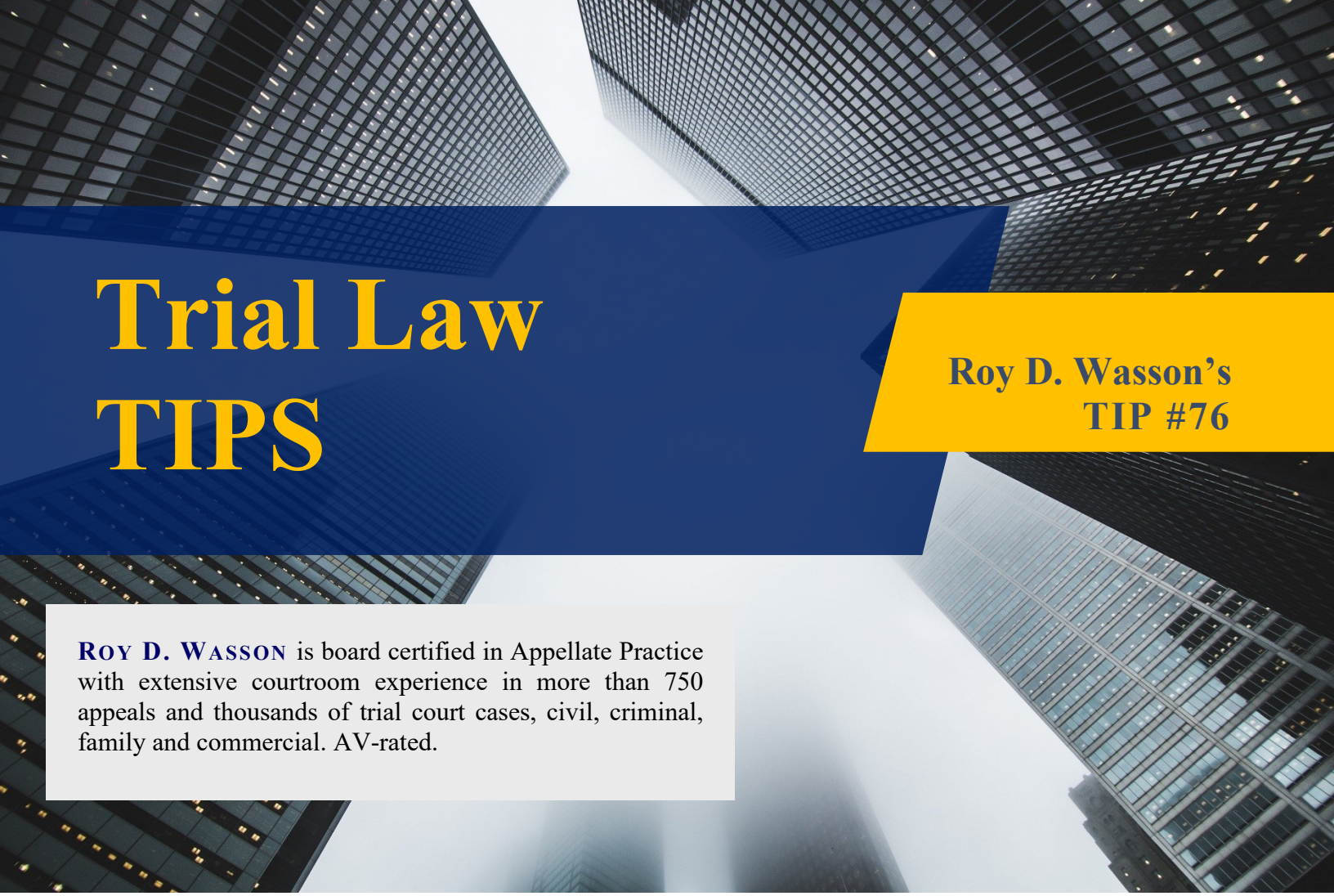

Trial Law TIPS

Roy D. Wasson's TIP #76

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.

Avoiding Statutes of Limitations When Identifying Incorrect Defendant in Complaint

Defendants delight in the tactic of waiting until after the statute of limitations has expired and then moving to dismiss the complaint for identifying the defendant by an incorrect name in the complaint. This situation arises in two kinds of circumstances, and the standard for avoiding the effect of the statute of limitations is somewhat different, depending upon which circumstance your case falls into.

The first circumstance is when the complaint contains a simple error as to the name of the Defendant and identifies a person or entity that does not actually exist. An example of this, suggested by a TLEL member, is where the Defendant is misidentified as "American Corp.," when the only entity that

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

could be named is "Corp. of America, Inc." The second kind of case where the issue arises is where there are two closely-aligned legal entities, and the complaint mistakenly identifies one of them as the defendant when it was the other one that harmed the plaintiff. With sufficient work and advance preparation, the plaintiff's attorney should be able to cure either type of problem of mis-identifying the defendant and avoid the statute of limitations.

Simple Misnomer Cases

As strange as it sounds, it is easier to avoid the statute of limitations when you have mis-identified the defendant by naming a nonexistent entity or person, rather than mistakenly identifying one of two or more existing parties. The easiest way to avoid the statute of limitations when correcting the name of the Defendant after the statute has expired is to establish that your identification of the incorrect party in the complaint was the result of a simple "misnomer," rather than the mistaken selection of one potential defendant over another.

Where an amended complaint "merely corrected a misnomer, then application of the relation-back theory . . . [precludes] dismissal on the ground that the suit was barred by the statute of limitations." *Anderson v. Emro Marketing Co.*, 550 So. 2d 531, 532 (Fla. 1st DCA 1989). "Conversely, however, if the amendment was intended to bring a new party into the suit, the relation-back theory would not have been applicable and dismissal on time-barred grounds would have been proper." *Id*.

Examples of simple misnomer cases are numerous. One case finding that the relation back doctrine precluded dismissal is where the original complaint identified "Scandinavian World Cruises, Ltd., Inc.," when the correct defendant was "Scandinavian World Cruises (Bahamas), Ltd." See *Barone v. Scandinavian World Cruises, Ltd.*, 531 So. 2d 1036 (Fla. 3d DCA 1988). A similar case involved the situation where the plaintiff sued "Taylor Creek Marina, a Florida corporation," a

non-existent corporation, when the correct party was "Taylor Creek Marina of Fort Pierce, Inc." See *Thomas v. Taylor Creek Marina of Fort Pierce, Inc.*, 520 So. 2d 708 (Fla. 4th DCA 1988).

Thus, if there is no entity with the name of the party you identified in your complaint and the misidentification was the reason of a simple misnomer, the law is clear that your amended complaint will relate back to the original filing and your action will not be barred by the statute of limitations.

Identification of Incorrect But Related Entity

As noted above, the general rule regarding relation back of amended complaints where a defendant is mis-identified does not apply where the amended complaint will serve to bring in a new party. However, there are exceptions to that general rule. The law in this area is somewhat confusing because these cases are also characterized as "misnomer" cases. But the courts often require a showing a lack of prejudice to the correct defendant, or some action on the part of the mistakenly-named defendant to lull the plaintiff into allowing the limitations period to expire, in order to permit the joinder of a new party after the statute of limitations has expired.

Several of the cases in this area were analyzed by the court in *Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.*, 725 So. 2d 451 (Fla. 4th DCA 1999) as follows:

> Rule 1.190 (c), however, does not specifically allow for the addition of a new party. Generally, the addition of a new party to an action will not relate back to the original complaint. *See Kozich v. Shahady,* 702 So. 2d 1289 (Fla. 4th DCA 1997)*; Troso v. Florida Ins. Guar. Ass'n,* 538 So. 2d 103 (Fla. 4th DCA 1989); *Lindsey v. H.H. Raulerson Jr. Mem'l Hosp.,* 505 So. 2d 577 (Fla. 4th DCA 1987); *Louis v. South Broward*

Hosp. Dist., 353 So. 2d 562 (Fla. 4th DCA 1977). Exceptions to this general rule are made, however, where the amendment is merely the correction of a misnomer. *See Francese v. Tamarac Hosp. Corp.,* 504 So. 2d 546 (Fla. 4th DCA 1987)(amendment allowed where the plaintiff first named "University Community Hospital" at a specific address and later named "Tamarac Hospital Corporation d/b/a University Community Hospital" at the same address).

Recent decisions of our court have liberalized the "addition-of-a-new-party" standard and allowed relation back where the new party is sufficiently related to an original party such that the addition would not prejudice the new party. *See Kozich,* 702 So. 2d at 1291; *Schachner v. Sandler*, 616 So. 2d 166 (Fla. 4th DCA 1993). In *Kozich* we held that "***the addition of a party...does relate back where the new and former parties have an identity of interest which does not prejudice the opponent***." 702 So. 2d at 1291.

The "identity of interest" is manifested in such circumstances as when the companies (1) operate out of a single office; (2) share a single telephone line; (3) have overlapping officers and directors; (4) share consolidated financial statements and registration statements; (5) share the same attorney, and (6) receive service of process through the same individual at the same location. *See Palm Beach County v. Savage Constr. Corp.*, 627 So. 2d 1332 (Fla. 4th DCA 1993).

> In this case, substantial identities of interest have been shown to exist between the original defendant and the new defendants. Robert Schmier stated in his affidavit that he is president of both the original defendant, Wilt's Inc.,and the new defendant, Wilt's Place, which is the general partner of Wilt's Ltd., a party to this action. All three entities received service of process through the same registered agent, Robert Schmier, at the same office and address. All three defendants were represented by the same attorney.
>
> Furthermore, no prejudice to Wilt's Ltd. and Wilt's Place has been demonstrated by their addition as defendants. As we stated in *Kozich*, the relation-back doctrine applies where:
>
> The newly added party had early knowledge of the litigation...prior to the running of the Statute, and knew or should have known that the plaintiff had made a mistake or was guilty of a misnomer as concerns the correct identity of the defendant so that the added party was deemed to have suffered no prejudice by being tardily brought in or substituted as a party.
>
> 702 So. 2d at 1291 (citing *Michelin Reifenwerke, A.G. v. Roose*, 462 So. 2d 54, 57 (Fla. 4th DCA 1984)).

Id. at 453 (emphasis added).

In addition to establishing a substantial identity of interest between parties (or instead of that where the proof cannot be obtained), the plaintiff should also attempt establish that the incorrectly-named defendant lulled the plaintiff into a false sense of security by not immediately protesting that it had nothing to do with the plaintiff's accident. In *Schwartz v. Metro Limo, Inc.*, 683 So. 2d 201 (Fla. 3d DCA 1996), the

court reversed an order granting the Defendant's motion to dismiss, holding that the amended complaint related back to the original complaint. In that case, the Plaintiff sued "Metro Tax Cab Company, Inc.," when the correct defendant should have been a different legal entity known as "Metro Limo, Inc." The mis-identified defendant failed to object to being named as the defendant until after the statute of limitations expired, and the court it stated its disapproval of such a tactic as follows:

> In the instant case, Metro Taxi Cab made several overt acts intended to lull the plaintiffs into a false sense of security. First, Metro Taxi Cab actively participated in pre-suit discovery and evaluation of the plaintiffs' claims. Correspondence between the plaintiffs' attorney and Metro Taxi Cab's attorney reveals that Metro Taxi Cab was aware of the plaintiffs' claims since January 28, 1988; that sometime after receiving notice of the claims, the plaintiffs' attorney sent Metro Taxi Cab's attorney a "demand package" containing the plaintiff's medical records, reports, and bills; that in November 1990, Metro Taxi Cab changed attorneys; and that on January 28, 1991, Metro Taxi Cab's new attorney requested a copy of the "demand package" containing the plaintiff's medical records, reports, and bills so that he could properly evaluate the plaintiffs' claims. Next, Metro Taxi Cab disputed the sufficiency of service of process. When Metro Taxi Cab was served with the original complaint in December 1990, it filed a motion to dismiss based on insufficiency of process. The dispute over insufficiency of process lasted until well after the statute of limitations had run against the proper defendant. Lastly, when Metro Taxi Cab answered the complaint with a general denial, it also asserted several affirmative

> defenses, including the plaintiff's contributory negligence. As the Federal District Court for New Jersey in *Hartford Accident* observed, these are clearly not the actions of an innocent defendant:
>
> > The only honest answer [the original defendant] could file was one in which it would plead no connection whatsoever with the accident. Had there been no like named and controlled . . . corporation, such an answer would undoubtedly have been filed. ***Under ordinary circumstances, one who sues a wholly innocent defendant would learn of his mistake by telephone at once***. Such is the normal way of sound practitioners.

Hartford Accident, 74 F. Supp. at 791, 794, *cited in Argenbright*, 196 So. 2d at 193. *Schwartz v. Metro Limo, Inc.*, 683 So. 2d 201, 203 (Fla. 3d DCA 1996)(emphasis added).

Of course, the best situation for applying the relation-back doctrine where you name an actual company that is the incorrect defendant is where the company you name both is closely related to the correct defendant and lulls you into a false security by failing to raise the objections to being named until after the limitations period expired. Where you find yourself in the situation of having named the incorrect party, look for evidence on both fronts.

Conclusion

These days of interlocking corporations using similar names and companies regularly doing business under names different from their correct corporate entity, it is virtually impossible to always have the defendant correctly identified in every complaint you file. The author hopes that this Trial Law TIP will assist the practitioner when naming the incorrect defendant either through a simple misnomer or by incorrectly

identifying a related company. If at first you do not succeed in naming the correct defendant in your complaint,

Keep Tryin!

Roy

WASSON & ASSOCIATES, CHARTERED
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com