HAPLESS HARVEST
MEDIATION

PREPARATION FOR MEDIATION SESSION

General and Confidential Information for Defense Counsel

Representing Total Insurance and its Insured Harvest Plenty

You are a relatively new partner at a litigation firm specializing in insurance and small business defense. Total Insurance company is a longtime firm client, and you have handled their insureds' cases for many years.

When you first started in this practice, you sometimes thought that insurance adjusters and other repeat defense clients were unrealistic and difficult to work with. They seemed jaded, cynical, and cheap. Unfazed by terrible injury claims, their starting assumptions were that plaintiffs' lawyers exaggerate and make ill-supported legal arguments, and that plaintiffs exaggerate, malinger, or just lie to get as much money as possible. Now, after a good many years of this work, you see where your defense clients are coming from. All too often they are right. You have no problem recommending that a defendant or its insurer pay a reasonable settlement when they are liable and the damages are real. However, it's your job as a lawyer to "kick the tires" on a claim. Just because an accident happened, the law doesn't necessarily hold a defendant liable. And plaintiffs should not be allowed to exploit a little accident to fix their longstanding physical ailments.

General Information

Based on the pleadings, the mediator and all mediation participants, will know the general information below[1]:

Jan Hapless was injured while shopping at Harvest Plenty, a health-oriented grocery store that is part a national chain. Jan was walking in an aisle when he slipped and fell on spilled carrot juice. Jan fell against the shelves and then backwards, sustaining serious injuries. Jan sued Harvest Plenty for negligence, alleging that they knew or should have known of the dangerous condition in the aisle, and that the aisle was unsafe due to poor lighting, distracting displays, excessive clutter, dirt, and other conditions. Harvest Plenty maintains that the carrot juice had been spilled just moments before by a five-year old in a cart near Jan. It maintains that the lighting was adequate, that if Jan had been paying attention the spill could have been avoided. In any event, the store did not have a reasonable opportunity to clean it up.

At the time of the fall, Jan was employed as manager at an upscale pasta grille restaurant. Based on Jan's deposition and medical records, the "special damages" portion of the claim totals $65,500,

[1] This document assumes that the lawyers made a brief and unsuccessful attempt at settlement negotiations prior to mediation, as described in the document titled "PRE-PRELIMINARY CONFERENCE Defense Counsel's Information In Preparation for Preliminary Conference with Mediator."

including: $20,000 in lost wages; $42,500 in medical treatment costs; $1,800 for future estimated physical therapy sessions; and $1,200 paid for house-cleaning.

The complaint seeks a round $1 million in medical and other expenses, lost income, damages for pain and suffering, loss of income earning capacity, and loss of quality of life and future enjoyment. Some discovery has taken place: Documents have been produced including insurance coverage and medical records. Jan and others have been deposed.

Both parties, counsel, and the mediator are or will be aware that you represent Harvest Plenty through its insurer, Total Insurance. You all know that Jan is represented by a well-respected attorney in a small but established litigation firm that specializes in plaintiffs' work. The lawyers had never worked with each other before.

Confidential Information

Regarding liability

You agree with Harvest Plenty's common sense position that they are not liable for Jan Hapless' fall. It's not their fault when customers walk around in a fog or while reading labels , without attention to where they are going. Hapless clearly didn't notice the juice spill in the aisle, even though it was large and orange on a white floor. In answers to interrogatories, the plaintiff acknowledged hearing a commotion farther down the aisle as a mother sounded angry at her young son. On deposition, the mother and the other customer in the aisle testified that when the five-year-old spilled the bottle of carrot juice, it was very loud: the child screamed, and his mom shrieked. The other woman yelled "watch it" as the carrot juice splashed up on her skirt. Both women estimated that Jan Hapless slipped within the next minute or two. Jan was on the floor, writhing in pain and shouting, "My knee, my knee!" when a Harvest Plenty employee rushed over. According to Jan, the employee apologized, and said "we should have cleaned this up." The two witnesses confirmed that a Harvest Plenty employee appeared very quickly. While they didn't remember his exact words, they agreed he said something along those lines. Neither Harvest Plenty nor, as far as you know, the plaintiff has been able to identify or find this employee. (He must have been temporary and perhaps undocumented; you are not going to think about that.)

If the case goes forward, you will file a Motion for Summary Judgment under Ohio's "Open and Obvious" doctrine, which protects property owners from liability for hazards that are "open and obvious." You will argue that undisputed factual circumstances of the aisle and the carrot juice spill establish that it should have been obvious to a reasonable person taking ordinary care. Given Ohio courts' willingness to apply this doctrine on Summary Judgment in slip and fall cases, and the other customers' testimony that the carrot juice puddle was clearly visible, you believe there's a high chance of knocking this case out before trial.

You anticipate that in mediation, and eventually on summary judgment, plaintiff's counsel will rest heavily on some additional facts to undercut your argument. First, he may make much of the apology by the store employee and claim a factual dispute about the length of time the carrot juice was on the floor and whether the store could have cleaned it up. In addition, they may eventually learn that the aisle had seen other spills within a few days of this accident. It's not inconceivable that the juice aisle was a bit overstocked. It's also true that the tofu display had been added the week before.

On summary judgment and, if need be, in mediation, you would argue that the time the juice was on the floor and any other spills or displays are irrelevant under the Open and Obvious doctrine. If it fits within the doctrine, it doesn't matter how long it had been there. Pothole cases or cases where storeowners put up orange cones around a spill are good examples. The question before the court is whether the undisputed facts – the witness testimony that the juice puddle was large and highly visible –support an Open and Obvious finding under Ohio case law. If so, it should be dismissed.

While your logic is impeccable, you recognize that excessive clutter or a distracting displays, making it difficult to see from Jan's vantage point, may be factual chinks in the chain. That's where your risk comes in. Of course, if the case gets through summary judgment, Jan's appeal as a witness, the time delay, the overcrowded aisle, previous spills, and all the rest would go to a jury. There, you still see the case as winnable: a jury could find that Jan was at fault and let Harvest Plenty off the hook. Or they could find Jan partially responsible and attribute significant contributory negligence to him.

Damages

Everyone agrees that Jan Hapless is employed as a senior manager at an upscale pasta grille restaurant and has been for at least ten years. Jan's salary at the time of the fall was $60,000 per year or $5,000 per month.

You think it's ridiculous that Harvest Plenty be asked to cover anything but the knee injury which healed within two weeks. It's clear from the emergency room that Jan sprained the knee in a carrot juice fall, nothing more; the doctor's ER notes just say, "may have twisted back in fall." It couldn't have been bothering Jan much because the emergency room docs didn't order any scans or treatments for a back injury. All the emergency room examinations and x-rays, and Jan's report of pain referred to the knee injury. That turned out to be a bad sprain of the knee ligaments, not a tear or a break. Jan was released from the emergency room and sent home with instructions to care for the knee.

Having now seen Jan's full medical record and your private investigator's report, you think the evidence suggests Jan's back had a pre-existing condition. Apparently, Jan played various sports in high school causing the usual aches and pains. Jan's older medical records contain a few reports of back pain, and episodic physical therapy to treat it while Jan was between 20 and 30. The investigator has been asking questions at Jan's health club and suspects that Jan stressed the back just before this incident. While you don't have specifics, one of the health club managers said that Jan had "really been pumping iron." If this case goes forward, you would authorize more investigative work to see if Jan had been playing backyard sports or undertaking extreme exercise and sustained any back injuries before the Harvest Plenty incident.

As a lawyer, you recognize that even if a pre-existing back condition were established (unless symptoms were active), the other side would invoke the "eggshell plaintiff" principle. If you "take the plaintiff as you find him," then Harvest Plenty's could be liable for the back injury as precipitated by the fall, notwithstanding a pre-existing problem. Your response would be that tort law still requires proximate cause: Hapless bears the burden to prove that Harvest Plenty proximately caused the back injury and need for surgery. Here, your best evidence is that emergency room report describes Jan's knee injury and pain level in detail but barely references Jan's back.

Even if you could swallow the back injury, you don't believe Jan needed to miss four solid months of work – ten weeks post-surgery. Given that Jan doesn't wait tables or tend bar, it should have been possible to sit in an ergonomic chair or walk and stretch every so often.

The inflated special damages, together with the malarkey in the complaint about lost earning potential and quality of life, confirm that this plaintiff is looking for a big payday and the lawyer counsel is intentionally inflating the claim.

Case Assessment and Settlement

All things considered: you estimate there to be 60% chance that this case will be dismissed on summary judgment, thus a 40% chance that Jan will get to trial. At that point, it would be a toss-up. A jury could decide the spill was open and obvious, find Jan at least 50% responsible and Harvest Plenty not liable. You also think it's highly possible a jury would find that only Jan's knee was injured in the fall, not the back.

You know Jan is claiming $62,500 in "special damages" but most of that is connected to the back injury. If you break down the $42,500 in medical costs, only $2,500 was for the knee. ($1,500 for the ambulance and emergency room visit, $1,000 for subsequent treatment). Simple math tells you that lost wages attributable to the knee were only $2,500, because it healed in two weeks. Jan's medical insurance covered these costs. So, really, the monetary damages from Jan's knee injury were only $5,000.

You also know that neither Jan nor Jan's lawyer are going to seriously entertain a settlement offer in the $5,000 range. Still, you think Jan's settlement position should acknowledge some uncertainty of recovery for the back injury, even if Harvest Plenty were found liable. You do recognize that starting negotiations with $5,000 would run the risk of insulting them. They might well walk out. Depending on Harvest Plenty's attitude in mediation, you might be willing to take that risk because it would also send the message that you know the case value is low.

On the topic of monetary damages from the back injury: at trial, the full medical costs would come in at trial, and the collateral source rule would not allow in evidence of the insurance coverage. However, as practical matter for settlement, Jan is not out-of-pocket for those medical costs. Jan's only monetary losses were 4 months of lost wages - $20,000, and arguably, the $3,000 total for additional physical therapy and house cleaning. So, Jan's real dollar losses, even with the back injury, were only $23,000. (You have no indication that Jan's medical insurer is aware of this lawsuit and seeking to enforce a subrogation right. If so, that would change the calculus.)

In sum, your strong chances on summary judgment, the possibilities of a defense verdict, knee injury damages only, and contributory negligence should make this a nuisance value case. Experience tells you that's not realistic. Moreover, your client would spend approximately $8,000 on your fees in discovery and summary judgment briefing, and $35,000 for your additional fees and expert witness costs through trial – a total of at least $43,000.

Brief and futile negotiation, onto mediation

In most cases, you would try good faith direct settlement negotiations before spending your client's money to hire a mediator. Never mind that it's just a slip and fall; this is not most cases. Your confidential document titled "PRE-PRELIMINARY CONFERENCE Defense Counsel's Information In Preparation for Preliminary Conference with Mediator" describes just how brief and futile that negotiation effort was. At least it provided an education about the attitude of opposing counsel, albeit an unpleasant one.

With all of this in mind, do remember that you must consult with the Total Insurance Representative about your case analysis before the mediation begins. It will be important to discuss what might be a reasonable settlement in mediation, even if that means some expansion of the reserve value put on the case. You will also want to explain how mediation works and jointly plan how best to manage your roles within the process.