HAPLESS HARVEST
NEGOTIATION

Information for Plaintiff's Counsel

You represent Jan Hapless in a personal injury suit against Harvest Plenty grocery store. Your representation agreement provides for Jan to pay a 33% contingency fee on any settlement or trial award, plus expenses advanced by the firm during litigation (expert fees, court costs, etc.).

Based on your initial interview and follow up meetings, you know Jan has been employed as a senior restaurant manager at an upscale restaurant. While Jan didn't regularly wait tables or tend bar, the job involved considerable time on one's feet, filling in for a waiter or bartender to move service along.

More than two years ago, Jan had some moderate back trouble attributable to various high school sports injuries, but nothing dramatic or debilitating. About a year before falling in Harvest Plenty, Jan lost about 35 pounds and began to exercise under the instruction of a personal trainer. Any occasional minor back muscle twinges completely disappeared with Jan's weight loss the previous year. A month or two before falling at Harvest Plenty, Jan had embarked on a more ambitious weight training regimen, proving that any back troubles were gone.

Jan was divorced about two years before the accident and has no children. Convinced that life will never be normal again, Jan is angry and bitter.

Regarding liability

Jan did not notice the carrot juice spill in the aisle. Jan did hear a commotion at a grocery cart approximately 20 feet down the aisle, a few minutes before the fall. Jan remembered only that a mother yelled angrily at her young son and another woman seemed to be involved in the conversation. Jan did not pay attention to what was said and didn't look over at them. Jan is sensitive to parents' embarrassment when people watch their squabbles with toddlers in a store. From Jan's perspective, it's only respectful to look the other way. Jan remembered and testified on deposition 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 just before slipping 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 over to him 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

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remember the employee coming to assist. 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 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 actually open and obvious should go to a trier of fact, given Jan's testimony about aisle's dirt, clutter and dim lighting, and the plain fact that Jan didn't see it. You may also raise a factual question as to whether the store's deliberately overstocked juice shelves and distracting display led to the spill and Jan's fall. A jury might find that Harvest Plenty's 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 negotiation with opposing counsel or before a judge, you will also argue that the store clerk's apology for failing to clean it up 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, the length of time shouldn't matter. 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 they find it was obvious enough for a reasonable person to see. 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. Having said that, you also plan to raise the store employee's admission that he should have cleaned it up. That might spook defense counsel enough to drive up settlement value. At this point, this employee is nowhere to be found. Fortunately, you are clever enough with the evidence rules to get such a statement in as an excited utterance, an admission, or statement against interest by a representative of the defendant. 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 a 30% chance that this case will survive the defense motion for summary judgment. If you do clear the summary judgement hurdle, you believe that Jan will make a very appealing and credible witness at trial. But you still believe there's a 50% chance a jury would find Jan largely responsible (again, under that Open and Obvious doctrine) and Harvest Plenty not liable. Even with a liability verdict, you believe a jury might attribute some contributory negligence to Jan. Moreover, a jury could theoretically find that the fall caused only the knee injury. As discussed above, you think

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that unlikely, but it's still possible. (These are just your current best estimates; what you hear in the negotiation or in a future mediation could certainly influence your assessment.)

Damages – physical

You anticipate Harvest Plenty's lawyer will claim Jan should only collect damages for a sprained knee arguing that the back condition was pre-existing. They may push the idea that Jan exacerbated it by pushing the workouts too far. To avoid "eggshell plaintiff" issues, they will argue Jan's fall did not proximately cause the back injury. They will make much of the emergency room report describing Jan's knee injury and pain level in detail but barely referencing a back issue.

You are not so worried about a challenge to the proximate cause of Jan's back injury. Yes, the ER admitting doc's notes focused on the knee; Jan had complained most loudly about intense, excruciating knee pain. It proved to be a bad sprain and strained ligaments. In fact, Jan also felt back pain when twisting 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 injured at Harvest Plenty. The seriousness of that injury became clearer in the aftermath. That's how back injuries go sometimes.

Jan's knee was mostly healed within two weeks after the fall. At that point, however, 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 recommended back surgery. Recovering from the accident and back surgery required Jan to lose four months of work.

Though the surgery was mostly successful, Jan's back may never be as it was. Jan still suffers from back pain with diminished physical strength and mobility. Since returning to work as a restaurant manager, it's been either painful or impossible for Jan to fill in for waitstaff or bartenders as in the past. That affects which shifts Jan is eligible to cover. Jan could not handle any other job that requires heavier lifting. Work aside, Jan cannot play any sports or lift weights.

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 Jan's knee, and $40,000 for the orthopedic consultation and surgery on Jan's back as well as follow up care and physical therapy to date. Jan's medical insurance covered these costs.

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 cleaning agency (for the period when Jan was unable to clean anything).

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Jan's salary at the restaurant is $60,000 per year, or $5000 per month. Jan received no sick pay for the entire four-month recovery period and is thus "out of pocket" for $20,000 in lost wages.

In total, Jan's monetary damages (leaving aside lost earnings potential) are $62,500, of which $23,000 was "out of pocket" and $42,500 was covered by insurance.

About possible settlement negotiation

With Jan's enthusiastic approval, you plugged a $1 million demand int0 the original complaint filed in the case. Before discovery, and before Jan's final prognosis, it made sense to aim high and get Harvest Plenty and its insurer to pay attention. In an early discussion with Jan, who was pushing to know what might happen at trial, you were careful to explain that nothing is certain: the case could be lost but it might be possible to get up to $250,000 if, and only if, everything went your way in litigation.

Given the risks you now see, you have recommended that Jan consider settlement. It makes sense to settle 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 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 about the financial hardship this has caused. Without pay during the recovery, Jan was embarrassed by having to borrow money from a parent to pay regular bills.

Putting aside strict monetary damages, Jan's quality of life has been severely diminished. 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 should be taught a lesson, so this doesn't happen to someone else.

First, talk with your client about your case analysis and try to obtain reasonable settlement authority. Then meet with defense counsel to try to negotiate a settlement.

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