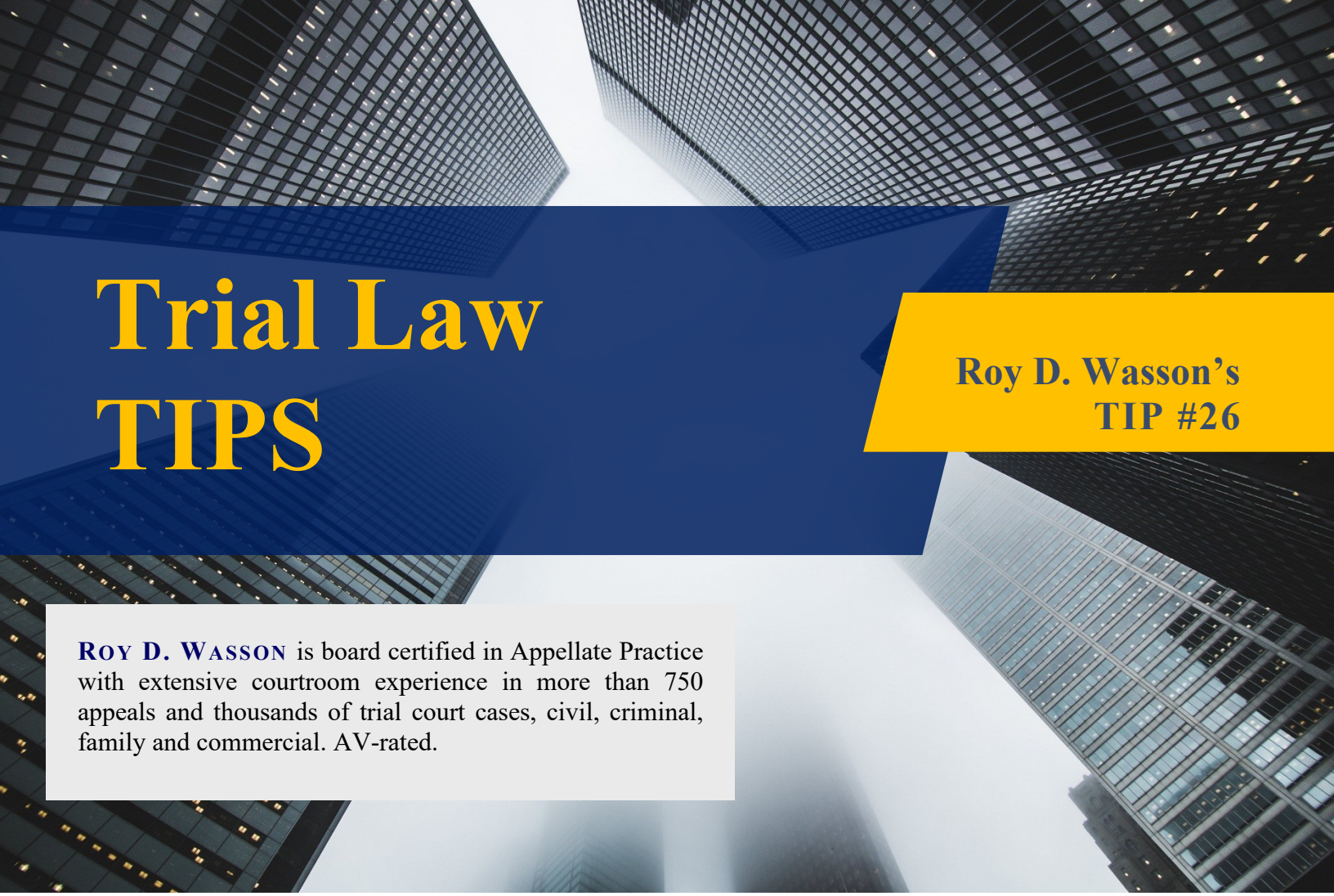

Trial Law TIPS

Roy D. Wasson's TIP #26

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.

Preservation of Error— Inconsistent Definitions of 'Inconsistent Verdicts' *Send the Jury Back if You Don't Like the Verdict*

Introduction

Did you ever have one of those weird kind of verdicts that was partly great and partly terrible? Maybe you had a tough liability case in which the jury checked "yes" in your favor on all of the important claims (and "no" to the defenses), so you were not really prepared for the shock when the clerk read that the amount of damages awarded were "zero." Jurors sometimes misunderstand the instructions (to say nothing of the evidence) and find that there has been a permanent injury in a threshold case, but award nothing for future economic or non-economic damages. Other times, the shoe is on the other foot and the jury fills in the blank with an

Wasson & Associates, Chartered
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

amount for future pain and suffering, having previously found against you on the permanency issue.

What do you do when you get a verdict like that? The legal standard for preserving for appeal a problem in such a verdict is simple enough to articulate, but extremely difficult to apply in practice. The bottom-line answer for you in such a situation is to request that the judge re-instruct the jury and send it back to deliberate; unless, that is, you're happy with the overall verdict.

Legal Standard Easy to Recite

The legal standard for preserving dissatisfaction with such a verdict for appeal boils down to a question whether the verdict was "inconsistent" or was instead merely "inadequate." A recent reaffirmation of the longstanding principle of Florida law on the subject is as follows:

> To preserve the issue of an inconsistent verdict, the party claiming inconsistency ***must raise the issue before the jury is discharged.*** If the trial court agrees, the trial court may re-instruct the jury and send it back for further deliberations. . . . This procedure allows the jury an opportunity to "correct" the inconsistency. . . . This procedure is in contrast to what is needed to challenge and inadequate verdict, which a party may raise for the first time in a post-trial motion. . . . This court has consistently held that a party's failure to object or otherwise inform the court of an inconsistent verdict before the jury is dismissed waives the inconsistency in the verdict as a point on appeal.

Florida Dept. of Transportation v. Stewart, 844 So. 2d 773 (Fla. 4th DCA 2003)(emphasis added).

Inconsistency: Not Like Pornography; Don't Always Recognize It

It is difficult to tell what sort of verdict the courts are going to call "inconsistent" and which ones are going to be "inadequate." For example, in *Dimare, Inc. v. Albertson's*, 758 So. 2d 1193 (Fla.

3d DCA 2000), the jury found that the plaintiff sustained $14,000 in past medical expenses but awarded nothing for past pain and suffering. The plaintiff did not ask that the jury be re-instructed and sent back to re-deliberate but moved for a new trial. Even though the trial court characterized the verdict as "inconsistent," the Third District rejected the defendant's argument that the problem with the verdict was not adequately preserved and affirmed the order granting the new trial.

Other parties in other cases have not been so lucky. For example, in *C.G. Chase Constr. Co. v. Hernandez,* 725 So. 2d 1144 (Fla. 3d DCA 1998), the Third District held that "the trial court correctly recognized that the jury's verdict was both inconsistent and inadequate," but reversed the trial court's order granting a new trial, holding that "the complaining party's failure to object to the inconsistency in the jury's verdict bars its post-trial challenge." *Id.* at 1146.

Several cases from the Fourth District have likewise held that a party dissatisfied with an inconsistent verdict "may not circumvent these cases by later arguing the verdict is inadequate or contrary to the manifest weight of the evidence" in addition to being inconsistent. *See Florida Dept. of Transportation v. Stewart*, *supra*, in which the court held: "It logically follows that most inconsistent verdicts, in some respect, would be either inadequate or contrary to the manifest weight of the evidence." *Id.*

Some courts have displayed a somewhat softer side in light of the inconsistency in the appellate decisions in this area. In *Simpson v. Stone*, 662 So. 2d 959 (Fla. 5th DCA 1995), the jury found that the plaintiff suffered a permanent injury but failed to award any non-economic damages, although awarding future medical expenses of approximately $5,400. The plaintiff did not ask that the jury be sent back to re-deliberate but simply moved for a new trial. Although it affirmed the denial of plaintiff's motion for a new trial, the Fifth District in its appellate decision held that "while the threshold finding of a . . . permanent injury coupled with a denial of any damages for pain and suffering indeed appears to be inconsistent, the lack of clarity in the existing case law on

this point . . . makes in inappropriate to find that Lois Simpson waived her right to challenge the verdict post-trial on the basis of inadequacy." *Id.* 961-62.

A sampling of the numerous cases in this area reflects that it is very dangerous to let the jury be discharged and save your objection for a motion for new trial or appeal. In *Gup v. Cook*, 549 So. 2d 1081 (Fla. 1st DCA 1989), the court held that the appellants were not entitled to a new trial on damages where the jury awarded zero for future medical expenses but awarded $500,000 for "future medical expenses reduced to present value," because the appellants failed to object to that "inconsistency."

In *Moorman v. American Safety Equipment*, 594 So. 2d 795 (Fla. 4th DCA 1992), the court held that the appellants waived their argument concerning the verdict when they failed to object to a verdict which found no defect in the product, but found negligence on the part of the manufacturer in failing to warn of the later-appearing defect.

Another case in which the appellant was held to waived any argument regarding the verdict was *Southeastern Income Properties v. Terrell*, 587 So. 2d 670 (Fla. 5th DCA 1991). In that case, the court held that the appellant waived argument regarding error "that the jury, although awarding future lost earnings, awarded no past earnings," because that inconsistency was not timely brought to the trial court's attention. *See also, e.g., Alamo Rent-A-Car, Inc. v. Clay*, 586 So. 2d 394 (Fla. 3d DCA 1991)(appellant waived argument regarding inconsistency in verdict in the award of the same amount of damages to children of different ages, because that claim was not made when the jury returned); *Sweet Paper Sales Corp. v. Feldman*, 603 So. 2d 109 (Fla. 3d DCA 1992)(trial court erred in awarding plaintiff new trial on damages for alleged inconsistency was obvious when verdicts were returned and not preserved by requesting that jury be sent back to re-deliberate).

Simple Solution:
Always Ask to Send the Jury Back if Verdict is Bad

As you can tell from these inconsistent cases, your safest bet is to request that the jury be re-instructed and sent back to deliberate again, unless you are totally satisfied with the verdict. If you like the verdict notwithstanding any inconsistency, that is one thing. If you would not take the verdict and run with it, then scrutinize the verdict form and ask that the court re-instruct the jury and send them back to the jury room before they are discharged. The judge may not grant your request, but the issue will be preserved for appeal.

Don't come crying to your appellate lawyer when you decide the day ***after*** trial that the verdict was too small, or there was some other problem with it. Well, do come crying, but don't expect a lot of sympathy.

Keep Tryin!

Roy

WASSON & ASSOCIATES, CHARTERED
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