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## Motions

### 1. Is the appellate court likely to uphold the trial court's ruling?

*The employer moved for summary judgment, alleging that the woman was a pathological liar who had filed the action and included fictitious documents in revenge for having been fired. Because the woman's attorney was at a lengthy out-of-state trial when the summary-judgment motion was filed, he failed to respond to it. The court therefore granted the motion in a one-line order and entered final judgment. The woman has appealed. After being fired, a woman sued her former employer in federal court, alleging that her supervisor had discriminated against her on the basis of her sex. The woman's complaint included a lengthy description of what the supervisor had said and done over the years, quoting his telephone calls and emails to her and her own emails to the supervisor's manager asking for help.*

- No, because the complaint's allegations were detailed and specific
- **No, because the employer moved for summary judgment on the basis that the woman was not credible, creating a factual dispute**
- Yes, because the woman's failure to respond to the summary-judgment motion means that there was no sworn affidavit to support her allegations and supporting documents
- Yes, because the woman's failure to respond to the summary-judgment motion was a default giving sufficient basis to grant the motion

Note:

*Later in the lifecycle of a federal case, either party can make a number of motions to adjudicate the dispute in their favor without a trial. If one party can show there is no genuine dispute of as to any material fact in the lawsuit, and that he is entitled to judgment as a matter of law, he can be awarded judgment through a Federal Rule of Civil Procedure (FRCP) 56 motion for summary judgment. The party seeking summary judgment has the burden of producing information that clearly establishes there is no factual dispute for a jury to resolve.*

*In deciding a motion for summary judgment, the court will "go behind the pleadings." Even if it appears from the pleadings that the parties are in dispute on a material fact, the summary judgment motion should be granted if the movant can show that the disputed factual issues presented by the pleadings are illusory. The movant bears the initial burden of production and may use affidavits and discovery materials to establish that there is no factual dispute on the matter for which summary judgment is sought.*

*B is correct. The standard for summary judgment is whether there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. By challenging the woman's credibility in its motion, the employer disputed all the facts and evidence she had laid out in her complaint. Therefore, the motion did not meet the standard for summary judgment, and the trial court's ruling should be reversed.*

*A is incorrect. The fact that the complaint's allegations were detailed and specific does not automatically prevent the court from entering summary judgment. The question is whether, taking into account those allegations, as well as the allegations the employer raised in its summary judgment motion, there remains no genuine dispute of any material fact such that the employer is entitled to judgment as a matter of law. By challenging the woman's credibility in its motion, the employer disputed all the facts and evidence she had laid out in her complaint.*

*C is incorrect. Although the woman failed to respond, that is not in itself a basis for summary judgment. The court may grant summary judgment only if the employer's motion and supporting materials show that the employer is entitled to that relief. The standard for summary judgment is whether there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. By challenging the woman's credibility in its motion, the employer disputed all the facts and evidence she had laid out in her complaint.*

*D is incorrect. The woman's failure to respond does not act as a default by which the court can automatically enter summary judgment. The employer has the burden to show that the summary judgment standard is met - that there is no genuine dispute as to any material fact such that it is entitled to judgment as a matter of law. Only if the employer satisfies that burden will the burden then shift to the woman to introduce arguments or evidence showing that a genuine dispute of material fact does exist.*

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## 2. Should the court grant the motion?

*After resting its case, the company moved for judgment as a matter of law. At the jury trial, the man presented evidence that he had paid all premiums on the insurance policy and that the policy covered personal-injury-related medical expenses arising from accidents. After he rested his case, the company presented evidence that a provision of the policy excluded payment for injury-related expenses resulting from an insured's "unduly risky" behavior. The company also presented a witness who testified that the accident had occurred in an area where posted signs warned bikers not to enter. The man did not cross-examine the witness. A man brought a federal diversity action against his insurance company, alleging that the company had breached its duty under his insurance policy by refusing to pay for his medical expenses resulting from a mountain-biking accident.*

- No, because a motion for judgment as a matter of law must first be made at the close of the plaintiff's case-in-chief
- **No, because whether the man's behavior was unduly risky is a question of fact for the jury to resolve**
- Yes, because the company's uncontradicted evidence of the man's unduly risky behavior means that no reasonable jury could find that the policy covers his injuries
- Yes, because the man waived his right to rebut the company's evidence by not addressing the "unduly risky" policy provision in his case-in-chief

Note:

*If the case reaches a jury, either party may move for a judgment as a matter of law, also referred to as a directed verdict, which has the effect of taking the case away from the jury and determining the outcome as a matter of law. FRCP 50(a)(1) states that if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party and grant a motion for judgment as a matter of law against the party, on a claim or defense that under the controlling law can be maintained or defeated only with a favorable finding on that issue.*

*The movant must make a motion for judgment as a matter of law before the case is submitted to the jury. FRCP 50 also permits a judge to reserve judgment on a motion for judgment as a matter of law and submit the case to the jury. If the jury decides against the party who moved for judgment as a matter of law, the judge can then evaluate the legal sufficiency on the evidence on a renewed motion for judgment as a matter of law.*

*B is correct. The court should not grant the motion because the question of whether the man's behavior was "unduly risky" is an issue of fact that the jury should decide. A motion for judgment as a matter of law seeks to take the case away from the jury, which is why the standard is that a reasonable jury would not have a legally sufficient evidentiary basis to find for a party on a given issue. Based on the facts presented, it is incorrect that a reasonable jury would not have a legally sufficient evidentiary basis to find for the man on this issue. The burden was on the company to establish that the man's behavior was "unduly risky," a reasonable jury COULD find for the man given that the sole evidence used to establish his behavior was the testimony about the warning sign. There was no witness testimony from anyone with firsthand knowledge about how the man actually behaved. The jury should determine whether that evidence alone is enough to find the man's behavior unduly risky. A reasonable jury might conclude that the warning signs were designed to keep bikers out of the area for reasons other than risk, such as trespassing, given no additional evidence as to why the signs were posted.*

*A is incorrect. This answer reaches the correct answer with the wrong reasoning. This is an incorrect statement of the law. A motion for judgment as a matter of law need only be made before the case is submitted to the jury. There is no requirement that it be made at the close of the plaintiff's case-in-chief.*

*C is incorrect. The fact that the man did not introduce any evidence to contradict the testimony about the warning signs does not in itself show that the company met its burden to establish that the man's behavior was "unduly risky." The jury must determine the meaning of the warning signs and whether the signs alone establish that the man's behavior was unduly risky. As explained above, a reasonable jury might conclude that the warning signs were designed to keep bikers out of the area for reasons other than risk, given no additional evidence as to why the signs were posted. Therefore, the testimony, standing alone, does not establish that a reasonable jury could determine that the company had met its burden to prove that the area was actually dangerous.*

*D is incorrect. The company properly raised the issue of whether the man's behavior was unduly risky and excluded from coverage as a defense to the man's claim. Therefore, the man had no obligation to raise the issue of the warning signs in his case-in-chief in anticipation of this possible defense. He had the option to either rebut the issue on cross-examination or remain silent, which is what he chose to do, and allowed the jury to determine whether the testimony about the sign was sufficient to satisfy the company's burden of proof.*

### 3. What standard should the court apply to determine how to rule on the motion?

*The railroad has made a renewed motion for judgment as a matter of law. At the close of the evidence, the railroad moved for judgment as a matter of law, which was denied, and the case was submitted to the jury. The jury returned a verdict for the widow. A railroad worker's widow brought a wrongful death action in federal court against the railroad, claiming that its negligence had caused her husband's death. At trial, the widow offered the testimony of a coworker of the husband. The coworker testified that he had seen the rail car on which the husband was riding slow down and the cars behind it gain speed. The coworker also stated that he later heard a loud crash, but did not turn around to look because loud noises were common in the yard. Three other railroad employees testified that no collision had occurred.*

- Whether the evidence revealed a genuine dispute of material fact supporting the widow's claim
- Whether the verdict is against the weight of the evidence
- Whether the widow presented a scintilla of evidence to support the verdict
- **Whether there is substantial evidence in the record to support the verdict, resolving all disputed issues in the widow's favor**

Note:

*If the case reaches a jury, either party may move for a judgment as a matter of law (previously referred to as a directed verdict) which has the effect of taking the case away from the jury and determining the outcome as a matter of law.*

*Federal Rule of Civil Procedure (FRCP) 50(a) the standard for granting a motion for a judgment as a matter of law: If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (i) resolve the issue against the party; and (ii) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.*

*FRCP 50 also permits a judge to reserve judgment on a motion for judgment as a matter of law and submit the case to the jury. If the jury decides against the party who moved for judgment as a matter of law, the judge can then evaluate the legal sufficiency on the evidence on a renewed motion for judgment as a matter of law (previously known as a judgment notwithstanding the verdict). The most important aspect of making this kind of motion is that the movant must make a motion for judgment as a matter of law before the case is submitted to the jury.*

*D is correct. This question is testing your knowledge of the correct standard for a renewed motion for judgment as a matter of law, formerly known as a judgment notwithstanding the verdict. The renewed motion was properly made here because the moving party correctly moved for a judgment as a matter of law at the close of evidence. After the jury verdict, the moving party properly renewed the motion. The standard for a renewed motion for judgment as a matter of law is the same as a motion for judgment as a matter of law. Either motion will be granted if the evidence, viewed in the light most favorable to the non-moving party, was such that no reasonable jury would have a legally sufficient evidentiary basis to find for the non-moving party.*

*A is incorrect. This choice states the standard for summary judgment. Although a motion for summary judgment is also considered a judgment made as a matter of law, the motion can be filed up to 30 days after the close of discovery and will be granted if the non-moving party fails to demonstrate a genuine issue of material fact for trial. These motions are typically filed before trial, not after.*

*B is incorrect. This choice states the standard for a new trial. After the close of trial, a motion for a new trial will be granted in the court's discretion for either: (i) errors at trial which substantially affected a party's rights; or (ii) if the verdict was against the manifest weight of the evidence.*

*C is incorrect. The scintilla of evidence rule is an old common law standard used for summary judgment or judgment as a matter of law that has been widely discarded by most states in favor of the federal standard of substantial evidence. The instructions to the MBE clearly note that the Federal Rules of Civil Procedure are in place. The FRCP have precedence over any state rules or common law standards unless instructed otherwise.*

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#### 4. What is the best way for the attorney to raise the argument that the court lacks personal jurisdiction over the defendant?

A plaintiff domiciled in State A has brought a federal diversity action in State A against a defendant domiciled in State B, seeking damages for injuries the defendant allegedly caused the plaintiff in State B. The defendant has never been to State A and has no connections there. The defendant's attorney knows that the defendant was properly served but does not believe that the State A court has personal jurisdiction over her.

- Move for discovery on the issue of personal jurisdiction
- Move for judgment on the pleadings, seeking dismissal of the action for lack of personal jurisdiction
- Move for sanctions against the plaintiff and his attorney for filing the action in a court that has no personal jurisdiction over the defendant
- **Move to dismiss the action for lack of personal jurisdiction based on the complaint allegations and an affidavit from the defendant about her lack of connection to State A**

Note:

The issue in this question is the proper method of dismissing a case on the basis of lack of personal jurisdiction. Personal jurisdiction is the court's ability to exercise authority as to that party. The typical way of objecting to lack of personal jurisdiction is filing a motion to dismiss on that basis. Lack of personal jurisdiction is one of several defenses that are waived if the defendant does not raise them in the defendant's pre-answer motion or answer (whichever defendant files first). Examples of other such defenses are insufficient process and insufficient service of process. Some defenses—such as lack of subject-matter jurisdiction—are never waived, however.

D is correct. It correctly identifies that a motion to dismiss is the proper method of objecting to a lack of personal jurisdiction.

A is incorrect. Moving for discovery is not the proper course of action. First, the defendant would have waived the defense of lack of personal jurisdiction if she moved for discovery without first asserting that issue in a pre-answer motion or the answer. Second, the question does not provide any explanation for why discovery would be needed on the topic of personal jurisdiction, especially since the facts indicate the defendant has never been to State A and has no connections there. Thus, moving for discovery is not the correct approach to object to the court's alleged lack of personal jurisdiction.

B is incorrect. The purpose of a motion for judgment on the pleadings is to assess and dismiss a case when the material facts are not in dispute and the contents of the pleadings reveal the merits (or lack thereof) of the claim(s). Generally, a motion for judgment on the pleadings is filed after an answer has been filed and the pleadings are closed. As noted above, if the defendant waits to raise the issue of lack of personal jurisdiction until after filing the answer—and the defendant did not raise the issue in the answer or a pre-answer motion—the defense of lack of personal jurisdiction is normally waived. Thus, a motion for judgment on the pleadings is not the appropriate approach.

C is incorrect. A motion for sanctions is not the best option here. First, the facts do not indicate that this issue is so severe as to warrant sanctions against the plaintiff and his attorney. Additionally, as noted above, if the defendant waits to raise the issue of lack of personal jurisdiction until after filing the answer—and the defendant did not raise the issue in the answer or a pre-answer motion—the defense is normally waived. Thus, a motion for sanctions is not the appropriate approach here.

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## 5. What would be the worker's best response to the motion for summary judgment?

The worker's attorney deposed the manufacturer's president, and the manufacturer's attorney deposed the worker. Immediately thereafter, the manufacturer moved for summary judgment on the ground that the worker had no evidence showing that the insulation had ever been used by the worker's employer. A construction worker sued an insulation manufacturer in federal court, claiming that he had developed a chronic health condition as a result of 20 years of exposure to the manufacturer's insulation at his work sites. The manufacturer answered, denying all liability and stating that it had never supplied its insulation to the worker's employer.

- **Argue that more time is needed for additional discovery to show the manufacturer's liability, and attach a declaration describing the desired discovery**
- Argue that the motion should be denied, because a central issue in the case will be the manufacturer's credibility on the question of its distribution of the insulation, and only a jury can decide questions of credibility
- Argue that the motion should be denied, because the manufacturer failed to attach any evidence to its motion to show that the insulation was not used by the worker's employer
- Make a cross-motion for summary judgment arguing that the manufacturer has introduced no evidence to show that its insulation did not harm the worker

Note:

If the case reaches a jury, either party may move for a judgment as a matter of law, also referred to as a directed verdict, which has the effect of taking the case away from the jury and determining the outcome as a matter of law. Federal Rule of Civil Procedure (FRCP) 50(a) states the standard for granting a motion for a judgment as a matter of law: If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may (i) resolve the issue against the party; and (ii) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

The movant (the person seeking summary judgment) can show the lack of a genuine issue of fact by submitting affidavits. They must: (i) only contain matters as to which the affiant has personal knowledge; (ii) state only matters which would be admissible at trial; and (iii) show the affiant is competent to testify at trial. The movant may also submit the fruits of discovery no matter which side they were obtained from.

FRCP 50 also permits a judge to reserve judgment on a motion for a judgment as a matter of law, and submits the case to the jury. If the jury decides against the party who moved for judgment as a matter of law, the judge can then evaluate the legal sufficiency on the evidence on a renewed motion for judgment as a matter of law (previously known as a judgment notwithstanding the verdict). The most important aspect of making this kind of motion is that the movant must make a motion for judgment as a matter of law before the case is submitted to the jury.

A is correct. If a motion for summary judgment is premature, the court may defer ruling on it. When the party opposing the motion shows by affidavit or declaration that he cannot yet present the facts, he may state the reasons for their unavailability. The court may deny the motion for summary judgment, order a continuance to permit affidavits to be obtained or depositions to be taken, or make such other orders as is just. In this case, both sides had only taken one deposition each before the defendant moved for summary judgment. Under the FRCP, in these circumstances, the plaintiff may make a declaration as to why he does not yet have all the facts necessary in the record for the court to make a decision. The court may then deny or defer the motion until more facts can be collected. Therefore, the best course of action for the plaintiff to take against the defendant's motion is to make a declaration to the court asking for greater discovery and describing the desired discovery.

B is incorrect. An opposition to a motion for summary judgment should be supported by affidavits, declarations made under oath, and other materials in the record. If a party fails to support an assertion of fact or fails to address another party's assertion, the court may grant summary judgment. Here, the worker should seek further discovery in order to obtain the proper evidence in the record to counter the motion for summary judgment.

C is incorrect. In this case, the worker is the plaintiff with the burden of proof. The manufacturer, the defendant, moved for summary judgment. A defendant may move for summary judgment, alleging that the plaintiff cannot meet an essential element of its case. However, here the plaintiff cannot switch the burden of proof onto the defendant to prove that the employer did not use the insulation.

D is incorrect. A motion on those grounds would be improper because the burden of proof at trial is on the plaintiff.

## 6. Is the court likely to grant the defendant's motion?

The plaintiff then filed a third action, alleging the same claims but also including additional allegations that were responsive to the defendant's second motion. The defendant has moved to dismiss the third action; the plaintiff opposes the motion. Instead of opposing the motion to dismiss, the plaintiff voluntarily dismissed the action and filed a new action, alleging the same claims but also addressing the pleading defects outlined in the defendant's motion to dismiss. The defendant then moved to dismiss the second action, and the plaintiff again voluntarily dismissed the second action instead of filing opposition papers. A plaintiff filed an action in federal district court and served the defendant with the summons and complaint. The defendant moved to dismiss the complaint for failure to state a claim.

- No, because the plaintiff has promptly and diligently attempted to address the pleading defects
- No, because the plaintiff voluntarily dismissed each previous action before the defendant filed an answer or moved for summary judgment
- Yes, because the plaintiff failed to seek a court order dismissing the second action
- **Yes, because the plaintiff's previously dismissed actions asserting the same claims operate as an adjudication on the merits**

Note:

Voluntary dismissal in federal court is subject to Rule 41(a) of the Federal Rules of Civil Procedure (FRCP). FRCP 41(a) allows the plaintiff to make a dismissal as long as the defendant has not filed an answer or a motion for summary judgment. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any federal court in an action based on or including the same claim. The practical effect of this is that once the case has been voluntarily dismissed, if it is brought to court again, a dismissal in this second case will mean the case can never again be brought back to court.

D is correct. A plaintiff may file a notice of dismissal for his own case without leave of the court if the defendant has not yet filed an answer or a motion for summary judgment. The dismissal will be without prejudice unless the plaintiff has previously dismissed any federal or state court action on the same claim. If the plaintiff previously dismissed any action based on or including the same claim, the notice of dismissal operates as an adjudication on the merits. In this case, when the plaintiff moved to dismiss his claim for the second time, he moved to dismiss the same claim he had originally filed. Therefore, this time, his notice of dismissal operated as an adjudication on the merits, and the defendant's motion should be granted.

A is incorrect. Although the plaintiff did address the defendant's pleadings when he renewed his claim, the new filings still contained the same claims he originally alleged. Because the plaintiff had previously dismissed the same claim, his voluntary dismissal will operate as an adjudication on the merits.

B is incorrect. A plaintiff can file a notice of dismissal for his own case without leave of the court if the defendant has not yet filed an answer or a motion for summary judgment. The dismissal will be without prejudice unless the plaintiff has previously dismissed the same claim. In this case, although the defendant had not yet answered or filed a motion for summary judgment, the plaintiff had already once voluntarily dismissed the same claim. Therefore, the second claim will operate as an adjudication on the merits, and the defendant's motion will be granted.

C is incorrect. If the defendant has not filed an answer or motion for summary judgment, and the plaintiff has not also previously dismissed the same claim, the plaintiff can dismiss an action without moving for leave from the court. However, in this case, the plaintiff had already once voluntarily dismissed the same claim. Therefore, the second time the plaintiff dismissed the same claim, the notice of dismissal acted as an adjudication on the merits.

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## 7. Should the appellate court consider the wholesaler's challenge?

*The jury found for the retailer on both claims. After the court entered judgment on the verdict, the wholesaler moved for a new trial and for judgment as a matter of law, arguing that the evidence was insufficient to support the jury verdict on either claim. The court acknowledged that there had been problems with some of the evidence, but it denied the motions. The wholesaler appealed, challenging the sufficiency of the evidence. A retailer brought a federal diversity action against a wholesaler, alleging breach of contract and fraudulent misrepresentation. After the parties presented their evidence at trial, the court instructed the jury on the law. Neither party filed a motion for judgment as a matter of law before the case went to the jury.*

- No, because a determination of the sufficiency of the evidence is solely within the jury's province
- **No, because the wholesaler did not raise the sufficiency-of-the-evidence issue in a motion for judgment as a matter of law before the case went to the jury**
- Yes, because the challenge was raised and ruled on by the trial court before the wholesaler filed the appeal
- Yes, because, as the trial court acknowledged, the wholesaler has strong arguments on the challenge

Note:

*In both federal and state litigation, the party who loses at trial generally has the right to appeal the adverse judgment. Generally, only final orders are reviewable on appeal. One of the procedural limits on what types of issues will be reviewed on appeal is that the losing party must preserve the issue during the trial court proceeding, typically by making an objection, and must then raise the issue properly on appeal.*

*To preserve an error for appellate review, the appropriate objection or motion must be made at the correct time in the trial court. A challenge to the sufficiency of the evidence should be made as a motion for judgment as a matter of law before the case is submitted to the jury. The motion must then be made again, as a renewed motion for judgment as a matter of law, after the verdict. This preserves the issue for appeal.*

*B is correct. The appellate court should not consider the wholesaler's challenge because, for the issue to be properly heard on appeal, the wholesaler had to have preserved the error during trial. But the wholesaler failed to do so. Therefore, the wholesaler was not able to move for a renewed motion of judgment of law after the verdict. The argument concerning the sufficiency of the evidence is a legal argument, which must be made to the trial court. After the trial court rules on the issue, it is subject to appellate review. Because the issue was never ruled on in the trial court, the appellate court cannot consider the challenge.*

*A is incorrect. This answer reaches the correct answer with the wrong reasoning. Although the appellate court should not consider the wholesaler's challenge, it is not because it cannot hear sufficiency-of-the-evidence motions. In fact, the appeals court can hear such an issue as long as it was properly preserved at the trial level. This was not the case here, which is why the appellate court should not hear the case.*

*C is incorrect. This is an incorrect statement of the facts. The issue regarding the sufficiency of the evidence was NOT properly raised and ruled on by the trial court before the wholesaler filed the appeal. The trial court never heard any arguments on the merits of the issue, which means it is not appealable.*

*D is incorrect. This answer choice is appealing because the reasoning is a true fact; however, it is a red-herring meant to lead you astray. The judge's comment is irrelevant, as a formal motion on the issue was never properly made or argued.*

## 8. What is the mechanic's best argument to defeat the summary judgment motion?

A mechanic sued his former employer in federal court, claiming that the employer had discharged him because of his age in violation of federal law. The employer answered, denying the claims and promptly moving for summary judgment. In support of the motion, the employer attached the mechanic's employment evaluations for the past three years, which rated his skills and performance as poor and culminated in a recommendation for his discharge.

- The allegations in the complaint conflict with the mechanic's employment evaluations, raising a genuine dispute as to material facts
- The employer cannot rely in his motion on matters outside the pleadings
- **The essential facts are unavailable to the mechanic and therefore discovery is required**
- The motion was filed before the close of discovery

Note:

*Federal Rule of Civil Procedure (FRCP) 56 allows either party to file a motion for summary judgment if, from the pleadings, affidavits, and discovery materials, it appears that there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of producing information that clearly establishes there is no factual dispute for a jury to resolve. Unless a local rule or court order dictates otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of discovery.*

*The movant (the person seeking summary judgment) can show the lack of a genuine issue of fact by submitting affidavits. They must only contain matters as to which the affiant has personal knowledge, must state only matters which would be admissible at trial, and must show the affiant is competent to testify at trial. The movant may also submit the fruits of discovery no matter which side they were obtained from.*

*C is correct. A party opposing summary judgment may show by declaration or affidavit that he cannot present certain facts and state the reasons for their unavailability. The court may then order a continuance to permit further discovery or make other orders as it sees just. In this question, the employer has presented evidence against the mechanic's claims. The mechanic's best chance to survive summary judgment is to show that he cannot present certain unavailable facts and ask the court to allow further discovery before ruling on the motion.*

*A is incorrect. Summary judgment will be granted if, based on the pleadings, affidavits, and discovery, the court finds there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. The case must go to trial if there is a genuinely disputed material fact. A genuinely disputed issue of material fact is one that is backed by evidence on both sides of the issue. If a party fails to properly support an assertion of fact or fails to properly address the other party's assertion of fact, the court may find the fact undisputed. In this question, the employer not only denied the claims but also attached evidence of the evaluations. The mechanic cannot assert mere allegations from the complaint without proper support backed by evidence. Allegations without support would not be enough to overcome the employer's motion for summary judgment.*

*B is incorrect. This is the incorrect standard for what is allowed to support a motion for summary judgment. This would be the correct rule if the employer had filed a motion for judgment on the pleadings at the start of the case. As explained above, a motion for summary judgment may be supported by affidavits, sworn statements, depositions, sworn pleadings, admissions, answers to interrogatories, or other materials in the record. Therefore, the employer can rely on other materials outside the pleadings, including the employment evaluations.*

*D is incorrect. A party may file a motion for summary judgment any time until 30 days after the close of all discovery. Therefore, it is not a defense to the motion for summary judgment that it was filed before the close of discovery. A motion for summary judgment could be made at any time in the case before the 30-day limit.*

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## 9. What is the best way for the defendant to seek relief from the judgment?

A plaintiff sued a defendant in federal court for injuries arising out of an accident involving the parties. The plaintiff alleged and presented evidence at trial demonstrating that her injuries had left her legs permanently paralyzed. The jury found in favor of the plaintiff and awarded her \$5 million in damages. Two months after the court entered judgment, the defendant was given a videotape made that day showing the plaintiff jogging with her doctor.

- Move for a new trial or in the alternative for remittitur to reduce the award in light of the shortened duration of the plaintiff's injuries
- Move for relief from the judgment on the ground that the judgment was based on the jury's mistaken belief that the plaintiff's injuries would be permanent
- **Move for relief from the judgment on the ground that the plaintiff committed a fraud in obtaining damages for permanent injuries**
- Move for relief from the judgment on the ground that there is newly discovered evidence that the plaintiff's injuries were not permanent

Note:

The federal court system applies the final judgment rule. The basic concept is that an appeal is allowed only after all the issues involved in the suit have been finally determined by the trial court. Under Federal Rule of Civil Procedure (FRCP) 60(b), after a judgment has been entered, a party may be entitled to have the judgment voided on several grounds: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence that, with reasonable diligence, could not have been discovered in time for a new trial; (iii) fraud, misrepresentation, or misconduct by an opposing party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged; or (vi) any other reason that justifies relief.

Under FRCP 60(b)(2), the court may relieve a party from a final judgment or order based on newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial. This motion must be made within a reasonable time not to exceed one year. Fed. R. Civ. P. 60(c)(1).

Most jurisdictions will allow the trial judge to set aside a verdict as against the weight of the evidence, and order a new trial. Under FRCP 59, a motion for a new trial must be filed no later than 28 days after the judgment is entered. The court may grant a new trial because of an error during the trial (usually going to the admissibility of evidence or the propriety of the instructions), because the verdict is against the weight of the evidence (limited to cases where the judge finds the verdict seriously erroneous), because of juror misconduct, or because the verdict is excessive or inadequate.

Both state and federal trial courts have wide discretion to grant a motion for a new trial. The FRCP set two different standards for granting new trials: one for jury trials, and another standard for non-jury cases. When there has been a jury trial, the judge may order a new trial for any reason for which a new trial has been granted in an action at law in federal court under FRCP 59(a)(1). When the action was tried without a jury, a new trial may be granted for any of the reasons an equity court would have granted the hearing, under FRCP 59(a)(2).

C is correct. The court may relieve a party from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party. In this case, the plaintiff presented evidence that she would be permanently paralyzed. Two months later, the plaintiff was seen jogging. This question asks what is the defendant's best chance at relief. In order to obtain relief from a final judgment, the defendant would have to prove one of the circumstances listed above. If the plaintiff was seen jogging after she presented evidence that she was permanently paralyzed, there is a good chance that the plaintiff only proved her case through fraud. If the defendant can prove fraud, he would be able to seek relief from the judgment. (Note: If the defendant moves for relief from the judgment on the ground that the plaintiff committed fraud, it will still be up to the judge to actually decide if this was fraud or to have a hearing on the matter.)

A is incorrect. A motion for a new trial must be filed no later than 28 days after the judgment is entered. In this case, more than 28 days have passed. Further, as explained above, submitting evidence of the plaintiff's fraud would be a better way to obtain relief from judgment.

B is incorrect. A jury's mistaken belief is not one of the grounds listed in the Federal Rules under which a party may seek relief from a final judgment or order.

D is incorrect. Newly discovered evidence is a ground, listed in the Federal Rules, under which a party may seek relief from a final judgment or order. However, the evidence must be of the sort that could not have been discovered in time to move for a new trial. In this case, the plaintiff presented evidence that she was permanently paralyzed. The fact that she was not actually paralyzed is not "new evidence," rather it was a fraud.

## 10. What is the purchaser's best response to the seller's answer?

A purchaser filed a federal diversity action against a seller, alleging breach of contract. The seller answered the complaint and included as a separate defense an allegation that the purchaser had brought and lost a similar contract claim against a different seller three years earlier, and that this history represented a pattern of filing frivolous lawsuits. The purchaser believes that the earlier lawsuit was factually completely different from the current one and is therefore irrelevant.

- File a reply that includes a denial of the separate defense
- Move for sanctions against the seller for asserting a frivolous defense
- Move to amend the complaint to add allegations about the differences between the lawsuits
- **Move to strike the separate defense as irrelevant**

Note:

Under Federal Rule of Civil Procedure (FRCP) 12(f), the court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" by acting on its own or via a "motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Such material can be stricken from any kind of pleading, whether a complaint, answer, counterclaim, or other pleading.

Most courts are reluctant to strike material from a pleading. Most judges feel that the pleader should be given an opportunity to show on the merits that the material in question is founded in fact, and is not immaterial, scandalous, or otherwise violative of FRCP 12(f).

FRCP 11 requires that "[b]y presenting to the court a pleading, written motion, or other paper - whether by signing, filing, submitting, or later advocating it - an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." If a party violates these requirements, the court may impose appropriate sanctions.

D is correct. The purchaser's best response to the seller's answer is to move to strike the separate defense (the claim that the purchaser has a pattern of filing frivolous lawsuits) as irrelevant. This is because FRCP 12(f) allows a party to file a motion to strike an insufficient and irrelevant defense within 21 days of service of the pleading, which includes the answer filed by the seller here.

A is incorrect. At this stage of the proceedings, the purchaser's BEST response to the seller's answer is to move to strike the defense regarding frivolous lawsuits as insufficient and irrelevant under FRE 12(f). If the motion to strike is denied, the purchaser can then file a reply to the seller's answer.

B is incorrect. Even though FRCP 11 allows for sanctions to be imposed when a party violates the requirements of the Rule, the seller's conduct does not appear to be based on improper motives, such as delay, harassment, or knowingly baseless claims. In fact, the claim does appear to be based in fact. As a result, moving for sanctions is not appropriate at this point in the proceedings.

C is incorrect. If the purchaser were to amend the complaint and add allegations about the differences between the lawsuits, it would not be removing the defense entirely. As such, this is not the best course of action.

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