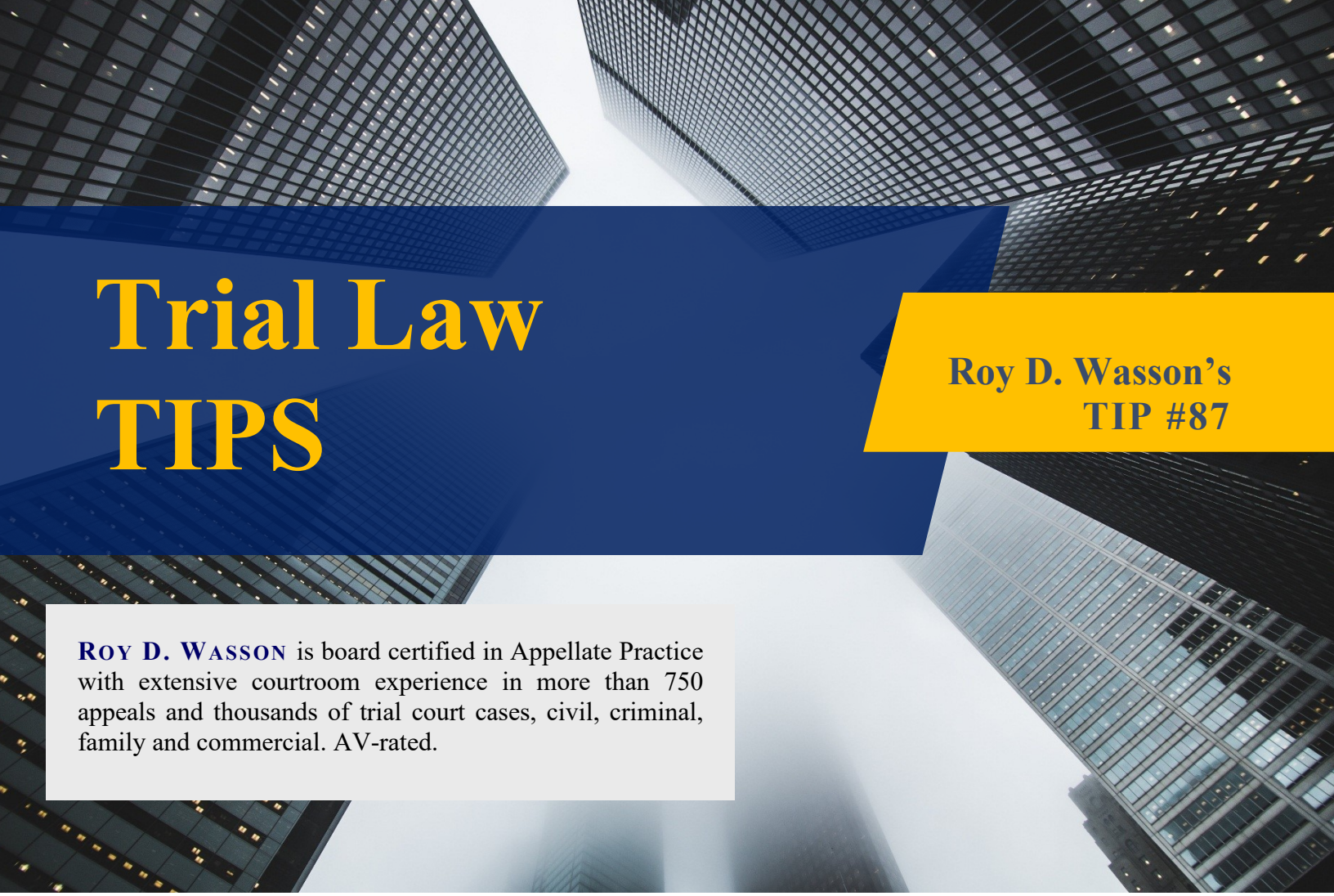

Trial Law TIPS

Roy D. Wasson's TIP #87

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.

Reformation of Releases to Pursue Claims Against Additional Tortfeasors

Have you ever settled with an initial tortfeasor, such as a negligent driver in a motor vehicle collision case, and then had a different tortfeasor, such as a medical malpractice defendant, raise as a defense the release your client gave to the first tortfeasor? It is a frightening proposition to learn that you may have committed legal malpractice in failing to tailor the release to avoid such a problem, but do not jump out the window when you receive the second defendant's motion to amend its answer to plead the affirmative defense of release. There is a way out: reformation of the release to reflect the parties' intent that only the first tortfeasor would be released.

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

Procedure to Reform Releases

The first thing you need to do when you receive the news that a second tortfeasor is raising the defense of release is call the attorney who defended the settling tortfeasor and offer to take him out to his favorite restaurant for a meal on your tab. At this point in the process, kick yourself in the butt for any rudeness or failure to cooperate that you may have demonstrated to opposing counsel in the prior litigation, and hope that the prospect of a free meal will help him or her forget.

Seriously, the first thing you should do is ask your former opponent to cooperate by agreeing that the release should be reformed to reflect that the parties only intended to release the settling party and any others vicariously liable for that party's negligence, not an unrelated entity insured by another company. If you can get a new release signed which makes that intent clear, do it immediately, but that is not all you need to do, because that first release is still in existence, and will be offered as a defense by the second defendant.

Reformation is an equitable process that requires court action. Where a release is raised as a defense to a claim, the party opposing the effect of the release may avoid the defense by amending his or her pleadings to seek reformation of that release. *See Abernathy v. National Union Fire Ins. Co.*, 717 So. 2d 196 (Fla. 5th DCA 1998); *Saucy v. Casper*, 658 So. 2d 1017 (Fla. 4th DCA 1995). You need a court order declaring the release reformed, and you need it in a case where the second tortfeasor is a party. Therefore, if you are in suit against the second tortfeasor (either in the same case in which you settled with the first defendant or another case), you need to amend the complaint to bring (or bring back) the first defendant into the case on a single count for reformation.

If you are not in suit against the second tortfeasor, you need to file suit and also join the settling party. This may make the first tortfeasor's attorney nervous, so make sure that your

count for reformation says something like "the settling Defendant never did anything wrong and just settled out of the goodness of his hear." You get the idea. But a court order in a case where both defendants are parties is required, so you can enjoy the res judicata effect of the reformation order on the settlement defense.

Law on Reformation of Releases

Where a release fails to reflect the intent of the settling parties, it is universally recognized that the release may be reformed to reflect the parties' true intent. "Where an agreement does not carry out the intent of the parties or violates such intent, equity will reform the agreement. Of course, ***such relief is equally available to one seeking to reform a release because of mutual mistake***." *Milford v. Metropolitan Dade County*, 430 So. 2d 951 (Fla. 3d DCA 1983). *Accord, Gonzalez v. Travelers Indemnity Company of Rhode Island,* 408 So. 2d 741 (Fla. 3d DCA 1982); *Ayr v. Chance,* 372 So.2d 1000 (Fla. 4th DCA 1979); *Alexander v. Kirkham,* 365 So.2d 1038 (Fla. 3d DCA 1978).

Do not let the second defendant get away with the argument that the first release cannot be reformed because it is unambiguous. The fact that the release may be unambiguous and purport to release all claims is not dispositive and is irrelevant to a claim for reformation. "The fact that the release as written unambiguously fails to extinguish the County's liability is plainly not dispositive and, indeed, is irrelevant to Milford's claim for reformation." *Milford, supra* (citing *Gonzalez v. Travelers Indemnity Company of Rhode Island,* 408 So.2d 741 (Fla. 3d DCA 1982).

If there is an issue of fact about the first defendant's intent in settling, you still can reform the release, but you will need to have an evidentiary hearing on the factual issue of intent. *See Gonzalez, supra* (summary judgment for insurer based on release of uninsured motorist benefits reversed and case remanded for trial on insured's claim that release did not

express actual intent of the parties to preserve the right to such benefits and should be reformed); *Ayr v. Chance,* 372 So.2d 1000 (summary judgment for defendants based on release discharging them from any and all claims reversed and case remanded for resolution of issue of fact as to whether release a product of mutual mistake).

Your motion to amend the pleadings to plead a claim for reformation will prevent the entry of summary judgment against you. as a matter of law, it would be error to deny leave to amend. As noted by the Third DCA in a case involving the same question (that I won thirty years ago):

> Leave to amend should be freely given when justice so requires. Fla. R. Civ. P. 1.190(a), the more so when a party seeks such a privilege at or before a hearing on a motion for summary judgment . . .. ***Old Republic's crossclaim for reformation of the insurance policy, if meritorious would have defeated Wilson's motion for summary judgment***. Consequently, the ***denial of Old Republic's motion for leave to file a crossclaim [seeking reformation] was error***.

Old Republic Ins. Co. v. Wilson, 449 So. 2d 421 at 422 (Fla. 3d DCA 1984)(emphasis added).

Conclusion

Congratulations on settling the first case and good luck in litigating the second one. You may not have agreed to the right release language before, but all you can do is . . .

Keep Tryin!

Roy

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