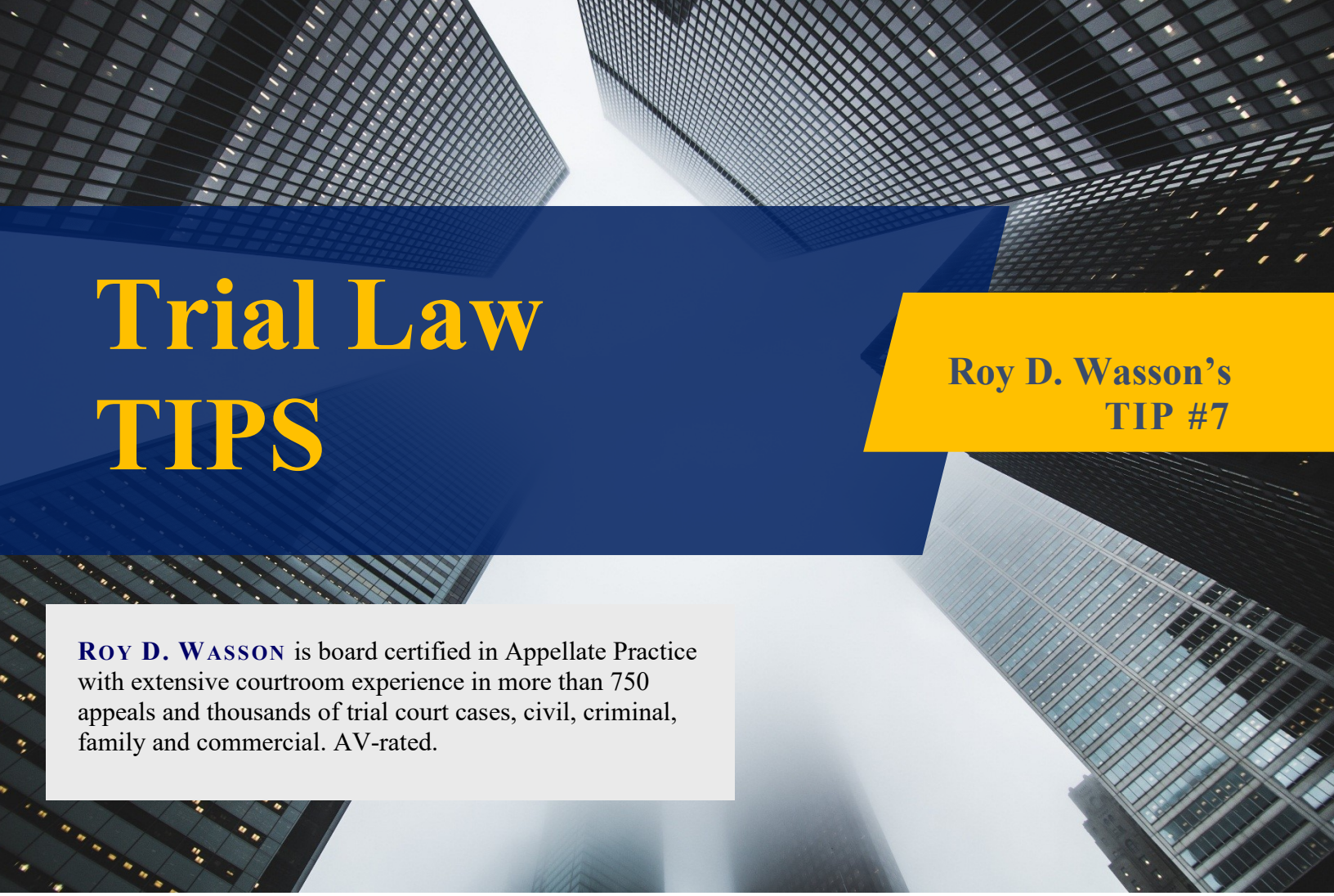

Trial Law TIPS

Roy D. Wasson's TIP #7

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.

Dismissal of Your Complaint Without Any Motion Under Fla. R. Civ. P. 1.140(h)(2)—Welcome to the Twilight Zone

Introduction

You know that self-satisfied feeling you get when you draft a complaint so tight and thorough that the Defense attorney doesn't even file a motion to dismiss? Yeah, you've surely reached a higher level of performance when the first defensive pleading you receive in the mail is an Answer and Affirmative Defenses. Your pleading prowess will get you a trial date at least a month or two before the usual wait, right? No need to cool your heels at motion calendar while the Defense attorney bills a few hours for a rinky-dink hearing on

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a motion to dismiss for failure to state a cause of action. Well, not so fast Demurrer-saurus.

Believe it or not, you could go to trial on that complaint, put on enough evidence to defeat a directed verdict motion, but have the judge throw you out of court because that iron-clad complaint of yours (as to which the defendant never filed a pretrial motion to dismiss) ***fails to state a cause of action!*** Welcome to the Twilight Zone world of Rule 1.140(h)(2).

No Pretrial Hearing Required

At least two appellate courts have held that a defendant can legally blindside the plaintiff by waiting until the time of trial, and even until the plaintiff has rested, to seek dismissal of a complaint for failure to state a cause of action. No, these were not decisions from the New Guinea Court of High Appeals. Nor were they Florida cases from 100 years ago. The Florida Supreme Court and the Fourth DCA have held within the last twenty years that the defense of failure to state a cause of action can be raised for the very first time ***at trial***.

Rule 1.140(h)(2) provides a variety of procedures for a defendant to raise the defense of failure to state a cause of action. That subsection of the rule provides:

> The defenses of failure to state a cause of action or a legal defense or to join an indispensable party may be raised by [1] motion for judgment on the pleadings or [2] ***at the trial on the merits*** in addition to being raised in either [3] a motion under subdivision (b) or [4] in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

(emphasis added).

The Florida Supreme Court has held that a motion to dismiss for failure to state a cause of action made for the first

time on the sixth day of trial was erroneously denied, holding as follows: "Rule 1.140 provides that the 'no cause of action' defense may be raised at trial. Here, it was raised at trial. Hence, the motion to dismiss should have been granted." *Florida Medical Malpractice Joint Underwriting Ass'n. v. Indemnity Ins. Co.,* 689 So. 2d 1040, 1042 (Fla. 1996).

Amendments to Conform to Evidence Inadequate

"Wait a minute," you say. If evidence came in during the trial which would support a cause of action, then even if one was not sufficiently pled in the original complaint, then when the defendant makes such a motion at trial, all you have to do is move for leave to amend the complaint to conform to the evidence, right? Wrong. The only case on point says that you cannot do that.

In *Schopler v. Smilovits,* 689 So. 2d 1189 (Fla. 4th DCA 1997), the plaintiff filed a complaint for fraud arising out of a commercial transaction, which failed to state the circumstances of fraud with the requisite specificity. However, the defendant did not file a motion to dismiss, but instead filed an answer and went to trial without saying a word. During the plaintiff's case-in-chief, evidence was introduced on the fraud claim which was sufficient to take the claim to the jury and to mandate denial of the defendant's motion for directed verdict. However, "[t]he opponent of the claim waited until the close of all the evidence at trial to move for a dismissal on the grounds of failure to state a cause of action." *Id.*

The trial court denied dismissal at that stage of the trial, recalling that there was "some evidence, unobjected [to] at trial, that might be consistent with an unpleaded claim of fraud." *Id.* Applying the rule of law that issues tried by implied consent will be treated as if they have been sufficiently pled, the trial court denied the motion to dismiss and a verdict was returned in favor of the plaintiff.

The Fourth DCA reversed that decision for the plaintiff, holding that the failure of the complaint to state a cause of action for fraud should have resulted in dismissal of the complaint at the end of the trial, notwithstanding the introduction of evidence supporting a fraud claim. Judge Gary Farmer wrote the opinion for

the majority which reversed the judgment in favor of the plaintiff, holding as follows:

> Rule 1.140(b)(6) authorizes the motion to dismiss for failure to state a cause of action. Rule 1.140(h)(2), expressly permits the opponent of a claim to ***wait until trial to move for dismissal on the grounds that the claim has been defectively pleaded.*** Contrary to the trial court's ruling, there is nothing in the rule that requires the motion to be made at the commencement of trial and before the presentation of any evidence. We are unable to agree that we should read such a requirement into the rule. Although it might seem "efficient" and ostensibly "just" in the eyes of the claimant or opponent to make the motion earlier rather than later, these considerations are hardly dispositive. There is the defendant's equal right to efficiency and justice.

689 So. 2d at 1189 (emphasis added).

The court in *Schopler* held that the plaintiff was not permitted to rely upon the rule pertaining to amendments to conform to the evidence, even thought there was no objection to that evidence at the time of trial. The plaintiff was literally blindsided by the defendant's delay until trial in raising the "failure to state a cause of action" defense, and there was nothing that the plaintiff could do to rescue the cause of action once that defense was raised at the close of the evidence. Don't let this happen to you!

Strategies to Avoid Dismissal at Trial

What can you do? To begin with, even if the defendant does not file a motion to dismiss on the ground of failure to state a cause of action, examine the defendant's answer when it is filed to see whether such a defense is raised. Then go ahead and set that defense down for hearing yourself before trial, in order to get a ruling on the issue. Since the defense can be raised during trial even without being pled in the defendant's answer, it wouldn't be a bad

idea to get some sort of acknowledgment from the defense attorney prior to trial that your complaint states a cause of action, at least in any case involving some complicated legal theory or novel defensive issues which might raise a question.

For example, you could send out requests for admissions, one of which asks the defendant to admit that "plaintiff's complaint states a cause of action for [medical malpractice, product liability, wrongful death, etc.]." Another approach might be to get something signed by defense counsel in the way of a stipulation that the complaint states a cause of action.[1] In any case in which you have the slightest doubt that your complaint states a viable cause of action, and you think that the defense attorney might pull this sort of stunt that we see in the cited cases, try to get some sort of determination early on in the trial on the issues, rather than being powerless to act after both sides have rested.

Conclusion

I hope that the cited cases are isolated examples of a somewhat strange principle of "gotcha" law, but the consequences were serious enough that I thought the issue deserves mention. We all hope to be able to plead a cause of action sufficient to avoid dismissal. Don't be lulled—by the lack of a motion to dismiss—into thinking that your pleading abilities have been perfected. Instead,

Keep Tryin!

Roy

[1] In cases in which trial courts require a pretrial stipulation setting forth the issues for trial, one could make the strong argument that the defense attorney's failure to include that defense in the pretrial stipulation would preclude it from being raised at trial, even if no motion to dismiss is required.