HAPLESS HARVEST

MEDIATION

POST-PRELIMINARY MEDIATION CONFERENCE

(IN PREPARATION FOR THE MEDIATION SESSION)

Confidential Information for Plaintiff's Counsel

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

You are quite sure the mediator picked up on defense lawyer's difficult personality and professional disconnect between you. Though it was a phone call and not a Zoom call, the defense lawyer sounded as if he was rolling his eyes when you emphasized the "dangerous aisle" at the grocery store. You thought you heard a barely audible "oh, puh-lease – totally unprofessional. And, ridiculously, he cranked up to dramatic voice when described Hapless' back injury as a pre-existing condition, they likely exacerbated, and are trying to hide."

When the mediator asked about damages, starting with specials, you explained the medical and expenses and lost work time, and then surgery, pain, forever debilitation, lost quality of life and earning capacity. The defense lawyer had the nerve to cut you off, saying, "There's no need to chalk up the big numbers on this call. We get that you're on a contingency fee but the mediator and I are both being pad for our time. The question was about actual expenses." The mediator said nothing. Of course, defense counsel was happy to waste everyone's time by explaining in detail how his legal arguments give him a straight path to summary judgment. Finally, you interrupted and said: "This isn't the time to argue your case. Besides, be serious, you've gotta know it's no slam dunk with this judge." Once again, the mediator did not comment.

There was an uncomfortable silence for a moment or two, and the conference continued.

Sniping aside, 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. Defense counsel noted (and the mediator seemed to be aware) that 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 and whether there's enough ambiguity about the hazard's "obviousness" that it should go to a jury.

It's clear to everyone that 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.

On the factual front for causation and damages: defense counsel maintained they have a good faith basis to challenge whether the fall caused the back injury or was a pre-existing condition unrelated to the fall. He had the nerve to question whether Jan Hapless' back surgery was necessary at the time, or whether Hapless elected to do it when someone else would cover the extra time off. (Still, you were glad to know now that they are planning to raise that ridiculous question.) Last but not least, defense counsel also raised 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 their 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. Defense counsel reported that he had called and asked if you would be willing to make a "serious demand to give us some sense of where you are on this case." You reported your response - that the complaint named a $1 million demand, and you weren't going to bid against yourselves. You asked for "a reasonable offer to bring back to my client." Defense counsel 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.