

A patient filed a medical malpractice action against a hospital in federal court, alleging that hospital staff had failed to diagnose the patient's cancer based on an X-ray that had been taken at the hospital. The patient's cancer was diagnosed six months later, based on the same X-ray, when he sought a second opinion. In the interim, the cancer had spread.

Fact and expert discovery have been completed in the action. The hospital has moved for summary judgment. In support of its motion, the hospital has submitted a memorandum identifying facts that it claims are not in dispute. It has also cited and attached supporting exhibits, including a declaration signed under penalty of perjury from the hospital's radiologist, who found no signs of cancer on the X-ray.

What is the best way for the patient to raise a genuine dispute of material fact?

- A. Submit a report from the patient's expert radiologist contradicting the findings in the declaration of the hospital's radiologist.
- B. Submit an affidavit from the patient's attorney detailing his conversations with the patient's expert radiologist.
- C. Submit an affidavit from the patient's expert radiologist with findings that contradict the declaration of the hospital's radiologist.
- D. Submit the patient's medical records showing his current cancer diagnosis.

## Explanation:

### Motion for summary judgment

(FRCP 56)

- |                           |  |
|---------------------------|--|
| <b>Time to file</b>       | <ul style="list-style-type: none"><li>• Motion may be filed until 30 days after close of discovery OR time set by local rule or court</li></ul>  |
| <b>Burden of proof</b>    | <ul style="list-style-type: none"><li>• Movant has initial burden to establish standard<ul style="list-style-type: none"><li>– may support by relying on pleadings, affidavits, declarations, discovery, or other materials containing admissible facts</li></ul></li><li>• If initial burden is met, burden shifts to nonmovant to either:<ul style="list-style-type: none"><li>– show specific disputed facts through affidavits, declarations, discovery, or other materials containing admissible facts (cannot rely on pleadings) <i>or</i></li><li>– request postponement for additional discovery &amp; support with affidavit or declaration</li></ul></li></ul> |
| <b>Standard for grant</b> | <ul style="list-style-type: none"><li>• No genuine dispute as to any material fact AND movant entitled to judgment as a matter of law<ul style="list-style-type: none"><li>– evidence must be viewed in light most favorable to nonmovant</li><li>– all doubts must be resolved in nonmovant's favor</li></ul></li></ul>   |

**FRCP** = Federal Rule of Civil Procedure.

A court should grant **summary judgment** in lieu of a full trial when (1) there is no genuine dispute of material fact and (2) the movant is entitled to judgment as a matter of law. The nonmovant can **raise a genuine dispute of material fact** through affidavits, declarations, discovery, or other materials containing admissible facts. **Affidavits** are written statements sworn in the presence of a notary public, and **declarations** are written statements signed under penalty of perjury. They can be used in determining a summary judgment if they:

- are based on the affiant's or declarant's **personal knowledge**
- contain **admissible facts** *and*
- show that the affiant or declarant is **competent to testify** to the matters stated therein.

Here, the hospital's radiologist stated in his declaration that he found no signs of cancer on the patient's X-ray. The patient can genuinely dispute this material fact by submitting an affidavit from his expert radiologist with findings that contradict the declaration. This affidavit can be used since the patient's radiologist has personal knowledge of the patient's X-ray, the findings are likely admissible, and the radiologist is competent to testify about this subject.

**(Choice A)** Most courts will not consider [expert reports](#) in deciding summary judgment motions because they are not sworn or signed under penalty of perjury and therefore contain inadmissible facts.

**(Choice B)** An affidavit from the patient's attorney detailing his conversations with the patient's radiologist is not valid since it (1) is not based on the attorney's personal knowledge of the patient's X-ray, (2) contains inadmissible hearsay, and (3) does not show that the attorney is competent to testify on medical issues.

**(Choice D)** The patient's medical records showing his *current* cancer diagnosis do not dispute whether there were signs of cancer on the X-ray taken *before* his diagnosis.

**Educational objective:**

In a motion for summary judgment, the nonmovant can raise a genuine issue of material fact through affidavits and declarations that (1) are based on the affiant's or declarant's personal knowledge, (2) set out admissible facts, and (3) show the affiant's or declarant's competency to testify to the matters stated therein.

**References**

- Fed. R. Civ. P. 56(c) (support for factual positions on summary judgment).

Copyright © 2019 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.