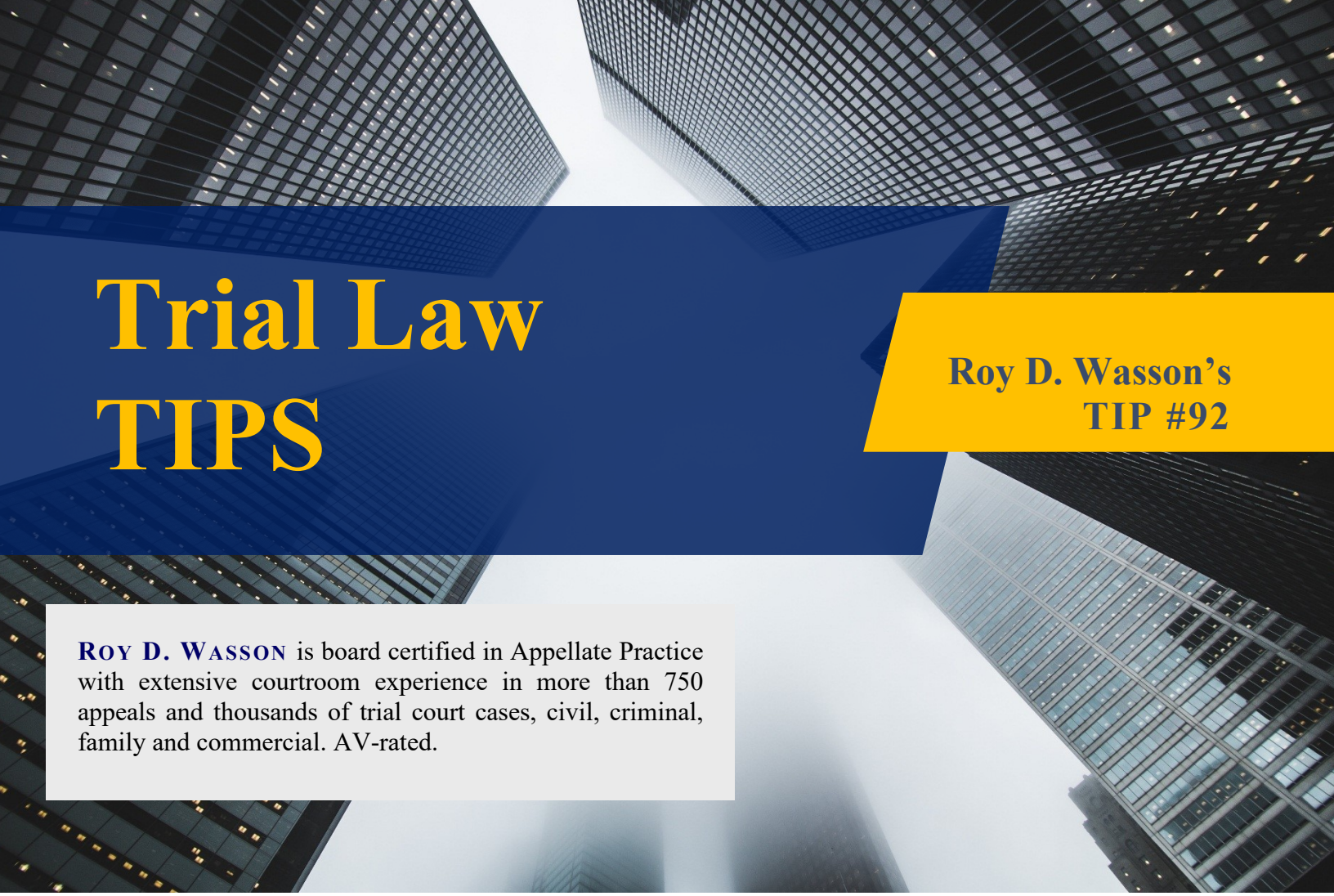

Trial Law TIPS

Roy D. Wasson's TIP #92

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.

Pleadings are Meaningless When Trumped by Pretrial Stipulation

Good trial lawyers know where to look when planning for everything to take place at trial from opening statement to the jury instructions: we look to the "pleadings," right? Many cases hold that cases cannot be tried on unpled issues, and that we must look to the formal pleadings listed in Fla. R. Civ. P. 1.090(a), as opposed to the generic things we casually call "pleadings" (such as motions, memos of law and discovery papers), to ascertain what issues will be tried. For example, in *Triana v. FI-Shock, Inc.*, 763 So. 2d 454 (Fla. 3d DCA 2000), the court stated:

> Because Espinoza failed to plead the issue of adequate warnings, we find that the trial court acted fully within its discretion in denying an interrogatory or jury instruction concerning Fi-Shock's failure to

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> adequately warn. The law is clear that ***litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared***. Our growing, complex society and diminishing resources mandate the requirement that litigants present all claims to the extent possible, at one time and one time only. *Arky, Freed, Stearns, Watson, Greer, Weaver, & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988). *See also Bloom v. Dorta-Duque*, 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999)(stating that "it is well settled that ***a defendant cannot be found liable under a theory that was not specifically pled***."); *Robbins v. Newhall*, 692 So. 2d 947, 950 (reversing final judgment where plaintiff had alleged three specific acts of negligence, but tried the case on a fourth alleged act that was never pled).

Id. at 458 (emphasis added).

But did you know that a claim or defense can be properly pleaded in the complaint, answer, or reply to affirmative defenses, but you still cannot have the jury instructed on that issue and win the trial on that claim or defense? I am not talking about claims or defenses that were properly pled, but then knocked out of the case by summary judgment. Instead, there is another court paper you sign and file that can trump those pleadings and prevent an issue from going to the jury. Or it can allow a claim or defense to be tried which was not pled in the complaint or answer. That other court paper is a "pretrial stipulation."

> The ability of a trial court to utilize this effective tool is granted through Florida Rule of Civil Procedure 1.200. Pursuant to rule 1.200(a)(11), at a case management conference, a trial court may require the parties to file "preliminary stipulations if issues can be narrowed." In addition, pursuant to rule 1.200(b)(1), a trial court may require parties to appear for a pretrial conference to determine "the

> simplification of the issues." Finally, rule 1.200(d) provides, "The court shall make an order reciting the action taken at a conference and any stipulations made. The order shall control the subsequent course of the action unless modified to prevent injustice."

Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037, 1039 n. 2 (Fla. 4th DCA 2015)

The Fourth District in that Palm Beach Polo Holdings case calls the pretrial stipulation "the ***trump card*** upon which all parties to any litigation can virtually always rely," and the court makes it clear that only those issues in that stipulation will be presented to the jury:

> As such, we take this opportunity to remind judges and litigators that any previous skirmishes or dust-ups or contentious pretrial issues become mostly irrelevant once the parties prepare and stipulate as to the final agreed-upon "executive summary" as to what the impending trial is about and the specific issues that remain on the table. The Pretrial Stipulation is surely one of the most coveted and effective pretrial devices enjoyed by the trial court and all involved parties. *Cf. Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008) ("A ***stipulation that limits the issues to be tried 'amounts to a binding waiver and elimination of all issues not included***.'" (quoting Esch v. Forster, 123 Fla. 905, 168 So. 229, 231 (Fla. 1936))).
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> The Pretrial Stipulation is a powerful blueprint that fully enables a well-run and fair trial. "'[I]t is the policy of the law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes.'" *Id.* (*quoting Spitzer v. Bartlett Bros. Roofing*, 437 So. 2d 758, 760 (Fla. 1st DCA 1983)). "'Pretrial stipulations prescribing the issues on which a case is to be tried

> are binding upon the parties and the court, and should be strictly enforced.'" *Id.* (*quoting Lotspeich Co. v. Neogard Corp*., 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982)).

174 So. 3d at 1028-29 (emphasis added and footnote deleted)

Do not be blindsided at trial by the judge's refusal to give a jury instruction on an issue not referenced in the pretrial stip. Whether it was pleaded in the complaint and addressed in motion practice is irrelevant; if it is not in the stip it is not an issue for trial. Follow this advice from the Fourth District: "We candidly acknowledge the frenzied nature of a civil (and criminal) litigation practice and the tendency of The Pretrial Stipulation process to become tedious and time-consuming. But everyone involved in the impending trial ultimately reaps huge dividends during the fast paced, adrenaline-pumping 'final act,' that we call the trial." *Id.* @ n. 3.

Blast From the Past—Tip #2
Think Before Filing Reply to Affirmative Defenses

Imagine you're in a medical malpractice trial and you ask your client to testify about what the defendant doctor told her after the negligent treatment was rendered. "Objection," says defense counsel, "what happened afterwards is irrelevant and immaterial." "No," you argue, "the doctor's assurances that the results of his treatment were normal sequelae is relevant evidence of ***fraudulent concealment*** of the malpractice sufficient to toll the statute of limitations." It may be ***relevant*** to that issue, but the fraudulent concealment avoidance is not a ***material*** issue unless it has been pleaded expressly, and many trial lawyers fail to plead that, or any other avoidances, correctly.

The place to plead avoidances to affirmative defenses is in the most misunderstood of pleadings: the reply. Although rarely necessary, the reply can make or break your case. Florida Rule

of Civil Procedure 1.110(d) provides, in relevant part: "In pleading to a preceding pleading a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense." *See also Coral Ridge Props., Inc. v. Playa Del Mar Ass'n, Inc*., 505 So. 2d 414, 416-17 (Fla. 1987) (discussing the requirement for a party to plead an avoidance of the affirmative defense); *Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Co*., 105 So. 3d 602, 607 (Fla. 4th DCA 2013) (noting that Rule 1.110(d) requires a party to include any affirmative defense or avoidance in the initial pleadings); *Kitchen v. Kitchen*, 404 So. 2d 203, 205 (Fla. 2d DCA 1981) ("[I]t is only when 'new matter' is sought to be asserted to avoid the affirmative defense that a reply is required."). "Where a party files no reply to an affirmative defense, this merely denies (as opposed to avoids) the affirmative defense." *Lazar v. Allen*, 347 So. 2d 457, 458 (Fla. 2d DCA 1977).

You should never file a reply which states that "Plaintiff denies each and every affirmative defense and demands strict proof thereof." Just say "no" to that useless form of pleading. Although we all know that a mere denial is not needed, what would it hurt? Just ask the Plaintiff's attorney in *Buss Aluminum Products, Inc. v. Crown Window Co*., 651 So. 2d 694 (Fla. 2d DCA 1995). A reply like that was called a "stray pleading" so useless that it did not constitute "record activity" to keep that case from being dismissed for failure to prosecute. *Id*. at 695. Although the failure to prosecute rule was later amended to prevent dismissal if there was any record filing without one year (whether or not it hastened the case to a conclusion), the *Buss Aluminum* case demonstrates the uselessness of a reply which merely denies affirmative defenses.

Worse still, such a mere denial in your reply would absolutely preclude you from putting on any proof to really ***avoid*** a defense raised in the answer. This is the part of reply law which escapes many attorneys. A reply is only needed to raise

"new matter" to avoid an affirmative defense; but if an affirmative defense is raised, a reply might well be necessary to enable you to put on proof to explain why that defense is no good.

This Tip started with the example of a reply to avoid the statute of limitations affirmative defense. Where an answer pleads that defense, a mere denial in the reply would do no good. Unless affirmatively pleaded, the avoidance of fraudulent concealment (or waiver, or any other new matter in avoidance of that defense) is not a material issue in the case and evidence on that defense should not be permitted over an immateriality objection. *E.g., Frisbie v. Carolina Cas. Ins. Co*., 162 So. 3d 1079 (Fla. 5th DCA 2015)(reversing summary judgment "because the issue of unclean hands—asserted by Appellee as an avoidance to Appellants' affirmative defenses—should have been pleaded in a reply to Appellants' answer").

To tie this Tip to the theme of Tip #92, don't forget to include in the pretrial stipulation any avoidances you plead in your reply.

It is hard to keep all the rules of pleading and practice straight. All we can do is . . .

Keep Tryin!

Roy

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