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# American Inns of Court

# Table 5 CLE – February 5, 2020

# Complete Questions and Answers

**Affirmative Defenses – Basic Questions**

1. What is an affirmative defense?

    a. Any valid defense to a claim.
    b. A defense for which the party pleading it bears the burden of proof.
    c. A matter that, assuming the allegations in the complaint to be true, constitutes a defense to it.
    d. B and C.

    **Answer: D.**

    At the most basic level, an affirmative defense is a defense for which the pleading party bears the burden of proof. *See, e.g.*, *State v. Soucy*, 139 N.H. 349, 353, 653 A.2d 561, 564 (1995); *Harry C. Crooker & Sons, Inc. v. Occupational Safety and Health Review Com'n*, 537 F.3d 79, 82 (1st Cir. 2008).

    The New Hampshire Supreme Court has described an affirmative defense as "a matter asserted by the defendant which, assuming the complaint to be true, constitutes a defense to it." *Meaney v. Rubega*, 142 N.H. 530, 532 (1997).

2. There is a rule that enumerates affirmative defenses.

    A. True

    B. False

    **Answer: True.**

    In state court, potential affirmative defenses are set forth in Superior Court Rule 9(d). In federal court, affirmative defenses are listed in F.R.C.P. 8(c). *See also* Circuit Court – District Div. Rule 3.9(d); Circuit Court – Family Div. Rule 3.5; Circuit Court – Probate Div. Rule 133.

3. The only affirmative defenses are those listed in court rules.

    A. True

    B. False

    **Answer: False.**

    Superior Court Rule 9(d) states that affirmative defenses "include the following" defenses listed in the rule, implying that there are others. Similarly, F.R.C.P. 8(c) indicates that affirmative defenses "includ[e]" those listed in the rule, but does not

state that the rule provides the exclusive list of affirmative defenses. *See also* Wright & Miller, 5 *Fed. Prac. & Proc.* § 1270.

4. The defenses enumerated in Superior Court Rule 9(d) and Federal Rule 8(c) are identical.

    a. True
    b. False

**Answer: True**

| **Superior Court Rule 9(d)** | **Federal Court Rule 8(c)** |
|---|---|
| • accord and satisfaction; | • accord and satisfaction; |
| • arbitration and award; | • arbitration and award; |
| • assumption of risk; | • assumption of risk; |
| • contributory negligence; | • contributory negligence; |
| • duress; | • duress; |
| • estoppel; | • estoppel; |
| • failure of consideration; | • failure of consideration; |
| • fraud; | • fraud; |
| • illegality; | • illegality; |
| • injury by fellow servant; | • injury by fellow servant; |
| • laches; | • laches; |
| • license; | • license; |
| • payment; | • payment; |
| • release; | • release; |
| • res judicata; | • res judicata; |
| • statute of frauds; | • statute of frauds; |
| • statute of limitations; and | • statute of limitations; and |
| • waiver. | • waiver. |

Note, however, that there are other differences between the Superior Court and Federal Rules. For example, Superior Court 9(e) preserves defenses for lack of

personal jurisdiction, sufficiency of process, and sufficiency of service so long as a party raises those defenses in a motion to dismiss filed within 30 days of service. Federal Rule 12(h) provides that such defenses are waived unless included in the first motion raising any Rule 12(b) defense other than subject matter jurisdiction, or failing to include it in a Rule 12 motion or other responsive pleading, or in an amendment to such responsive pleading filed within 21 days of serving it.

5. What happens if a party fails to plead an affirmative defense?

    a. The defense is waived.
    b. The defense is waived, but only if the defense existed at common law.
    c. The defense is waived, but only if the opposing party has already issued written discovery.
    d. The defense is waived unless there is no prejudice to the opposing party and fairness or justice requires that the defense be allowed.

    **Answer: D.**

    The general rule is that failure to raise an affirmative defense results in waiver. *See* Super. Ct. R. 9(d); *Federal Deposit Ins. Co. v. Ramirez–Rivera*, 869 F.2d 624, 626 (1st Cir.1989). Courts have fashioned an exception to this rule, however, permitting amendment of affirmative defenses in the absence of prejudice and when justice so requires. *See, e.g., Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 728, 992 A.2d 725, 728 (2010); *Conjugal P'ship of Jones v. Conjugal P'ship of Pineda*, 22 F.3d 391, 400 (1st Cir.1994).

**<u>Subject Matter Jurisdiction</u>**

1. Plaintiff filed a tort complaint against Defendant in federal court. In Defendant's Answer, he listed several affirmative defenses including, among others, (1) that the Court lacked subject matter jurisdiction, (2) that the Plaintiff's claims were untimely, (3) that other unnamed parties are responsible for Plaintiff's injuries, (4) that the Defendant did not breach his duty, and (5) that the Defendant's breach did not cause Plaintiff harm. In the parties' joint discovery plan, the Defendant's theory of defense was stated as follows: "Defendant did not breach his duty to Plaintiff and acted reasonably and appropriately." The discovery plan also included agreed-upon language that read: "The parties do not anticipate any jurisdictional questions." Shortly after the joint discovery plan was submitted, Plaintiff filed a Motion to Strike all five of the abovementioned affirmative defenses. Which of the below is Plaintiff's most persuasive argument for her motion?

A. The Court should strike all of the affirmative defenses, except for (4) that the Defendant did not breach his duty, as the Defendant's theory of defense in the discovery plan made no mention of the other affirmative defenses.

B. The Court should strike the lack of subject matter jurisdiction affirmative defense as Defendant has waived that defense by agreeing, in the discovery plan, that the parties do not anticipate jurisdictional questions.

C. The Court should strike all five of the affirmative defenses as each of them has been insufficiently pled.

D. The Court should strike all of the affirmative defenses except for (1) on subject matter jurisdiction.

**Answer: D.**

Subject matter jurisdiction may be raised at any time. *See, e.g.,* F.R.C.P. 12(h)(3).

**Affirmative defenses in defamation claims**

1. Jane brought suit against her neighbor, Joe, alleging that, among other things, he trespassed onto her property and improperly cut down trees on her property that he then sold to a third-party. In her Complaint, Jane alleged that, on several occasions, Joe "snuck onto the back edge of her property at night" to cut down and remove trees from her property. In Joe's Answer to the Complaint, he admitted that he cut down the trees, that he did so over the course of several days, and that he only did so after the sun went down, but denied that he "snuck" onto the subject property, maintaining that the trees were located on his property and that he was within his rights to remove them. Joe filed a counterclaim against Jane for defamation, claiming that Jane defamed him by publishing, in her Complaint, that he "snuck" onto her property and wrongfully cut down trees when, in fact, he was cutting down trees on his own property. Which of the following affirmative defenses could Jane raise in her Answer to Joe's Counterclaim?

   A. Substantial truth

   B. Privilege for statements made in civil proceedings

   C. Both A. and B.

   D. Neither A. nor B.

   **Answer: C.**

   "In the law of defamation, truth is defined as substantial truth, as it is not necessary that every detail be accurate. In other words, literal truth of a statement is not required so long as the imputation is substantially true so as to justify the gist or sting

of the remark." Thomas v. Telegraph Publishing Co., 155 N.H. 314, 335 (2007) (citing *Faigin v. Kelly*, 978 F. Supp. 420, 425 (D.N.H. 1997) (quotations omitted)). Joe admitted that he cut down the trees on the subject property and admitted that he did so during the evening. His dispute is whether he "snuck" onto the property to do so, as he maintains that it was his own property and that the characterization of him "sneaking" on to it was defamatory.

Further, Jane's statements were absolutely privileged because they were made in civil pleadings and were pertinent or relevant to the pleadings. *See Provencher v. Buzzell-Plourde Associate*s, 142 N.H. 848, 853 (1998) ("Statements made in the course of judicial proceedings constitute one class of communications that is privileged from liability in civil actions if the statements are pertinent or relevant to the proceedings.")

**DeBenedetto**

1. Who does the burden of establishing fault fall upon as against a DeBenedetto non-litigant defendant?

   A. The Plaintiff because the plaintiff bears the burden of proving their case.
   B. The plaintiff because the DeBenedetto defendants become named defendants in the suit.
   C. The litigant defendant because the litigant defendant seeking apportionment is in position analogous to that of a plaintiff.
   D. The litigant defendant due to RSA 507:7-I.

   **Answer: C.**

   The burden of establishing fault on the part of a non-litigant tortfeasor lies with the litigant defendants in the case. *Everitt v General Electric*, 156 N.H. 202, 207 (2007)

2. A motor vehicle accident took place on the highway. Plaintiff alleges Defendant was operating her motor vehicle at an extremely high rate of speed and attempted to make a dangerous lane change into the second travel lane where Plaintiff was present, thereby causing their motor vehicles to collide. Defendant maintains she was travelling in the far-left lane of travel when an unidentified SUV in the middle lane operated by "John Doe" veered into her lane of travel and caused her motor vehicle to veer off of the highway onto a grassy area to attempt to avoid an accident. In order to prevent striking the median or a tree, Defendant was caused to veer her motor vehicle back onto the highway, which resulted in her colliding with Plaintiff's vehicle. This unidentified motor vehicle left the scene of the accident prior to the police arriving. Can "John Doe" be a named as a DeBenedetto defendant?

   A. Yes, because they were a party that contributed to the accident.

B. Yes, but only if the allegation can be supported by "adequate evidence."

C. No, because "John Doe" is too vague to put the DeBenedetto defendant on notice.

D. No, because "John Doe" is judgment-proof.

**Answer: B.**

Allegations against non-litigant parties must be supported by "adequate evidence." *DeBenedetto v CLD Consulting Engineers* 153 NH 793, 804 (2006).

**Marital Defenses**

1. Wife files petition for divorce against husband claiming fault ground of adultery. Husband responds wife is guilty of conduct to endanger health and reason. Is this response a counterclaim, denial or affirmative defense?

   A. Denial as it counters the element of "innocence" in a fault ground divorce.

   B. Counterclaim because husband could be entitled to divorce on separate grounds than wife.

   C. Affirmative defense as it asserts "recrimination."

   D. Both B and C.

   **Answer: D.**

   Husband can cross petition for divorce based on grounds that are separate from those alleged by wife, and court would address the merits of each claim on its own. It can also be asserted as an affirmative defense as it shows the wife is not an innocent party and therefore, not entitled to a fault ground divorce. *See In re: Ross*, 169 N.H. 299, 302-03 (2016).

2. Wife files petition for divorce based upon adultery. Husband argues wife consented to the adulterous relationship. Is this a defense to the fault ground divorce?

   A. No because when fault ground statute was written, adultery was a crime and one party cannot consent to the criminal act of another.

   B. No because like forgiveness, it goes to the question of whether the adultery destroyed the marriage, and consent is a denial to that element.

C. Yes, the defense of "connivance" is recognized in New Hampshire so long as it is shown the plaintiff assented to the conduct.

D. Yes, but in addition to answer "C," the plaintiff must have aided in the accomplishment of the fault conduct.

**Answer: D.**

Connivance is a defense to a fault ground claim if the defendant can show the plaintiff not only assented to the fault conduct, but also either passively or aided in its accomplishment. *Bailey v. Bailey*, 67 N.H. 402 (1893).

**Estoppel**

1. Lakefront property is subdivided into three adjoining lots by Owner. One lot is conveyed to Defendant, one lot is conveyed to Son of Owner, and one lot is conveyed to Daughter of Owner. The lots are subject to a restrictive covenant that no lot can be subdivided into lots of less than 600 feet of water frontage. Defendant subsequently obtains town approval to subdivide his lot into two lots of 300 feet of water frontage each (in violation of the restrictive covenant). Son of Owner sues Defendants for failing to abide by the restrictive covenant. The trial court finds that Son of Owner was not a proper party to enforce the restrictive covenant. Daughter of Owner then files an identical lawsuit to enforce the restrictive covenant. If the Defendant asserts collateral estoppel as an affirmative defense, is he likely to prevail?

   A. No, because collateral estoppel is not an affirmative defense.

   B. Yes, because the identical issue was already litigated and finally decided in Son of Owner's lawsuit.

   C. No, because Daughter of Owner will meet her burden of proving that she lacked privity with Son of Owner during Son of Owner's lawsuit.

   D. None of the above.

   **Answer: D.**

   None of the above. The doctrine of collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated or determined the prior action. Three basic conditions must be satisfied before collateral estoppel will arise: the issue subject to estoppel must be identical in each action; the first action must have resolved the issue finally on the merits; and the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so. *Daigle v. City of Portsmouth*, 129 N.H. 561, 570

(1987). The defense of collateral estoppel is an affirmative one. As such, the party asserting it bears the burden of proving all of its elements. *Gephart v. Daigneault*, 137 N.H. 166, 172 (1993).

Under similar facts, the New Hampshire Supreme Court held in *Gephart v. Daigneault* that, because Daughter of Owner lacked privity with Son of Owner, the elements of collateral estoppel were not met, and therefore Daughter of Owner was not estopped from making her claim. However, Choice C is incorrect here, because the burden is on the party *asserting* the affirmative defense. Here, the burden is on Defendant to establish that privity existed between Son of Owner and Daughter of Owner, and therefore that Daughter of Owner should be estopped from making her claim.

2. Boyfriend moves out of girlfriend's home, but leaves some valuable personal property. Girlfriend files domestic violence action against Boyfriend. The Court issues a final default judgment order against Boyfriend providing that he shall retrieve his personal belongings within 30 days, and his failure to do so shall result in Girlfriend being allowed to dispose of them. Boyfriend does not attend the hearing, litigate the issue, or appeal the default order. Boyfriend makes no attempt to retrieve his personal belongings, and Girlfriend sells them after 30 days. Boyfriend then sues girlfriend for wrongfully disposing of his personal property. Can Girlfriend assert collateral estoppel as an affirmative defense to Boyfriend's claims?

   A. Yes, but she is unlikely to prevail because a default judgment cannot be the basis for a defense of estoppel.

   B. Yes, and she is likely to prevail because the issue was already decided by the Court in the domestic violence action.

   C. Yes, and she is likely to prevail because Court enjoys broad discretion with respect to affirmative defenses.

   D. Both B and C.

   **Answer: A.**

   Collateral estoppel "bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact *actually litigated* and determined in the prior action. In the case of a judgment entered by default, none of the issues is actually litigated." *Marston v. United States Fidelity & Guar. Co.*, 135 N.H. 706, 710 (1992). But beware: even if default judgment cannot constitute collateral estoppel, a default judgment can constitute res judicata in a subsequent litigation involving the same cause of action. *Gray v. Kelly*, 161 N.H. 160, 164 (2010). Cause of action is "the right to recover, regardless of the theory of recovery." *Id.* "It refers to all theories on which relief could be claimed on the basis of the factual transaction in question." *Id.*

**Recoupment**

1. Company A has filed a lawsuit against Company B for breach of contract, asserting they have delivered goods and provided services but have not been paid $20,000. Company B disputes the charges, asserting that Company A's accounting is all wrong, Company B has been overcharged, and that Company A actually owes Company B $40,000. Company B has identified recoupment as a defense. Assuming Company B demonstrates it is entitled to recoupment, can it be awarded the $40,000 it overpaid based solely on this defense?

   A. Yes, as long as part of its defense they have proven they are owed that amount.

   B. No, they should have brought a counterclaim.

   C. I was told there would be no math on this test. I am an attorney.

   D. Who brings a recoupment defense anyways?

   **Answer: B.**

   Recoupment refers to a defendant's right "to reduce or eliminate the plaintiff's claim, either because the plaintiff has not complied with some cross-obligation of the contract . . . or because the plaintiff has violated some legal duty in the making or performance of the contract." *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 716 (2010). In New Hampshire recoupment can be asserted either defensively, as it was here, or affirmatively. *Zurback Steel Corp. v. Edgcomn*, 120 N.H. 42, 44 (1980). However, when it is asserted defensively, that party may only defeat or diminish a plaintiff's recovery; it cannot obtain relief in excess of the plaintiff's demand. *Id.*

**Additional Questions**

1. Can a litigant defendant name an immune party as a DeBenedetto defendant?

   A. Yes because "party" for the purposes of apportionment under RSA 507:7-e includes all parties contributing to an occurrence.

   B. Yes because allegations against non-litigant tortfeasors must be supported with "adequate evidence".

   C. No because immune parties cannot be DeBenedetto defendants.

   D. No because immune parties cannot be compelled to litigate fault.

   **Answer: A.**

*See DeBenedetto v CLD Consulting Engineers* 153 N.H. 793, 804 (2006). ("[F]or apportionment purposes under RSA 507:7–e, the word 'party' refers not only to 'parties to an action, including ... settling parties,'…, but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court.")

2. Husband petitions for divorce from wife claiming fault ground of adultery. Wife claims husband forgave her and therefore is not entitled to a fault ground divorce. Is forgiveness an affirmative defense?

   A. No. Husband carries the ultimate burden of proving both the fault conduct and that the fault conduct caused the destruction of the marriage.

   B. No. Affirmative defenses are not allowed in a divorce action and need not be pled.

   C. Yes, affirmative defenses are allowed in a divorce action, but forgiveness is not one.

   D. Yes. New Hampshire recognizes affirmative defense of forgiveness in a divorce action and must be pled in an answer.

   **Answer: D.**

   Affirmative defense of condonation, which is the innocent spouse's forgiveness of a past marital wrong on the condition that it never be repeated, is recognized in New Hampshire. *Tibbetts v. Tibbets*, 109 N.H. 239, 241 (1968). Affirmative defenses must be pled in answer to divorce petition. N.H. Fam. Div. R. 2.5(B).

3. A New Hampshire tug boat captain filed a suit in which he alleged that an unseaworthy condition aboard his employer's tugboat had caused injuries to his shoulder and back that would permanently disable him from all future maritime employment. Defense counsel is aware of several different suits the plaintiff had filed over his career, in which the plaintiff had alleged that he had injured his back so severely that he would never again work as a mariner. Additionally, defense counsel was aware that plaintiff's personnel file contained license renewal applications accompanied by declarations co-signed by the plaintiff and his doctor stating that plaintiff was currently physically capable of performing the duties of a mariner. Notably, the plaintiff's most recent renewal application had been submitted ten months after the occurrence of the injury at issue in the current lawsuit. Is there an affirmative defense of estoppel, despite the fact that there has been no prior litigation or final decision on the issue?

   A. No, there is no affirmative defense to be made.

B. Yes, an affirmative defense of collateral estoppel can still be made.

C. Yes, an affirmative defense of judicial estoppel is applicable.

D. Can we please be done with questions about estoppel?

**Answer: C and D.**

The New Hampshire Supreme Court recently recognized judicial estoppel as an affirmative defense. *Alward v. Johnston*, 171 N.H. 574, 580-81 (2018). The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument in another phase. While the circumstances under which judicial estoppel may be invoked vary with each situation, the following three factors typically inform the decision whether to apply the doctrine: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See Kelleher v. Marvin Lumber*, 152 N.H. 813, 848 (2005).