HAPLESS HARVEST

MEDIATION

POST-PRELIMINARY MEDIATION CONFERENCE

(IN PREPARATION FOR THE MEDIATION SESSION)

Mediator Information Gathered

In the preliminary conference call, counsel for the parties were civil, but you detected some undertones of enmity, or at least professional competition and prickliness. You didn't pick up any personal grudges; it seemed more like a strong dose of disconnects and mistrust between the plaintiffs' and defense bars. Though it was a phone call and not a Zoom call, the defense lawyer sounded as if he was rolling his eyes when plaintiff's lawyer emphasized the "dangerous aisle" at the grocery store. The plaintiff's lawyer no doubt did the same when the defense started questioning whether his client's back injury was a pre-existing condition. You caught the tiniest whiff of snobbery in defense counsel. His comment on the call – "Yeah, yeah, I get that you guys have to be on a contingency and then put up big damage numbers" – was met with a sigh. And plaintiff's lawyer snorted audibly when the defense lawyer said the case would be a slam dunk on summary judgment, and commented: "seriously, come on, with this judge?"

As stated in the pleadings, it's undisputed that that Jan Hapless was injured while shopping at Harvest Plenty, a local grocery store within a national chain. Jan was walking in an aisle before slipping and falling on spilled carrot juice. Jan was taken to the emergency room with an obvious knee injury and some indication of a back injury too. It's undisputed that Jan's knee healed fairly quickly but Jan's back then required surgery. Altogether, Jan missed four months of work. Whether Jan's back condition was caused by the fall appears to be highly disputed. The defense will allege that Jan's pre-existing back condition is what necessitated the surgery. Based on the phone call, the plaintiff is adamant that the fall caused the back injury and was the reason for surgery. You couldn't tell if the defense is dug in on this or merely puffing it as a potential weapon.

You suspect the important legal issues dividing the parties have to do with negligence, contributory negligence, and particularly whether the "Open and Obvious" doctrine creates a serious risk of dismissal on summary judgment. Often argued 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 fails 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 or whether there's enough ambiguity about the hazard's "obviousness" that it should go to a jury.

Clearly, predictions 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.

You also picked up on quarrels about 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 be part of the discussion. In short, the attorneys don't agree on much except a knee injury.

As is your practice, you asked the lawyers whether there had been any previous settlement discussions and, if so, how much progress was made. They explained that the defense attorney 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 responded by saying 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." The defense attorney refused, saying: "The number in the complaint is just a plug in – not serious. The insurance company isn't going to make an offer without a serious and reasonable demand to respond to."

At that point, the only thing they agreed upon was to try mediation.