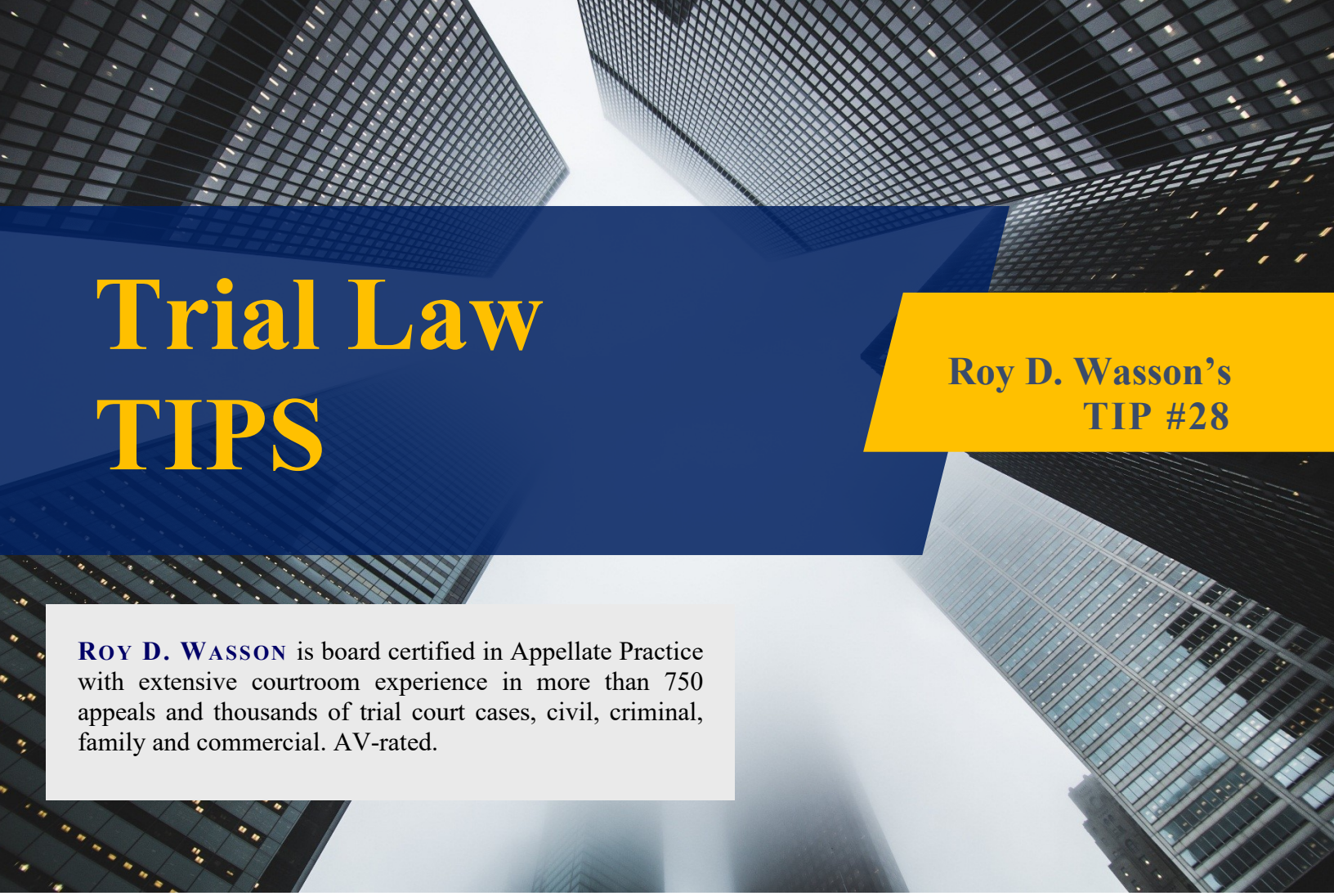

Trial Law TIPS

Roy D. Wasson's TIP #28

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.

Proposals for Settlement in Sovereign Immunity Cases

Introduction

Did a state agency ignore your reasonable Proposal for Settlement? Can you get fees if you beat the proposal by more than the statutory percentage? Would such an award of fees be in addition to the sovereign immunity cap or would you need a claims bill to collect? In overview, while attorneys' fees are recoverable against such governmental entities, they are capped at twenty-five percent of the total judgment, just as if your client was paying you out of the recovery. Further, the fee award is not going to be outside the $100,000 per person per incident cap or subject to its own cap. In other words, the fee award will be added to the main judgment to see if you need to pursue a claims bill.

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Fees Are Recoverable Under § 768.79 Against State

Several cases have dealt with this issue, including *Hellmann v. City of Orlando*, 634 So. 2d 245 (Fla. 5th DCA 1994). That was a case in which the plaintiff had served an offer of judgment pursuant to §768.79, Fla. Stat., which the defendant city had rejected. The court agreed with the plaintiff that fees were recoverable against the city, holding: "When the appellant, plaintiff below, offered to settle this case he did so in accordance with the statute. When the defendant city rejected his offer, it put itself in jeopardy of having to pay attorney fees if the ultimate judgment was at least 25% greater than the offer." *Id*. at 246.

Fee Awards Limited to 25% of Judgment Amount

However, the *Hellmann* case also held that the trial court correctly denied plaintiff's request for a full attorneys' fee measured in accordance with lodestar principles. The court accepted the state's argument that a lawyer handling a case against a state agency cannot recover more than 25% of the judgment as a fee, so the state should not be liable for a larger amount: "Because the government controls absolutely how much it will pay in tort claim cases, we are bound by the statute limiting the award of attorneys' fees." *Id.*

Another case dealing with the issue is the First DCA's decision in *City of Live Oak v. Harris*, 702 So. 2d 276 (Fla. 1st DCA 1997). That was a case in which the plaintiff served a proposal for settlement under §768.79 which was rejected by the defendant. After trial, the plaintiff was awarded damages of $32,580, which was more than 25% greater than her proposal for settlement in the amount of $15,000. The trial court awarded attorneys fees in the amount of $55,235, and the city appealed.

The First District reversed the size of the fee award, agreeing with the court's *Hellmann* decision that fees were limited to the 25% amount under §768.28(8), Fla. Stat. The court specifically rejected the plaintiff's argument that it was unfair the city to be limited to a 25% attorneys fee when the plaintiff would have unlimited liability if the shoe was on the other foot, holding:

> We sympathize with Harris' further argument that, in the event a plaintiff would become liable for attorney's fees in favor of the sovereign under §768.79, the plaintiff would be responsible for the full amount of the fee, but that same plaintiff, in the event she prevails under §768.79 would not be entitled to recover her full attorney's fees should they exceed 25% of the judgment. However, Harris' "remedy is in the legislature, not the courts."

702 So. 2d at 277 (quoting *Hellman*).

Claims Bill Required to Collect Court-Awarded Fees

In the event that your verdict and attorneys fee award exceed the statutory cap under §768.28, you will need to get a claims bill to collect the excess. That was an issue addressed by the court in *Pinellas County v. Bettis*, 659 So. 2d 1365 (Fla. 2d DCA 1995). There the verdict against the county was for more than $200,000, and the trial court awarded attorneys' fees under the proposal for settlement which was within the 25% limitation under §768.28(8), Fla. Stat. The plaintiff convinced the trial court to order the county to pay the attorneys fee amount without the necessity of a claims bill, essentially convincing the trial court that the fee award was not subject to the sovereign immunity cap. On appeal, however, the Second District disagreed and reversed, holding as follows:

> The County, however, argues the trial court erred in requiring it to pay this fee beyond the sovereign immunity limits of §768.28(5), Florida Statutes (1989). We agree. Section 768.28(5) limits the County's liability in a tort action to $200,000 this is the total amount payable by the County, and any excess amount is recoverable only by action of the Legislature. . . . to the extent the trial court's order awarding attorney's fees requires the County to make payment beyond the limits of liability, that was error. The prevailing party must look to the Legislature to collect any sum awarded beyond the $200,000.

Id. at 1367-68. Thus, unless the political climate is right for a claims bill, this area of law is not of much help. Maybe it will help

you settle the smaller to mid-size cases to hold the threat of a fee award over the State's head, so go ahead and serve your Proposal for Settlement as in any other case. But don't spend your award right yet, if it brings your total recovery over the statutory cap.

Keep Tryin!

Roy

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