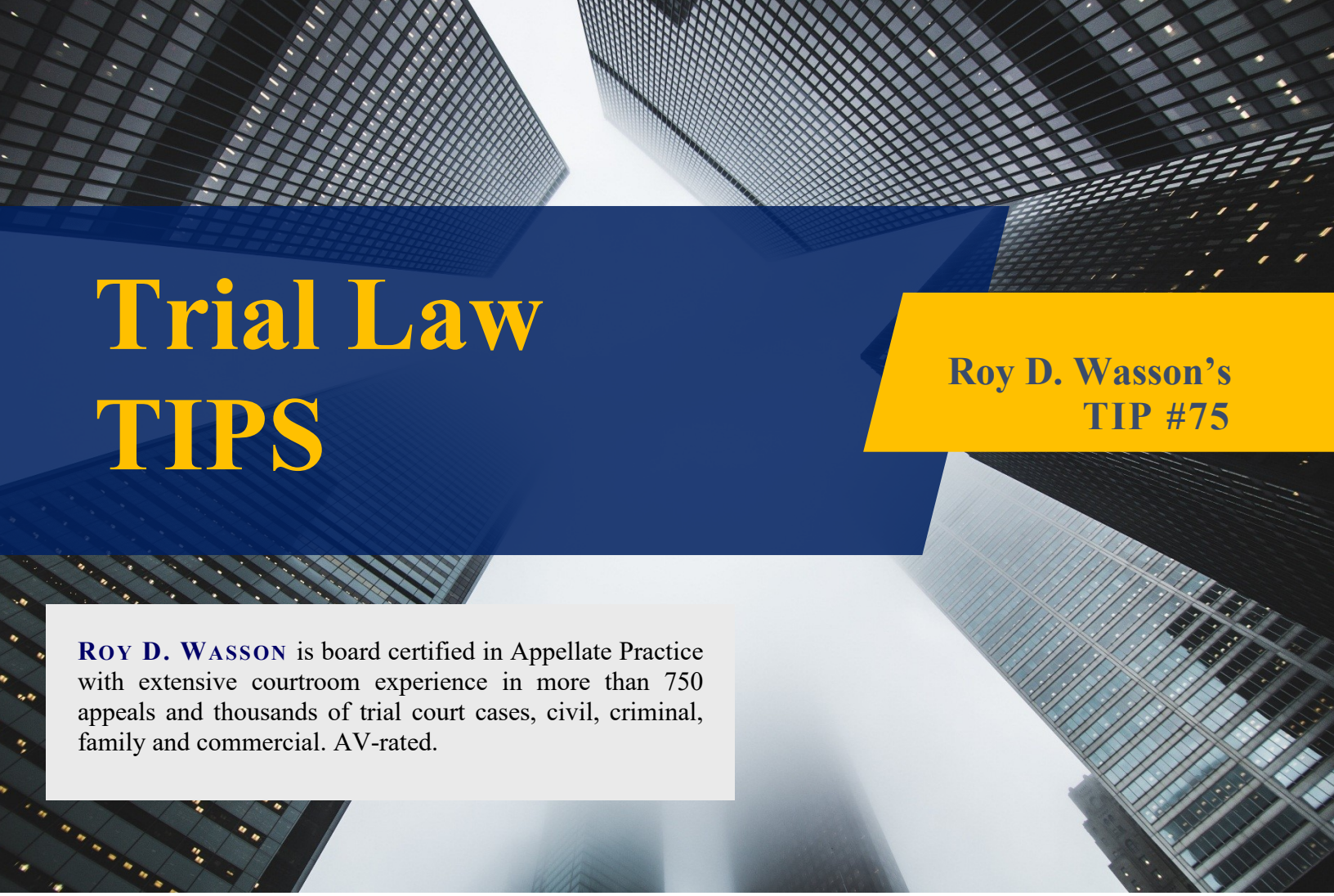

Trial Law TIPS

Roy D. Wasson's TIP #75

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.

Overcoming "Sudden Loss of Consciousness" Defense

Insurance defense counsel sometimes raise the defense that their client (or the deceased insured who also died in the crash that injured or killed your client) was not negligent in causing the collision, even if it was a head-on crash in your client's lane of travel. The defense angle in such cases is that their driver unexpectedly passed out or became incapacitated just before losing control. Insurance companies will go great lengths to establish the fact that the defendant suffered from some serious medical condition that could have caused such a sudden loss of consciousness. "As a general rule, the operator of an automobile, vessel or other mode of transportation who unexpectedly loses consciousness or becomes incapacitated is not chargeable with negligence as a result of his or her loss of control." *Feagle v. Purvis*, 891 So. 2d 1096, 1098-99 (Fla. 5th DCA 2004).

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The defense also is likely to argue that their client could not predict that the condition leading to unconsciousness would have occurred just prior to the crash in question, making the case for the absence of negligence in getting behind the wheel. The elements of the defense in question are as follows:

> 1. The defendant suffered a loss of consciousness or capacity. *See, e.g., Bridges v. Speer*, 79 So. 2d 679, 681 (Fla. 1955); *Wilson v. The Krystal Co*., 844 So. 2d 827 (Fla. 5th DCA 2003).
>
> 2. The loss of consciousness or capacity occurred before the defendant's purportedly negligent conduct. *See Malcolm v. Patrick*, 147 So. 2d 188, 193 (Fla. 2d DCA 1962).
>
> 3. The loss of consciousness was sudden. *See, e.g., Baker v. Hausman*, 68 So. 2d 572, 573 (Fla. 1953); *Malcolm*.
>
> 4. The loss of consciousness or capacity was neither foreseen, nor foreseeable. *See, e.g., Baker; Wilson; Wingate* [*v. United Servs. Auto Assoc*., 480 So. 2d 665 (Fla. 5th DCA 1986)]*; Malcolm*.

Feagle, 891 So. 2d at 1099.

In a recent case, the trial court granted summary judgment for the defendant, accepting the defendant's position that it was impossible for him to know that he suffered from the condition that led to his loss of consciousness and the resulting crash. However, on appeal to the Fifth District Court of Appeal, that summary judgment was reversed. The court held as follows:

> In this case, it is undisputed that Woodall lost consciousness while driving when he suffered a brain aneurism, and that his loss of consciousness caused the collision which injured Abreu. Defendants submitted the affidavit of a medical expert explaining that: "it would have been impossible for the patient [Woodall] to know prior

> to the accident . . . that he had an intercranial aneurism." It was this opinion which apparently swayed the trial court when deciding the summary judgment motion.
>
> However, medical notes submitted for consideration at summary judgment indicated that Woodall had a history of aneurysm and discussed a "nephrology consult" which stated that an angiography was recommended due to a "known history of cerebral aneurysm." Another medical report described Woodall as a "severe vasculopath who was not getting proper medical care." In addition, various medical records indicated that on the day of the accident, Woodall had a headache for several hours prior to losing consciousness, and that his "head was spinning." The records further report that Woodall "tried to drive home" but "started having blurry vision where he could not see" and "felt like he was going to pass out." This evidence raises questions of fact as to whether Woodall's loss of consciousness was foreseeable, how suddenly he lost consciousness and whether he had any "premonition or warning" of it. Given this conflicting evidence, summary judgment should not have been granted.

Abreu v. F.E. Development Recycling, Inc., No. 5D09-826; 2010 Fla. App. LEXIS (Fla. 5th DCA May 7, 2010)(footnotes deleted).

The message is clear: The plaintiff should conduct discovery into the defendant driver's medical history in any case involving the loss of consciousness defense. If at first you don't succeed,

Keep Tryin!

Roy

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