HAPLESS HARVEST

MEDIATION

POST-PRELIMINARY MEDIATION CONFERENCE

(IN PREPARATION FOR THE MEDIATION SESSION)

Confidential Information for Defense Counsel Representing Total Insurance and its Insured Harvest Plenty

Well, at least the mediator seemed competent in the preliminary conference call.

You are quite sure the mediator picked up on the plaintiff's lawyer's difficult personality and professional disconnect between you. Though it was a phone call and not a Zoom call, you'd be willing to bet that the plaintiff's lawyer made an unjustified eyeroll when you mentioned evidence that Mr. Hapless' back injury was a pre-existing condition. You thought you heard a barely audible "oh, puh -lease – totally unprofessional. And, ridiculously, he cranked up to dramatic voice when to when describing the "dangerous aisle" at the grocery store. When the mediator asked about special damages, he started to go on and on about surgery, pain, forever debilitation, lost quality of life and earning capacity. You cut that off by saying, "Look, we understand the strategy of chalking big numbers at trial, especially on a contingency fee, but I think the mediator was asking about the actual expenses." Frankly, the mediator seemed grateful for the interruption. You didn't appreciate the plaintiff's lawyer audible snort when you explained why the legal path to summary judgment is so straightforward. In a mocking, patronizing tone, he interrupted and said: "come on, be serious, you've gotta know it's no slam dunk with this judge."

This sniping and the substance of the preliminary conference call certainly set out the important legal issues dividing the parties: negligence, contributory negligence, and whether the "Open and Obvious" defense creates a serious risk of dismissal on summary judgment. As you explained (and the mediator seemed to be aware), often raised in slip-and-fall cases, Ohio's "Open and Obvious" doctrine provides that if a reasonable person could have seen and avoided a hazard, but failed to do so, the premises owner is not liable for their injuries. The underlying logic is that, in some circumstances, the plaintiff is "obviously" more than 50% at fault and should not recover. On summary judgment, the court's focus is on the facts of the physical circumstances and the hazard itself, whether these facts are disputed and whether there's enough ambiguity about the hazard's "obviousness" that it should go to a jury.

It's clear to everyone that predications about the likelihood of summary judgment would affect the settlement value of the case. The lawyers recognize differences in witness's factual estimates of how long the spill had been there before the plaintiff fell. However, they disagree over whether the timing of the spill would impact the summary judgment question.

On the factual front for causation and damages: you made it clear that the defense has a good faith basis to challenge whether that the fall caused the back injury or whether it was

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a pre-existing condition that was not related to the fall. You also raised a question as to whether his back condition really required surgery, or whether Mr. Hapless elected to do it when he thought someone else would cover the extra time off. (That last point seemed to shock the plaintiff's attorney.)

Just so that the mediator would have the full picture, you noted serious issues of contributory negligence if the case went to trial, whether the plaintiff "really needed" four months off from work and whether the idea of lost earnings potential should even be part of the discussion. The mediator summarized by noting that attorneys don't agree on anything except the fact of a knee injury.

The mediator explained that it's her practice to ask lawyers whether there had been any previous settlement discussions and, if so, how much progress was made. This time, you both agreed. You reported that you had called plaintiff's attorney and asked if he would be willing to make a "serious demand to give us some sense of where you are on this case." Plaintiff's attorney reported his response - that the complaint named a $1 million demand, and they weren't going to bid against themselves. He asked for "a reasonable offer to bring back to my client." You refused, saying that number in the complaint was "just a plug in" and wasn't serious and that the insurance company "wasn't going to make an offer without a serious and reasonable demand to respond to. "At that point, the only thing you both agreed upon was to try mediation.

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