HAPLESS HARVEST
MEDIATION

PREPARATION FOR MEDIATION SESSION

Information for Plaintiff's Counsel

Recently named partner in a very well-respected firm specializing in plaintiff's work, you represent Jan Hapless in his personal injury suit against the Harvest Plenty grocery store. Your retention agreement provides for Jan to pay a 33% contingency fee on any settlement or trial award, plus expenses advanced by the firm during the litigation (such as expert fees, court costs, etc.).

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, he would have seen the spill and that in any event it 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, 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.

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[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 Plaintiff's Counsel's Information in Preparation for Preliminary Conference with Mediator."

Jan is represented by a well-respected attorney in a small but established litigation firm that specializes in plaintiffs' work.

Both parties, counsel, and the mediator are or will be aware that you represent Jan Hapless, the plaintiff in this case. You know that Harvest Plenty, through its insurer, Total Insurance, is represented by an attorney in a well-regarded local insurance defense firm. The lawyers have never worked with each other before.

Confidential Information

Based on your initial interview and follow up meetings, you know Jan has been employed as a senior restaurant manager at an upscale pasta grille restaurant. While he didn't regularly wait tables or tend bar there, he was on his feet a great deal, filling in for a waiter or bartender to move service along. About a year before his fall in Harvest Plenty, Jan had lost some weight (35 pounds) and began to exercise under the instruction of a personal trainer. While Jan had had some moderate back trouble in the past from an old sports injury or two, that disappeared as soon as Jan lost weight the previous year. A month or two before the Harvest Plenty fall, Jan had embarked on a more ambitious weight training regimen, proving that any back troubles were completely gone.

Damages – physical

You anticipate that Harvest Plenty's insurance company will claim Jan should only collect damages for a sprained knee. They will no doubt argue that Jan had a pre-existing back condition. They may even suggest that Jan exacerbated it by pushing those workouts too far. To avoid "eggshell plaintiff" issues, they will argue that the fall did not proximately cause Jan's back injury, pointing to the fact that the emergency room report describes Jan's knee injury and pain level in detail but barely references a back injury.

You are not so worried about a Harvest Plenty challenge to the proximate cause of Jan's back injury. Yes, the ER admitting doc's notes focused on the knee; Jan did complain most loudly about intense, excruciating pain in his knee. It proved to be a very bad sprain and strained ligaments. But even then, Jan also felt the back had been injured as he twisted to catch himself during the fall; that is mentioned in the ER notes. Jan is honest and will be a convincing witness: Jan had no back troubles for at least two years before the fall and required major back surgery after the fall. Jan's back was hurt when it twisted during the fall, and it worsened dramatically in the aftermath. That's how back injuries are sometimes.

Jan agrees that the knee was mostly healed within two weeks after the fall. However, then Jan couldn't get out of bed without severe back pain. When physical therapy didn't help, Jan consulted with a highly regarded orthopedic back surgeon who strongly recommended back surgery. Recovery from the knee and then back surgery rendered Jan unable to work for a full four months.

Though the surgery was somewhat successful, it's fair to say that Jan's back may never be the same. Jan still suffers from back pain and diminished physical strength and mobility. Since returning to work as a restaurant manager, it's been either very painful or just plain impossible for Jan to fill in for waitstaff or bartenders as in the past. That sometimes affects the shifts Jan can cover. At this point, Jan could not handle any other job that required heavier physical lifting. Work aside, Jan cannot play any sports or lift weights. Jan was divorced about two years before the accident and has no children. Jan worries about ever having a normal life and feels angry and bitter about that terrible fall at Harvest Plenty.

Damages – Monetary

The cost of Jan's medical treatment totaled $42,500,including: $1,500 for the ambulance and emergency room visit, $1,000 for subsequent treatment of the knee, and $40,000 for the orthopedic consultation and surgery on his back as well as follow up care and physical therapy to date. Jan's medical insurance covered these costs.

However, Jan's insurance will not cover any future estimated physical therapy costs of $1,800 (once a month for $150 per visit for at least another year). By the time physical therapy is done, Jan will have paid approximately $1,200 to a house cleaning agency (for the period when Jan was unable to clean the apartment).

Jan's salary at the restaurant is $60,000 per year, or $5000 per month. Jan did not receive any sick pay for the entire four-month recovery period and is thus "out of pocket" for $20,000 in lost wages.

Totaled for the legal claim: Jan's total monetary damages (leaving aside lost earnings potential) are $62,500, of which $23,000 are "out of pocket" and $42,500 were covered by insurance.

Regarding issues of liability

Jan did not notice the carrot juice spill in the aisle before slipping on it. Jan acknowledges having heard some commotion at the grocery cart farther down the aisle, a few minutes earlier. Jan remembered hearing that a mother sounded angry at her young son. Another woman was involved in the conversation. Jan did not pay attention to what they were saying and did not look in their direction. Jan testified that it's only polite to look away when parents are having trouble with their children in a store: stopping and staring adds to their embarrassment. Jan remembers that the entire aisle (indeed much of the store) was poorly lit, dirty, with food bits and sticky spots. The aisle was cluttered with inventory and displays. Jan remembers walking along and reading a recipe card from a tofu display in the aisle when he slipped on the carrot juice.

At their depositions, the mother and the other customer in the aisle testified that when the five-year-old spilled the carrot juice bottle on the floor, it caused a loud commotion. The

child screamed and his mom shrieked. The other woman, five feet away, yelled "watch it" as the carrot juice splashed up on her skirt. Both customers said carrot juice was clearly visible to them. They also agreed that Jan fell very soon after the spill. Jan testified that a store employee rushed to the scene after the fall and apologized: saying "I'm so sorry, I should have gotten this!" as Jan lay on the floor writhing in pain. The other witnesses remember the employee coming to assist, and they confirm that he "apologized and said something like that" but didn't remember his exact words.

Case Assessment

Because of your practice experience with slip and fall cases, you anticipate that the defense will raise Ohio law's "Open and Obvious Doctrine" on summary judgment, arguing the carrot juice was out in the open, and should have been obvious to a reasonable person taking ordinary care. You would argue that whether the spill was or was not open and obvious should go to a trier of fact, given Jan's testimony about aisle's dirt, clutter and dim lighting, and the fact that she didn't see it. You might also be able to raise the factual question as to whether the store's deliberate overstocking in the juice aisle and distracting display led to the spill and Jan's fall. A jury might find that these Harvest Plenty profit maximizing choices were what made Jan unable to see the spill. However, you recognize that summary judgment is a real concern, given Ohio courts' willingness to apply this doctrine in slip and fall cases, and the other customers' testimony that they saw the large juice puddle on the floor.

In negotiations with other side, you will also argue that the store clerk's apology creates a factual question about whether the store was on notice and had a reasonable opportunity to clean the spill or secure the area. The other side is surely aware of that. (As a matter of law, a purist-defense counsel would argue that the length of time the spill had been on the floor is 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. A judge may dismiss the case on summary judgment if he or she thinks it was so obvious, the plaintiff should have seen it. That's not tactful language to use when explaining the doctrine to your client, but it is true.)

In sum, your argument on summary judgment must address the physical circumstances of the carrot juice spill. You will emphasize that the jury should decide whether the clutter, dirt, distraction, and lighting made it not-so-obvious. You also plan to raise the store employee's admission that he should have gotten there and cleaned it up. That might spook defense counsel enough to drive up settlement value. No one has been able to track down that employee yet. However, you are clever enough with the evidence rules to get his statement in. That admission could easily sway a judge or a jury to put some or all of the blame on Harvest Plenty.

All things considered: you estimate there to be 70% chance that this case will NOT survive the defense motion for summary judgment, thus a 30% chance that Jan will get to trial. (Of course, you are not going to concede that to opposing counsel.) If you do clear the

summary judgement hurdle, you are confident that Jan will make a very appealing and credible witness at trial. But even then, a jury could decide the spill was open and obvious, find Jan at least 50% responsible and Harvest Plenty not liable, or attribute some contributory negligence to Jan. Even if Jan wins on liability, a jury could theoretically find that the fall caused only the knee injury. As discussed above, you think that unlikely, but it's still possible.

About possible settlement negotiation

Given these risks, you have recommended that Jan consider settlement. It makes sense to do that now, before anyone spends time briefing and arguing summary judgment or incurring expert witness fees. (From now through trial, you estimate $3,000 in expert witness fees and other costs for which Jan would reimburse the firm.)

On the settlement front, you are concerned about whether Jan will be receptive to a reasonable number, even if you recommend it. You know Jan was very upset by opposing counsel's style at the depositions, as he tried to suggest that Jan was a malingerer and even a liar. Jan is angry that at the financial hardship this has caused. During the recovery period, Jan's parents had to lend Jan money to pay the mortgage. It was terribly humiliating for Jan to have to ask!

Putting aside strict monetary damages, Jan's quality of life has been impacted and Jan wants Harvest Plenty to pay for it. Jan has expressed ambivalence about the idea of settling because it feels like selling out. Jan wants to tell the story of this fall and Harvest Plenty's callousness to a loyal customer. Jan is adamant that Harvest Plenty and their rude attorney need to be taught a lesson, so this doesn't happen to someone else.

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. This is not most cases. Your confidential document titled "PRE-PRELIMINARY CONFERENCE Plaintiff's 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, prior to the mediation, you must talk explain your analysis of this case to your client. It will be important to discuss with Jan what might be a reasonable settlement in mediation. You will also want to explain how mediation works and jointly plan how best to manage your roles within the process.