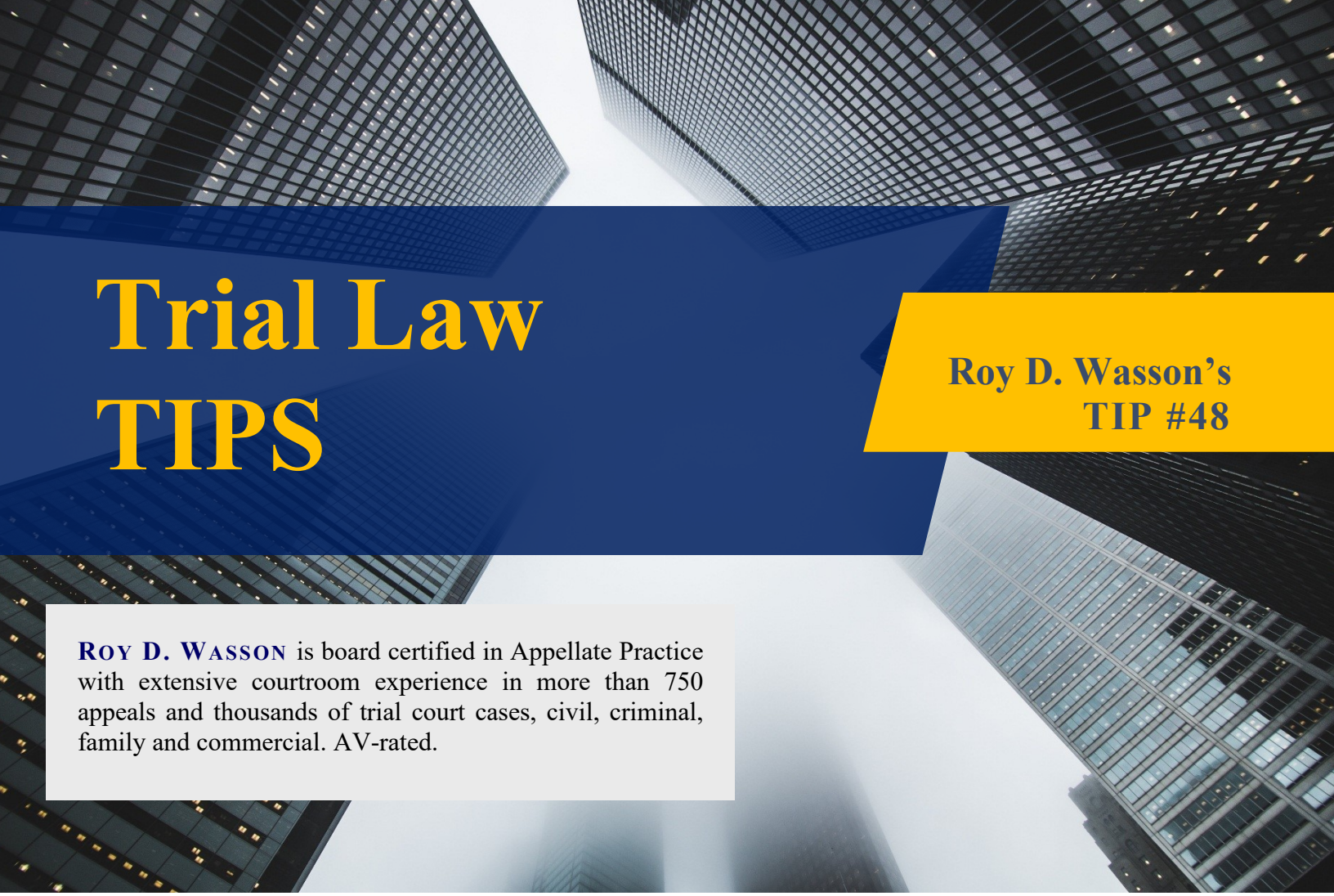

Trial Law TIPS

Roy D. Wasson's TIP #48

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.

Striking a Defendant's Pleadings for Tampering with Evidence May Jeopardize Insurance Coverage

—the Baby or the Bathwater?

Introduction

It has become very fashionable for defendants to seek to have a plaintiff's pleadings stricken and his or her case dismissed for perceived misstatements during depositions and other alleged discovery misconduct. While it is not quite as fashionable for the plaintiff to seek to have the defendant's pleadings stricken and a default entered on liability, the occasions on which such relief has been requested and granted are growing in number.

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Striking a defendant's pleadings may be an appropriate sanction for discovery misconduct and tampering with evidence in a particularly egregious case. However, trial lawyers should use care before seeking such relief, because insurance companies are using their clients' evidence tampering as a basis to deny coverage under "failure to cooperate" clauses of liability policies.

Striking a Defendant's Pleadings—Showing that is Required

Trial courts have the inherent authority and power under the Florida Rules of Civil Procedure to strike pleadings, enter defaults, and otherwise impose "death penalty" sanctions for evidence tampering, discovery abuses, perjury, and other forms of litigation misconduct. "The integrity of the civil litigation process depends on truthful disclosure of facts." *Morgan v. Campbell*, 816 So. 2d 251 (Fla. 2d DCA 2002). However, the ultimate sanction of a default is reserved for cases involving the worst misconduct.

One of the leading cases in Florida dealing with the propriety of such severe sanctions based upon such misconduct is *Figgie International v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997). That was a case in which the trial court had stricken the Defendant's answer and affirmative defenses and entered a default judgment on liability, following the defendant's destruction of evidence and presentation of false deposition testimony regarding its actions. Among the other many useful cases on the subject are *Mercer v. Raine*, 443 So.2d 944 (Fla. 1984); *O'Vahey v. Miller*, 644 So. 2d 550 (Fla. 3d DCA 1994); *U.S. Fire Ins. Co. v. C&C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996); and *Tramel v. Bass*, 672 So. 2d 78 (Fla 1st DCA 1996). The sanction was affirmed on appeal in the Alderman case. The defense then settled on the eve of the damages trial.

Coverage Contests After Pleadings Are Stricken

Luckily for the plaintiffs in the *Alderman* case, the defendant was a solvent corporation which was able to fund a significant settlement without insurance coverage after its pleadings had been stricken. If the defendant had been an insolvent company and the plaintiff's only hope of recovery had been against the liability

insurance company, (as is often the case) the success in striking the pleadings would have turned into a disaster.

After entry of the default judgment on liability, and the settlement of the plaintiff's claims, the defendant *Figgie*'s liability carrier, "Reliance then sued Figgie seeking a declaratory judgment that it was not obligated to provide coverage for that settlement." *See Scott Technologies, Inc. v. Reliance Ins. Co.*, 746 So. 2d 1136, 1137 (Fla. 3d DCA 1999). The trial court granted summary judgment for the insurance carrier, holding that Figgie had to fund the settlement itself and had forfeited its right to insurance coverage as a result of its misconduct.

The court of appeal held as follows:

> In affirming the trial court's final order of summary judgment on the issue of coverage, we need look no further than Judge Goldman's meticulous recitation of Figgie's many willful discovery violations, and his observation that "In the more than thirty-five years that the Court has been on the bench and engaged in the practice of law, the facts of the present case present the most egregious case of discovery abuse this court has ever seen." *Figgie Int'l*, 698 So. 2d 563, 564. When Figgie's intentional discovery fraud caused the entry of the default judgment on liability, ***Figgie breached its duty of cooperation as a matter of law.*** *See Ramos v. Northwestern Mutual Ins. Co.,* 335 So. 2d 71 (Fla. 1976); *Rustia v. Prudential Property & Cas. Ins. Co.*, 440 So. 2d 1316 (Fla. 3d DCA 1983). n1 In breaching its duty to cooperate, Figgie forfeited any right to coverage that may have existed under its policy with Reliance.

Id. at 1137 (emphasis added).

Thus, if you have a situation in which the defendant has committed serious discovery misconduct or tampered with evidence, your decision whether to seek the ultimate sanction of striking the defendant's pleadings should also consider the effect

that your success may have on the availability on liability insurance coverage.

Involvement of Defense Counsel as a Possible Factor

Trial lawyers currently litigating issues of this sort around Florida have begun to seek discovery which will uncover the involvement of defense counsel retained and paid by liability insurers in the misconduct which leads to sanctions against their clients. The theory these trial lawyers are attempting to develop is that the defense attorney is the agent of both the liability carrier and his or her named client, the insured defendant. Of the acts of the D.A. are imputed to the insurer, then the insurer may be estopped to rely on the breach of the cooperation clause.

It will be difficult to overcome issues of confidentiality and litigation immunity to discover a defense attorney's communications regarding litigation misconduct by his or her client. That said, the avenue remains one of the few approaches which trial lawyers can attempt to throw out the bath water (a defendant's defenses) while keeping the baby (liability coverage) in the tub. If any readers of this articles have had success along those lines, please post the information so others can use it.

Conclusion

Trial lawyers are soldiers in battles on behalf of their individual clients and in the general war against defendants' litigation misconduct and abuses of our judicial system. Sometimes in trying to win that war by holding defendants accountable for their tampering with or destruction of evidence, perjury, or other discovery misconduct, we can jeopardize the battle for our client by placing insurance coverage at risk. Do what you have to do to balance your client's interests with vindicating the system.

And, if at first you don't succeed, just . . .

Keep Tryin!

Roy

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